JUSTICE SCALIA AND HIS CRITICS: AN EXPLORATION OF SCALIA’S FIDELITY TO HIS CONSTITUTIONAL METHODOLOGY

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INTRODUCTION: SCALIA’S JURISPRUDENTIAL HUBRIS

Justice Antonin Scalia was appointed to the Supreme Court in 1986. Just months later, the front runner for the Democratic Presidential nomination responded to rumors of marital infidelity with this challenge: “If anyone wants to put a tail on me, go ahead. They’d be very bored.” The Miami Herald took former Senator Gary Hart’s dare, and the resulting expose on his relationship with part-time model Donna Rice ended his maverick bid for the Presidency. Twelve years into Scalia’s tenure on the Court, President Bill Clinton repeated Hart’s mistake when he shook his finger at the television cameras and claimed that he “did not have sex with that woman,” even though Independent Counsel Kenneth Starr was investigating his relationship with Monica Lewinsky. Both Hart and Clinton violated a self-evident rule of public life: Don’t publicly challenge your watchdogs when you have something to hide.

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1 E.J. Dionne, Jr., The Elusive Front Runner, N.Y. TIMES, May 3, 1987, § 6 (Magazine), at 38.


4 See Walter Shapiro, Fall from Grace, TIME, May 18, 1987, at 16. Hart’s challenge came on the eve of a secret cruise to Bimini with Donna Rice. See id. For additional perspectives on the lessons of the Hart scandal, see Hendrik Hertzberg, Sluicegate, NEW REPUBLIC, June 1, 1987, at 11; Richard Zoglin, Stakeouts

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Justice Scalia has issued a similar challenge to his arena’s watchdog—the legal academy. Like Hart and Clinton, Justice Scalia revels in his role as critic of conventional thinking. With missionary zeal, he attacks his judicial colleagues as well as legal scholars for creating a self-serving version of constitutional analysis that usurps the democratic process. In its place, he aggressively promotes his vision of a “dead” Constitution with a limited role for judicial intervention. With his critique of mainstream jurisprudence and his claim that only his methodology is faithful to the Constitution, Scalia has in no uncertain terms thrown down the gauntlet to those he calls the prevailing “law-trained elite.”

Scalia’s challenge has spawned a veritable academic cottage industry. Over fifty recent articles focus exclusively on some aspect of his jurisprudence, while many others incorporate a critique of Scalia’s views on a particular doctrinal or theoretical subject. Nevertheless, no single article

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8 See David Luban, Legal Traditionalism, 43 STAN. L. Rev. 1035, 1045 (1991) (arguing that Scalia’s
provides a complete picture of how Scalia implements his constitutional methodology or establishes a framework for the existing critiques of his jurisprudence. These are the two goals of this Article.

Part I provides an overview of Scalia's constitutional methodology, beginning with his self-professed motivation for that methodology: to find an alternative to mainstream constitutional theory, which he believes allows judges to inject their own personal values into constitutional law. Next, it explores Scalia's attempts to implement the components of his constitutional methodology—textualism, faint-hearted originalism, and the "clear rules" principle—in his opinions. Part I also discusses the principles of hierarchy and compatibility that are critical to Scalia's claim that he has established a true methodology rather than merely three separate tools for constitutional analysis.

Part II establishes a framework for the existing critiques of Scalia's constitutional methodology. Scholars have attacked Scalia's methodology as theoretically flawed on two basic grounds. The first line of attack suggests either that Scalia's system is simply not constitutionally mandated, or that text, history, and precedent are more difficult to decipher than he maintains. A second and distinct line of criticism suggests that whatever its theoretical potential, Scalia himself discards or distorts the methodology when its result conflicts with his ideological and political values. Both the "theoretical" critique and the "as applied" critique lead to the conclusion that Scalia's methodology fails to prevent the very kind of value-laden judging he criticizes—either by choice or because his methodology cannot deliver what it promises.

Part II also criticizes a segment of the Scalia literature, in which certain scholars claim to have decoded his true agenda, claiming that it is Scalia's well-known conservative stance on social and political issues that motivates his jurisprudential choices. While Scalia feels deeply about many issues that come before the Court, he pointedly makes clear that he sometimes joins opinions whose result he finds personally offensive. Therefore, it is a mistake to assert that Scalia manipulates his methodology to reach, sub rosa,

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9 See infra notes 152-59 and accompanying text.
10 See infra notes 189-95 and accompanying text.
11 See infra notes 227-28 and accompanying text.
12 See infra note 235 and accompanying text.
results consistent with his personal values in all cases. Instead, it makes more sense to try to disentangle the sometimes compatible and sometimes warring influences on his jurisprudence. Ultimately, I do not seek to undermine Scalia’s critics, but rather to provide direction for their research and to discourage the search for a Rosetta Stone of Scalia’s jurisprudence.

Finally, I conclude with a broader discussion of Scalia’s challenge to mainstream constitutional theory. I argue that the methodology’s theoretical limitations and Scalia’s “monkey business” in applying its components call into question not only his assertion that his system is superior at cabining judicial discretion, but also, by implication, his attack on less rigid modes of constitutional interpretation.

I. SCALIA’S CONSTITUTIONAL METHODOLOGY: THE CONSTITUTION AS CADAVER

A. The Motivation for the Methodology

The scholarship on Justice Scalia contains some startling contrasts. Scalia has been compared to both Felix Frankfurter and his jurisprudential opposite, Hugo Black. Articles debate whether his opinions reflect his Catholic upbringing or are more analogous to Anglican doctrine. Others insist that his

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13 Monkey Business was the name of the private yacht on which Gary Hart and Donna Rice traveled to the Caribbean island of Bimini during their affair. See Shapiro, supra note 4, at 16.


opinions systematically favor the executive branch or Congress, or exalt traditional social values above all else.

All in all, the scholarship on Scalia sounds like the much-abused parable about the three blind men and the elephant. In this story, each of the blind men touches the elephant in a different place—the leg, the trunk, and the body. Afterwards, each proclaims that he has discovered either a tree, a snake, or a house. While a multiplicity of points of view in legal scholarship, to put it mildly, is not uncommon, the divergence of opinion on Scalia's constitutional jurisprudence is actually somewhat perplexing. More than any modern Supreme Court Justice, Scalia has laid out an explicit vision of his jurisprudence that he and supporters claim leads to "relatively consistent results across different areas of substantive law."
Scalia envisions the Constitution as a “dead” document, its meaning fixed at the time of ratification.22 He believes the Supreme Court should implement this fixed meaning and no more.23 For Scalia, this requires that the Court use only the plain meaning of the Constitution’s text, either as its words were defined at the time or limited by the historical practices at ratification.24 To the extent that further interpretation of the Constitution is necessary, this exegesis should be in the form of clear rules that constrain judicial discretion in future cases. In Justice Scalia’s terminology, these principles are called “textualism,” “originalism,” and a preference for “general rules.”25

According to Scalia, substantive constitutional doctrines should be merely the byproduct of the proper application of these neutral methods to specific issues. While Scalia does not claim his methodology is flawless,26 he does assert its superiority over the view that the Constitution is a living, evolving document. This organic approach, Scalia maintains, is ultimately nothing more than a cloak that hides the imposition of personal judicial preferences.27 Therefore, in Scalia’s words, his system should prevail because you “can’t beat somebody with nobody.”28

What is the source of Scalia’s Constitution as cadaver? Despite his assertion of textual fidelity, no explicit directive in Article III, or anywhere else in the Constitution, mandates that the Supreme Court don a historical straitjacket.29 Although there is some helpful language in the writings of the Framers, neither a fair reading of the historical record nor the open-ended nature of much of the Constitution’s language suggests that the Framers would have endorsed Scalia’s inflexible system.30 Therefore, the true source of

23 See Scalia, supra note 7, at 3, 8.
24 See infra note 59 and accompanying text.
27 See id. at 864.
28 Id. at 855.
29 See Cass Sunstein, Justice Scalia’s Democratic Formalism, 107 YALE L.J. 529, 562 (1997); see also James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“[Judicial power] must be deemed to be the judicial power as understood by our common-law tradition. That is the power to say ‘what the law is,’ not the power to change it.”) (citation omitted).
30 See H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 903 (1985); Rosen, supra note 19, at 29 (stating that originalism sometimes leads to “the common law constitutionalism that Scalia wants to avoid”).
Scalia’s conception for the Court’s role must lie outside the Constitution. That source fairly can be identified as one ideological approach to the role of judicial review in a constitutional democracy. The adherents of this ideological approach, sometimes referred to as democratic formalism,31 believe that the countermajoritarian difficulty—allowing unelected judges to overturn the legislative acts of an elective majority—is fundamentally inconsistent with democracy.32 Thus, they insist on tight restrictions on the role of the judicial branch, lest it usurp the power of the legislature to make new laws, and ultimately the power of the people to amend the Constitution.33 Nevertheless, for Scalia and his defenders, the countermajoritarian difficulty can be mitigated, if not solved, by a close reading of constitutional text, fidelity to long-standing historical traditions, and adherence to rigid rules that serve to “limit judicial discretion and the imposition of subjective value judgment.”34 Close adherence to text and long-standing historical traditions, they argue, is

31 See Sunstein, supra note 29, at 530.

While Scalia does not refer to the countermajoritarian difficulty by name in his speeches or opinions, scholars generally agree that this is a fair label for his philosophy of judicial review. See Gerhardt, supra note 15, at 29 n.13 (noting that Justice Scalia does not use “the term countermajoritarian difficulty” to refer to the problem that he has identified as the central dilemma in constitutional adjudication); see also William N. Eskridge, Jr., Democracy, Kulturkampf, and the Apartheid of the Closet, 50 VAND. L. REV. 419, 421 (1997) (contending that the Constitution and original design offer little support for “Scalia’s strong invocation of the countermajoritarian difficulty” in Romer v. Evans, 517 U.S. 620, 644 (1996)); Larry Kramer, Same-Sex Marriage, Conflict of Law, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 65, 1991 (1997) (arguing that Scalia’s use of long-standing tradition to hold that a practice long permitted cannot now be unconstitutional is a variation of the countermajoritarian difficulty but is even stronger in the sense that “Scalia offers continuous usage as a sort of popular reaffirmation that makes judicial interference even tougher to justify”); Carlin Meyer, Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?, 54 U. Pitt. L. Rev. 63, 116 (1992) (noting that Scalia’s countermajoritarianism leads to his narrow reading of liberty for due process purposes).

33 See Tracy Breton, Scalia: Let the Constitution Stand, PROV. J. BULL., May 21, 1997, at B1 (“Scalia said that every time a judge reads things into the Constitution or Bill of Rights that are not specifically enumerated there, ‘you are taking something out of the democratic process.’”).
inherently more democratic because it “requires judges to follow democratic-ly sanctioned legislative commands.” Thus, it is not surprising that Scalia’s opinions reflect profound suspicion of expansive interpretations of judicial power and downright hostility to perceived judicial encroachment upon the executive or legislative branches, or upon other governmental institutions.


36 See Lewis v. Casey, 518 U.S. 343, 362 (1996) (Scalia writing for the majority stated that “the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive . . . [It is the ne plus ultra of what our opinions have lamented as a court’s ‘in the name of the Constitution, becom[ing] . . . enmeshed in the minutiae of prison operations.’”); Carlisle v. United States, 517 U.S. 416, 426 (1996) (speaking for the majority, Scalia rejected the district court’s attempt to enter an untimely judgment of acquittal not permitted under Federal Rules of Criminal Procedure); Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 815 (1994) (Scalia, J., concurring in part, dissenting in part) (describing a “misguided trial-court injunction” permitted by the Court as a “powerful loaded weapon lying about”); UMW v. Bagwell, 512 U.S. 821, 842 (1994) (Scalia, J., concurring) (criticizing contemporary courts that “routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions” without historical foundation); Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 106-07 (1993) (Scalia, J., concurring) (supporting “traditional view . . . that prospective decision making is quite incompatible with the judicial power” and is clearly a “practical tool of judicial activism”); see also Post, supra note 5, at 59 (“Mistrust of courts, however, is a theme that also emerges in Scalia’s theory of constitutional interpretation.”); David M. Zlotnick, Battered Women & Justice Scalia, 41 ARIZ. L. REV. 847, 914 (1999) (citing cases demonstrating Scalia’s hostility to judicial contempt power).


38 See Neder v. United States, 119 S. Ct. 1827, 1845 (1999) (Scalia, J., concurring in part, dissenting in part) (contending that it is always structural constitutional error when a judge fails to submit an element of an offense to the jury because the Constitution requires juries, not courts, to make a determination of guilt). Chief Justice Rehnquist, writing for the majority, held that failure to instruct on materiality in a federal fraud case could be constitutional harmless error. Id. at 1839 (majority opinion).
Still, while Scalia clearly believes his methodology’s emphasis on restraining judicial discretion effectively addresses the countermajoritarian problem, it is not readily apparent how he reconciles the initial contradiction that the premise for his methodology lies beyond both the plain meaning of the Constitution’s text and an irrefutable historical record. Scalia’s public statements suggest that his constitutional methodology did not arise solely from an abstract contemplation of text, history and political theory, but rather is motivated in large part by his harsh assessment of modern judicial decisionmaking. Scalia believes the greatest danger to the Constitution is the modern Court’s willingness to use open-ended interpretation to implement the Justices’ own values. He has repeatedly asserted that such an approach has dire consequences for the Court and for the Constitution itself. For example, in *Cruzan v. Missouri Department Of Health*, Scalia wrote that the Court “need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.” In a public speech, Scalia also claimed that those who believe in the living Constitution ultimately will destroy the Constitution itself.

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39 See Segall, *supra* note 34, at 1004 (noting that Scalia’s methods are shaped by the countermajoritarian difficulty); see also *supra* note 32 and accompanying text.
40 But see Sunstein, *supra* note 29, at 540 (arguing that Scalia has not subjected his methodology to empirical testing; thus, “he has not shown that his approach is preferable to reasonable alternatives”).
41 See City of Chicago v. Morales, 119 S. Ct. 1849, 1871 (1999) (Scalia, J., dissenting) (claiming that facial challenges to a statute’s constitutionality are incompatible with both separation of powers doctrine and the case or controversy requirement, and also criticizing frequency with which exceptions to this doctrine are made on “hot-button social issues on which ‘informed opinion’ was zealously united”); see also County of Sacramento v. Lewis, 523 U.S. 833, 865 (1998) (Scalia, J., concurring) (“But for judges to overrule that democratically adopted policy judgment on the grounds that it shocks their consciences is not judicial review but judicial governance.”); United States v. Virginia, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part, dissenting in part).
42 497 U.S. 261, 292 (Scalia, J., concurring).
43 *Id.* at 300-01 (emphasis added).
Scalia puts the blame for judicial abuse of the Constitution squarely on mainstream legal culture—the so-called "law-trained elites" he rails against in his public speeches and in some opinions.\textsuperscript{45} The origin of this unchecked legal elitism, Scalia says, is rooted in the common law system in England, where judges, unconstrained by statutes or a written constitution, exercised the thrilling function of making law.\textsuperscript{46} From there it spread to modern law schools, where students come away thinking that a judge's highest function consists of "devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."\textsuperscript{47} The problem, Scalia argues, lies in the different role required when interpreting a written Constitution.\textsuperscript{48} In Scalia's view, the Constitution delegates the law-making function to the elected branches, leaving the Court to secure only explicitly enumerated rights and to enforce the provisions of the text and the separation of powers principle.

Scalia also argues that judges are drawn from an educational and cultural elite that is ill-suited to decide divisive societal issues.\textsuperscript{49} At best, Scalia believes judges are out of touch with the views of the masses.\textsuperscript{50} At worst, he accuses these "law-trained elites" of foisting their blatantly minority values on the rest of society under the guise of constitutional interpretation. In addition, Scalia argues that academics condone this practice because the resulting decisions are generally in accord with their political preferences.\textsuperscript{51}

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\item[45] See, e.g., United States v. Virginia, 518 U.S. at 567 (Scalia, J., dissenting).
\item[46] Scalia, supra note 7, at 4-9.
\item[47] Id. at 7.
\item[48] See id. at 40; see also Scalia, supra note 25, at 1178.
\item[49] See Newcomer, supra note 5, at 17A.
\item[50] See id.
\item[51] In Romer v. Evans, 517 U.S. 620 (1996), Scalia accused the majority of "imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality ... is evil." Id. at 636 (Scalia, J., dissenting). He added, \footnotesize

\[\text{[w]hen the Court takes sides in the culture wars, it tends to ... reflect[ ] the views and values of the lawyer class ... . How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; ... because he eats snails; because he is a womanizer; because she wears real-animal fur ... . But if the interviewer should wish not to [hire] an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge ... require[d from] all [of the National Association for Law Placement's] member-schools ... .} \]

\text{Id. at 652-53.}\]
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While Scalia belongs to this elite class by professional training and earlier vocation,\(^{52}\) he does not describe himself as an enlightened member, who is now capable of being an impartial arbiter. Instead, time and again, Scalia casts himself as an outsider. For example, in addition to constitutional arguments, Scalia draws on his immigrant roots to oppose affirmative action.\(^{53}\) Recently, Scalia set himself even further apart, during a speech to a Mississippi prayer breakfast, by proclaiming that the “educated circles” believe that Christians such as himself are “simpleminded.” In the same speech, he went on to say “we must pray for the courage to endure the scorn of the sophisticated world.”\(^{54}\) Thus, while steeped in countermajoritarian theory, Scalia’s methodology is fueled by deep personal convictions that the judiciary advances social values inimical to his own and to those held by the majority of American citizens.\(^{55}\)

This perspective reveals the truly herculean task Scalia has set for himself and his methodology. Given his intense distrust of the judiciary, his methodology’s goal is not simply to ensure that the judicial branch respects the political judgments of the executive and legislative branches. Rather, as noted by historian Gordon Wood, Scalia’s ambition is to convert a judge into the “mere machine” envisioned by Thomas Jefferson, one that accurately transcribes and applies the popular will.\(^{57}\) At the same time, Scalia is no repressed Frankfurterian, loath to expound upon or even to reveal his personal politics. Rather, he

\(^{52}\) Justice Scalia is a Harvard Law School graduate and also served as a law professor at the University of Virginia and the University of Chicago. See Fred Bosselman, Four Land Ethics: Order, Reform, Responsibility, Opportunity, 24 ENVTL. L. 1439, 1485 n.210 (1994).

\(^{53}\) Scalia argues that his ancestors never oppressed anyone; therefore, white descendants of immigrants such as himself should not be forced to suffer disadvantages based on the wrongs of earlier American generations or the guilt felt by their policy-making descendants. See Antonin Scalia, The Disease As Cure: “In Order To Get Beyond Racism, We Must First Take Account of Race,” 47 WASH. U. L.Q. 147, 152 (1979). But see Dwight L. Greene, Justice Scalia and Tonto: Judicial Pluralistic Ignorance and the Myth of Colorless Individualism in Bostick v. Florida, 67 TUL. L. REV. 1929 (1993).


\(^{55}\) Id.

\(^{56}\) Moreover, if we recognize the personal nature with which Scalia presents his points, any excesses we find in his analysis might properly be attributed to emotional zeal rather than to a failure of his vaunted intellect. SeeBeschle, supra note 16, at 1358 (noting that Scalia is respected for his wit and his intellect). But see Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 TEX. L. REV. 267, 314 (1997) (arguing that Scalia’s “astonishing rigidity . . . especially his fear of unconstrained judgment . . . [cries] out for psychoanalytic explanations”); Richard Cohen, Justice Scalia and the “Worldly Wise,” WASH. POST, Apr. 12, 1996, at A25 (asserting that Scalia has read so often how smart he is that he has come to believe it).

\(^{57}\) Gordon S. Wood, Comment, in A MATTER OF INTERPRETATION, supra note 7, at 50.
has made quite clear his view that his personal politics are quite different from those of the current judicial and academic elites, as well as his conviction that the majority of Americans agree with him, not his elitist opponents. Thus, Scalia’s methodology must be able, first and foremost, to restrain him from letting his passionately held beliefs and status as self-anointed judicial representative of the masses influence his decision-making process. To return to the parable of the three blind men and the elephant, perhaps scholars should spend less time trying to define the attributes of a unitary beast called “Scalian jurisprudence” and spend more time attempting to understand the tension between Scalia’s methodological agenda and his personal politics. 58

B. The Components of the Methodology

1. Scalia’s Semantic Textualism

Consistent with his underlying motivation, Scalia sees textualism both as a constitutionally mandated end in itself and as a means to restrict the judiciary to its proper role: “Judges should be restricted to the text in front of them . . . . According to my judicial philosophy, I feel bound not by what I think . . . but by what the text and tradition actually say.” 59 At the core of Scalia’s textualism is his belief that the Constitution is “an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.” 60 Scalia therefore utterly rejects all claims of modern hermeneutic theory about the indeterminacy of language. 61 On the contrary, he believes the words that

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58 I do not maintain, however, that Scalia’s personal alienation is the lodestone that explains his entire jurisprudence (or that the scholarly suppositions that attribute his motives to Catholicism, Anglicanism or a political “ism” are devoid of merit). In fact, some critics contend that Scalia has no need to manipulate his methodology because it is biased in favor of returning conservative outcomes. See infra note 143 and accompanying text.

59 Gerhardt, supra note 15, at 30 n.18 (citing Dan Izenberg, Clinging to the Constitution, Jerusalem Post, Feb. 19, 1990 (quoting Scalia)). To Scalia, judges should not “determine what seems like good policy at the present time, but . . . ascertain the meaning of the text.” Kannar, supra note 16, at 1303 (quoting Justice Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987)).

60 Scalia, supra note 26, at 854.

61 Scalia mischaracterizes and then dismisses indeterminacy theory in his Originalism article. Id. at 856 (“Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning.”). Actually, the hermeneutic position is that words have multiple meanings, and that especially for later generations, it is impossible to be certain that one has placed oneself fully in the interpretative shoes of the earlier generation. See infra notes 163-67 and accompanying text. Furthermore, Scalia and the hermeneuticians are actually in agreement that the text alone is often insufficient to ascertain meaning for the broader phrases of the Constitution. See infra notes 169-70 and accompanying text.
make up legal text, including the Constitution, are definable—that they have "meaning enough" for purposes of judging.\textsuperscript{62}

Scalia's proclamation of his fidelity to the constitutional text and his general belief that the law supplies the necessary tools of interpretation is only a starting point. The devil is in the details, namely how to ascertain the meaning of the Constitution's often broad aspirational clauses and how to apply a 200-year-old text to modern scenarios beyond the conception of the document's drafters. Thus, Scalia's textualism requires an interpretive technique. It is the technique he has chosen and the degree of confidence he has in its results that distinguishes Scalia's textualism.\textsuperscript{63}

In his seminal article on the origins of Scalia's jurisprudence,\textsuperscript{64} George Kannar argues that Scalia's brand of textualism places particular reliance on philology, the formalistic study of words.\textsuperscript{65} For Scalia, the ordinary social and dictionary meaning of individual words is the most important, and often decisive, ingredient of his analysis of a constitutional provision. Moreover, Scalia requires that the interpretation of text be done "in as semantically precise [a] way as possible,"\textsuperscript{66} with close attention to the formal rules of grammar.\textsuperscript{67} While Kannar defends Scalia's textualism as a pragmatic choice,

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\item \textsuperscript{62} Scalia, \textit{supra} note 26, at 856. Scalia has asserted that "while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible." Scalia, \textit{supra} note 7, at 24.
\item \textsuperscript{63} Scalia accepts Dworkin's label of "semantic intention" to describe his textualism, although, of course, they disagree on what it means and who is more faithful to its terms. \textit{See} Antonin Scalia, \textit{Response, in A MATTER OF INTERPRETATION}, \textit{supra} note 7, at 129, 144.
\item \textsuperscript{64} Kannar traces the roots of Scalia's textualism to his pre-Vatican II Catholic education and his father's textualist approach to translation as a Romance language scholar. \textit{See} Kannar, \textit{supra} note 16, at 1313-19. Professor Beschle's subsequent article, comparing Scalia's jurisprudence to Anglican theology, suggests the Catholic component of the Kannar's theory may be tenuous. \textit{See} Beschle, \textit{supra} note 16, at 1346-53.
\item \textsuperscript{65} \textit{See} Kannar, \textit{supra} note 16, at 1307 (noting Scalia's enormous confidence in textualism).
\item \textsuperscript{66} \textit{Id.} at 1307-08. Kannar adds that this formalistic version of textualism harkens back both to a Nineteenth Century view of language and a more recent but still superseded version of literary criticism. \textit{Id.}
\item \textsuperscript{67} \textit{See, e.g.,} Walton v. Arizona, 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part, concurring in the judgment) (suggested that the "and" in the Eighth Amendment requires that punishments be both cruel and unusual to violate the text). According to Kannar, Scalia believes a semantically based textualism serves to minimize a judge's "interpretive discretion and the influence of social, political, or moral context, except as that context has made its way directly into the 'ordinary meaning' of relevant, legally operative words." Kannar, \textit{supra} note 16, at 1308.
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he admits this kind of "obsessional textualism" does "frequently tend . . . to remove the 'text' even from its original historical context."  

Scalia's opinions generally reflect his theoretical bias toward defining words narrowly, and correspondingly, toward marginalizing broader meanings that could be attributed to the immediate text or to the document as a whole. This bias is most obvious in statutory interpretation because such cases often require interpretation of narrowly drawn words or phrases. Here, Scalia often places exclusive reliance on the dictionary definition of the operative word or phrase. The broadly written and judicially glossed language of the Constitution provides fewer opportunities for this mode of interpretation. Nevertheless, even here, the impact of Scalia's textualism is discernable in cases that involve more specific clauses or phrases. In these cases, Scalia's first option is again to turn to dictionary definitions of the pertinent words at the time the text was adopted. For most constitutional analysis, this means late eighteenth and early nineteenth century dictionaries.

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68 Kannar, supra note 16, at 1316, 1308. In Common-Law Courts, Scalia appears to agree and willingly embraces the charge of formalism. Scalia, supra note 7, at 25, 144 ("[O]f course it's formalistic. The rule of law is about form."). Critics argue that Scalia's desperate pursuit of a single clear meaning for the text dismisses any interpretive role for the underlying principles, philosophy, and even the true intent of the document's drafters. For example, Scalia's textualism ignores the possibility that the Framers intended the aspirational phrases in the Constitution to be reinterpreted by future generations. See Ronald Dworkin, Comment, in A MATTER OF INTERPRETATION, supra note 7, at 115, 122; see also infra notes 153-58 and accompanying text.

69 Compare Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (focusing solely on the "irreducible literal meaning" of the Confrontation Clause and admitting no exceptions), with id. at 1026 (Blackmun, J., dissenting) (looking first to the Framers' "primary object" for the clause).

70 See Holloway v. United States, 119 S. Ct. 966, 972-73 (1999) (Scalia, J., dissenting) (focusing on "customary English usage" of the word "intent" and quoting Black's Law Dictionary). In an analysis similar to the constitutional critique, one commentator suggests that Scalia's textualist approach to statutory interpretation "requires that to determine what the statute means the judge put on blinder that shield the legislative purpose from view." Popkin, supra note 14, at 1142; see also West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting) (arguing the literalist's approach to statutes calls for using "thick grammarian's spectacles" and "ignor[ing] the available evidence of congressional purpose").

71 See Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (citing Webster's Dictionary) on the meaning of "representatives" to exclude elected judges from Voting Rights Act. His well-known refusal to consider legislative history also is related to his overly confident textualist thinking. If he viewed text more ambiguously, it would be more difficult to cast out this promising source of additional information about the intended meaning of a statute. See supra notes 60-62 and accompanying text.

One clear example of Scalia’s constitutional law by Webster’s is California v. Hodari D., a case concerning the meaning of “seizure” in the Fourth Amendment. Modern case law had held that generally, a “seizure” occurs when a reasonable person would not feel free to leave. However, Scalia’s opinion in Hodari D. narrowed the definition of “seizure” to mean “physically grasped” for situations in which a suspect refuses to submit. Scalia’s primary authority for overruling existing precedent in this area was an 1828 version of Webster’s Dictionary. Sometimes, he also buttresses his dictionary definition with historical usage, etymology, and literature. However, in a few cases, the plain meaning has been so clear to Scalia that he has simply declared the definition he finds obvious without citation.

Nevertheless, it is rare that a constitutional provision can be conclusively defined by an ancient Webster’s volume. Most constitutional litigation concerns more abstract phrases that are less amenable to semantic dissection and have layers of meaning added by precedent. Scalia’s semantic textualism functions predominantly as a nay-sayer, or as he puts it, as a “brake” on the

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74 See United States v. Mendenhall, 446 U.S. 544, 554 (1980).
75 Hodari D., 499 U.S. at 624.
76 See id. (stating that “[f]rom the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession’”) (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828); 2 J. BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2037 (1981)).
77 See, e.g., Coy v. Iowa, 487 U.S. 1012, 1016-17 (1988) (concluding that the Confrontation Clause requires a “face-to-face” meeting, citing the Latin derivation of “confrontation,” as well as WILLIAM SHAKESPEARE, RICHARD II act. I, sc.1, and President Eisenhower’s description of his hometown code of Abilene, Kansas.).
78 See Lilly v. Virginia, 119 S. Ct. 1887, 1903 (1999) (Scalia, J., concurring in part, concurring in the judgment) (arguing that the use of pre-trial tape recorded statement of accomplice after accomplice invoked the Fifth Amendment privilege was “a paradigmatic Confrontation Clause violation”); City of Chicago v. Morales, 119 S. Ct. 1849, 1872 (1999) (Scalia, J., dissenting) (failing to find a constitutional right to “loiter” that Scalia argues was the underlying basis of the majority opinion); Mitchell v. United States, 119 S. Ct. 1307, 1316 (1999) (Scalia, J., dissenting) (arguing that the text of the Fifth Amendment prohibits only “compell[ing]” a person to testify against him or herself, and not “one of the natural (and notgovernmentally imposed) consequences of failing to testify . . . the factfinder’s increased readiness to believe the incriminating testimony that the defendant chooses not to contradict”); Minnesota v. Carter, 119 S. Ct. 469, 474-75 (1998) (Scalia, J., concurring) (arguing that use of the word “their” in the Fourth Amendment limits protection to the owner of the property). Dissenting in Maryland v. Craig, Scalia again argued that the meaning of “confrontation” in the Sixth Amendment must include a “face-to-face” meeting. Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U.S. 1012, 1015 (1988) (in turn quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring))).
79 See Kannar, supra note 16, at 1306 (citing Justice Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987)).
expansion of constitutional rights.\textsuperscript{79} By narrowly focusing on the precise semantic meaning of each word or phrase, he routinely finds no justification for unenumerated rights, such as substantive due process rights, that the modern Court has held to exist. In sheer numbers, Scalia’s "brake" cases are the most representative of his textualism in constitutional law.\textsuperscript{80}

Scalia's opinions rarely rest solely on textualist analysis. Instead, either to support a plain meaning argument,\textsuperscript{81} or to decide cases that are not amenable to textualist analysis, he turns to the second prong of his methodology—his version of originalism, which he alternately calls "original meaning" or "faint-hearted" originalism.\textsuperscript{82}

2. Historical Practices and Scalia's Faint Hearted Originalism

The core tenet of originalism, broadly defined, is that "the principal task of judges called upon to interpret the Constitution is to ascertain and give effect to the original intentions of the Framers and ratifiers."\textsuperscript{83} Although it is "a commonplace assertion that to some degree . . . all constitutional lawyers are originalists now,"\textsuperscript{84} Scalia's originalism also has distinguishing features, both in theory and in application. Beginning with his confirmation hearing, Scalia took pains to distinguish the generic version of originalism, which he calls "original intent," from his search for the "original meaning."\textsuperscript{85}

Scalia asserts that for his "original meaning" approach, the beginning and end is the text of the Constitution. Therefore, while he believes it important to understand the Constitution in terms of "what it meant to the society that

\textsuperscript{80} See Department of Commerce v. United States House of Rep., 119 S. Ct. 765, 781 (1999) (Scalia, J., concurring in part) (suggesting that text and historical practices require an actual counting of the census).
\textsuperscript{81} Nevertheless, semantic textualism is the core of the methodology. Thus, while historical analysis supplements the textualist's desire to understand "the text of the document and what it meant to the society that adopted it," for Scalia, the text is always "the starting point and beginning of wisdom." Hearings on the Nomination of Judge Antonin Scalia Before the Senate Comm. on the Judiciary, 99th Cong. 108 (1986). Scalia acknowledges, however, that "textualism is not ironclad protection against the judge who wishes to impose his will, but it is some protection." Scalia, supra note 7, at 132.
\textsuperscript{84} Hearings, supra note 82, at 108 (1986) ("[f] nobody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make a difference.").
adopted it," the final text is what counts, not the actual mental intentions of the drafters or ratifiers of the document.\footnote{Id.} While Scalia's motives are similar to those of the proponents of "original intent," Scalia's focus on the Framers' end product rather than their pre- or post-drafting debates has significant implications for how he implements his originalism. Unlike many versions of originalism,\footnote{See Mark Tushnet, \textit{Interdisciplinary Legal Scholarship: The Case of History-In-Law}, 71 CHI.-KENT L. REV. 909, 913 (1996).} Scalia's approach does not use the statements and writings of individual drafters as authoritative sources for the meaning of the text. Rather, he consults these sources only "because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."\footnote{Scalia, \textit{supra} note 7, at 38. Understood this way, Scalia's "original meaning" approach to constitutional law can be somewhat reconciled with his view that legislative history should be irrelevant to statutory interpretation. In both instances, it is the final textual product that controls, not the thoughts or actions leading up to the deliberative body's decision. Scalia has said so himself: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." \textit{Id.} It is only the added difficulty of interpreting a two-hundred-year-old text that allows Scalia to seek confirmation in historical sources for the original meaning. Scalia, \textit{supra} note 26, at 856-57.} Because the extra-textual statements of the drafters are not authoritative, Scalia is left with the problem of how to find a specific historical meaning for the text, especially when the words are too broad to be amenable to a semantic textualism reading. In his oft-cited article, \textit{Originalism, the Lesser Evil}, Scalia offers only vague, inspirational advice that a judge must immerse himself "in the political and intellectual atmosphere of the time."\footnote{See Wyoming v. Houghton, 119 S. Ct. 1297, 1300 (1999) ("In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.").} Scalia's judicial opinions, however, recognize that his theory needs a firmer footing to avoid subjectivism. In practice, therefore, he grounds his originalism in longstanding historical practices to define, and often to limit, the scope of the Constitution's language.\footnote{See Wyoming v. Houghton, 119 S. Ct. 1297, 1300 (1999) ("In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.").}

Scalia's "historical practices" originalism operates as follows: when confronted with a claim of constitutional right not resolved by a plain reading, he asks whether the activity existed at common law and during the drafting/ratification period. Activities not in existence or without a very close
historical analog are not protected by constitutional text.\footnote{See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1991).} However, if the activity was known and illegal, it still can be restricted without offending the Constitution.\footnote{See City of Chicago v. Morales, 119 S. Ct. 1849, 1872 (1999) (Scalia, J., dissenting) (citing the \textit{vast historical tradition of criminalizing} loitering and stating that \textit{there is not the slightest evidence for the existence of a genuine constitutional right to loiter}); 44 Liquormart v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in the judgment, dissenting in part); Planned Parenthood v. Casey, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment, dissenting in part).} Conversely, if the relevant period permitted a specific practice, its protected status cannot be eliminated. Thus, Scalia’s originalism sometimes defends a historic practice now under attack.\footnote{For example, in Lee v. Weisman, 505 U.S. 577 (1992), Justice Scalia dissenting from a decision upholding a First Amendment challenge to religious invocations at public school ceremonies, claiming that such invocations had a long historical pedigree. Scalia said that \textit{[i]n holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste to a tradition that is as old as public-school graduation ceremonies themselves.} \textit{Id.} at 631-32 (1992) (Scalia, J., dissenting); \textit{see also} Mitchell v. United States, 119 S. Ct. 1307, 1316-18 (1999) (Scalia, J., dissenting) (asserting historical practices suggest that \textit{[t]raditionally, defendants were expected to speak rather extensively at both the pretrial and trial stages of a criminal proceeding} and that, therefore, the use of the defendant’s silence at sentencing against him should be permitted); Clinton v. New York, 524 U.S. 417, 466-69 (1998) (Scalia, J., concurring in part, dissenting in part) (discussing why history and tradition support line item veto legislation); Rutan v. Republican Party, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (defending the political patronage system).} However, like his semantic textualism, Scalia’s “historical practices” approach more often results in no protection for a modern practice, either because that practice was condemned under the religious or moral precepts of that earlier time,\footnote{See Casey, 505 U.S. at 984.} or because the modern situation was unknown to the Framers.\footnote{See 44 Liquormart, 517 U.S. at 517 (criticizing parties for failure to discuss historical evidence regarding Framers’ view of commercial speech).}

Although Scalia’s use of historical practices analysis is hardly novel, two things distinguish his originalism. First is his insistence that in the absence of historical support, the Court should not recognize behavior as protected by the
Constitution. The process by which he selects the appropriate historical analogy. Scalia has said that, in theory, originalism could include exploration of the "political and intellectual atmosphere of the time." In his opinions, however, he has stated that the Court should seek out the most specific historical practice of which the Framers were aware that is analogous to the activity at issue.

For example, in Michael H. v. Gerald D., the Court denied a due process challenge by a biological father who sought parental rights for a child conceived during his relationship with a married woman. A state statute essentially barred his claim by establishing a presumption that the woman's husband was the father of the child if the spouses were cohabiting when the child was conceived. Justice White's dissent, which Justice Brennan joined, argued that the Court should look at the underlying right asserted by the father, that of parenthood. Using this broad concept, White found a long history of fundamental due process protection that he would have extended to this case. Under his historical practices approach, in contrast, Scalia found substantial common law roots for the statute, based on an aversion to illegitimacy and the desire to protect the "peace and tranquility of states and families." Furthermore, finding no historical support for the rights of "adulterous natural fathers" in the common law, Scalia concluded that this biological father had no due process rights. In an extended footnote, Scalia argued that the Court should refer to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."

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96 Even when a historical inquiry yields "no answer," Scalia insists on finding some historical reference point. In the Fourth Amendment context, he has argued that Issues should be evaluated "under traditional standards of reasonableness" and by making whatever historical analogies are possible, for example, extrapolating the traditional search and seizure rules for ships to modern transportation such as automobiles. Wyoming v. Houghton, 119 S. Ct. 1297, 1300 (1999). Compare id. at 1304 (Breyer, J., concurring) ("[H]istory is meant to inform, but not automatically determine, the answer to a Fourth Amendment question.").

97 Scalia, supra note 26, at 856-57.

98 491 U.S. 110 (1989) (plurality opinion).

99 See id. at 113.

100 See id. at 135-60 (White, J., dissenting); see also Lawrence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057, 1086, 1103 n.172 (1990).

101 Michael H., 491 U.S. at 125 (citations omitted); see also Houghton, 119 S. Ct. at 1300 (discussing the common law roots of "warrantless search of containers within an automobile").

102 Michael H., 491 U.S. at 127-28 n.6. Scalia later tried to distance himself from this clear statement that the most specific historical practice is the touchstone for his originalism. In his dissent in Planned Parenthood v. Casey, 505 U.S. 833 (1992), Scalia argued that the majority misrepresented his Michael H. opinion to mean "that 'liberty' includes 'only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.'"
Scalia’s focus on the most specific historical analog is consistent with his motivating principle to contain judicial discretion because fidelity to the prevailing historical practices at the time of ratification grounds his originalism in fixed and reasonably verifiable extra-textual sources. Moreover, the more specific the historical analog, the closer the current interpretation of the text to the original compact (and correspondingly, the less likely that the opinion will incorporate the subjective views of the Justices). This results in judicial opinions laden with nuts and bolts historiography. While Scalia recognizes that judges do not always have the time or training for this kind of research, he asserts the argument that this methodology, at least, tells him what to look for.

Aside from the difficulty of historical research, Scalia’s dedication to Eighteenth Century mores as an anchor for constitutional analysis presents a further dilemma for his originalism. As Scalia willingly admits, some features of early American society are simply unpalatable to modern sensibilities. Scalia recognizes this limitation and attempts to accommodate it with the final component of his originalism—his so-called “faint hearted” principle. This

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Id. at 981 (Scalia, J., concurring in the judgment and dissenting in part). Scalia insisted that footnote 6 in Michael H. was no more than an observation that “in defining ‘liberty,’ we may not disregard a specific, ‘relevant tradition protecting, or denying protection to the asserted right.’” Id. at 981. While Scalia may not have liked this characterization, it does appear to accurately describe his analysis in Michael H. and other cases. See, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 862 (1998) (Scalia, J., concurring in the judgment) (“I would ask whether our Nation has traditionally protected the right[] assert[ed].”) (citation omitted).


104 As a practical matter, Scalia acknowledges the difficulties of applying it correctly: the need for an “enormous mass” of materials of often questionable reliability and the discipline to put on the “beliefs, attitudes and philosophies, prejudices and loyalties” of an “earlier age.” Scalia, supra note 26, at 856-57. These tasks, Scalia recognizes, are “sometimes better suited to the historian than the lawyer.” Id.

105 See Scalia, supra note 7, at 45. All too often, unfortunately, Scalia’s historical assertions remain unchallenged by other Justices, who prefer to contest him on a higher theoretical plane. Compare Michael H., 491 U.S. at 124-26, with id. at 139 (Brennan, J., dissenting).

106 Originalism, “[i]n its undiluted form, at least, . . . is medicine that seems too strong to swallow,” and therefore, “in a crunch I may prove to be a faint-hearted originalist.” Scalia, supra note 26, at 861, 864. Scalia also is willing to “adulterate” originalism with the doctrine of stare decisis. Id. at 861. Accepting the notion that stare decisis lies outside originalism, this Article will examine the impact of this exception as part of the critique of his methodology. See infra notes 184-86 and accompanying text.
principle permits him to depart from a historical rule, but only when it is absolutely clear that an "evolution in social attitudes has occurred." While Scalia has never definitively spelled out the parameters of his faint-hearted exception, he has said that a societal shift must appear in "extant" sources. The sole example he has offered of an extant source is widespread and one-sided legislation either permitting or condemning the practice.

The requirement for clear extant verification of social evolution, however, reveals the limited reach of Scalia's faint-heartedness. In his *Originalism* article, Scalia used public flogging as an example of a historical practice permissible at ratification, but one he would be unlikely to sustain if reenacted by a legislature today. Without citing specific evidence, Scalia asserted that the societal perception towards flogging has evolved from a permissible practice to an unconscionable one. In other words, to demonstrate that societal attitudes have truly evolved, Scalia wants democracy's hard proof in "extant legislation." Neither opinion polls nor, even worse, the Court's finger in the wind will suffice. But if societal mores have changed so significantly that a historical practice now is either basically forbidden by statutes or no longer imposed by state action, it is doubtful that the issue would reach the Court. Thus, Scalia's threshold for departing from originalism is so high that, while theoretically possible, its conditions rarely, if ever, will occur. Not surprisingly, Scalia has yet to concede openly that the conditions for faint-hearted originalism have been met while he has been a member on the Court.

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107 Scalia, *supra* note 26, at 864. Scalia, however, is rarely faced with this challenge because by the time of his appointment, many historically-based rules had been overturned by the Warren and Burger Courts. By refusing to re-examine many of these decisions to determine if they meet his faint-hearted criteria, Scalia does not have to confront a variety of harsh historical practices that he might otherwise be obligated to uphold under his methodology. As discussed later, because he has no clear rule for rejecting precedents that run counter to the precepts of his methodology, Scalia also creates a window through which his preferences can reenter. *See infra* notes 185-87 and accompanying text.


109 Scalia argues that to permit judges to make nuanced decisions about the level of societal change necessary to shrink off the constraints of history invites personal values back into the process. Thus, he prefers to err on the side of restraint—in his words, to be the "librarian who talks too softly." *Id.* at 864; *see also* Montana v. Egelhoff, 518 U.S. 37, 48 (1996) (declining to adopt a "new common-law" rule that would allow intoxication to be considered in determining specific intent, because such a rule is inconsistent with historical practices); Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) (focusing on objective signs such as legislation to assess the evolution of society's views towards punishing minors as adults).


111 For example, in *Pacific Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), Scalia dissented on the grounds that "punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species." *Id.* at 39 (Scalia, J., dissenting).
Thus, an insistence on grounding every asserted constitutional right in historical practice provides an incomplete solution to the need for context created by insistence on fidelity to constitutional text. Even Scalia recognizes that the open-ended nature of the Constitution’s language and the inadequacy of historical inquiry do not provide an answer for every case. Therefore, he acknowledges that sometimes the Court must create constitutional doctrine in a manner similar to that in which the courts developed the common law. 112 This is where the “clear rules” principle comes into play.

3. The Clear Rules Principle and Formal Realizability

Published in 1883, German philosopher Rudolf von Ihering’s classic Spirit of the Roman Law touted the use of clear rules in a governmental or legal system in order to restrain official arbitrariness and to promote certainty of application. 113 According to von Ihering, a well-written rule has “formal realizability” in that it permits the administrator to determine the correct result by confirming a convergence of easily identifiable events or factors. 114 Opposing clear rules are legal standards. Standards “collapse decisionmaking back into the direct application of the background principle or policy to a fact situation ... [and] give[c] the decisionmaker more discretion than do rules.... Thus, the application of a standard in one case ties the decisionmaker’s hand in the next case less than does a rule....” 115

112 Scalia uses the Fourth Amendment’s “reasonableness” requirement as an example of constitutional language that calls for clarification by the Court and suggests that “the path out of this confusion” is to regard the reasonableness requirement as affording protection where it was afforded at common law. California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in the judgment).

113 See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687-89 (1976) (citing RUDOLF VON IHERING, DER GEIST DES RÖMISCHEN RECHT 50-55 (1883)).

114 Id. at 1687-88; see also Shael Herman, The “Equity of the Statute” and Ratio Scripta: Legislative Interpretation Among Legislative Agnostics and True Believers, 69 Tul. L. Rev. 535 (1994). To use von Ihering’s example, a rule to determine legal competency solely by reference to age is a “formally realizable” rule because the question of age is easily ascertained. See Kennedy, supra note 113, at 1688 (citing RUDOLF VON IHERING, DER GEIST DES RÖMISCHEN RECHT 51-56 (1883)); Segall, supra note 34, at 997-99. But see Anthony D’Amato, Aspects of Deconstruction: The “Easy Case” of the Under-Aged President, 84 Nw. U. L. Rev. 250, 250-51 (1989).

Almost one hundred years later, Justice Scalia arrived at similar conclusions for constitutional law in his article *The Rule of Law as a Law of Rules.* General rules, Scalia asserts, constrain not just the lower courts but the high court as well: “[o]nly by announcing rules do we hedge ourselves in.” Thus, contrary to the conventional wisdom that the case-by-case approach is “the course of judicial restraint, ‘making’ as little law as possible in order to decide the case at hand,” Scalia asserts that the common law approach and its modern cousin, the balancing test, actually leave judges free to decide the next case according to their own preferences. Moreover, because balancing tests use multiple factors, it is difficult to prove inconsistent reasoning from case to case, and hence the intrusion of judicial bias. Despite his dislike of balancing tests, Scalia recognizes that these “modes of analysis [will be] with us forever,” because of the prevalence of balancing tests in precedent and because some constitutional language inevitably requires their usage. Therefore, all he urges is that they “be avoided where possible; and that the rule of law, the law of rules, be extended as far as the nature of the question allows.”

Although framed only as a preference, Scalia’s insistence on clear rules in constitutional cases should not be underestimated. According to Kathleen Sullivan, it is the rules-versus-standards divide that is most responsible for the frequent rifts between Scalia and the moderates on the current Court.

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116 Scalia, *supra* note 25. The concept of the rule of law embraces more than the need for clear rules. In essence, “[t]he law must be capable of guiding the behavior of its subjects,” JOSEPH RAZ, *The Role of Law and Its Virtue*, 210, 214 (1979), but should not be so determinate that “errors of under- and over-inclusiveness” occur. *Sullivan, supra* note 115, at 58.

117 Scalia, *supra* note 25, at 1180. Scalia also stated that general rules control even if the “next case should have such different facts that my political or policy preferences regarding the outcome are quite opposite.” *Id.* at 1179.

118 *Id.; see also Segall, supra* note 34, at 1002 (“Although many scholars believe that the legal realists forever cast doubt on rule-oriented jurisprudence, Justice Scalia’s message is that the realists were wrong and that rules and language can and should constrain judicial choice.”) (citation omitted).


120 *Id.* at 1187; *see also* Wyoming v. Houghton, 119 S. Ct. 1297, 1300 (1999) (recognizing that Fourth Amendment’s use of the word “reasonableness” lends itself to a balancing of governmental interests versus privacy interests but attempting to cabin the test by relying on historical analogies).

121 Scalia, *supra* note 25, at 1187. Scalia advances additional reasons for his clear rules preference, including the value of uniformity and predictability. *Id.* at 1179. He also argues that clear rules embolden judges to be courageous in the face of an unpopular decision such as protecting a criminal defendant’s rights. *Id.* at 1180. Moreover, Scalia suggests that the case-by-case approach is even more ill-suited to our system, because the Supreme Court reviews only a small percentage of cases. *Id.* at 1178-79.

122 Sullivan cites *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as emblematic of this schism. In *Lucas*, Justice Stevens, dissenting, rejected “‘set formula[s]’ or ‘rigid’ categorical rule[s]” because they do not promote “‘fairness and justice’” and are “‘arbitrary.’” *Sullivan, supra* note 115, at 54 (quoting *Lucas*, 505 U.S. at 1064, 1071 (Stevens, J., dissenting)); *see also* *Lucas*, 505 U.S. at 1036...
Scalia’s opinions chide these Justices for a host of clear rules violations including creating unclear rules,\textsuperscript{123} applying flexible balancing tests that fail to provide guidance or restrain judicial discretion,\textsuperscript{124} or undermining previously clear rules by creating new exceptions, all to justify their preferred outcome.\textsuperscript{125} Scalia’s attachment to the clear rules principle also reverses the old adage, (Blackmun, J., dissenting) ("Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense.").\textsuperscript{123} See United States v. Fordice, 505 U.S. 717, 750 (1992) (Scalia, J., concurring in the judgment, dissenting in part) (stating that the Court’s meaning in its use of the phrase "substantially restrict[ing] a person’s choice of which institution to enter’ is not clear.’); see also Houghton, 119 S. Ct. at 1303 n.2 (claiming that the dissent’s determination that passenger property is immune from search under auto exception is "unclear and hence un administrable’); City of Chicago v. Morales, 119 S. Ct. 1849, 1873 (1999) (Scalia, J., dissenting) (criticizing the majority’s departure from the established rule "governing facial challenges’ to criminal statutes in favor of one unsupported by law or tradition.").\textsuperscript{124} See Kehr v. A.O. Smith Corp., 521 U.S. 179, 200 (1997) (Scalia, J., concurring in part and concurring in the judgment) (supporting the adoption of all or nothing rules on statutes of limitation questions because any other rule permits judicial law making); Granfinanciera v. Nordberg, 492 U.S. 33, 70 (1989) (Scalia, J. concurring in part, concurring in the judgment) (concluding that the “public rights doctrine’ exception to the Seventh Amendment jury requirement should require that the government be a party and that central features of the Constitution must be “anchored in rules, not set adrift in some multifactored ‘balancing test’").\textsuperscript{125} See Waters v. Churchill, 511 U.S. 661, 686-87 (1994) (Scalia, J., concurring in the judgment). In addition to the well-known conflict between flexible standards and clear rules, there is another important mode of legal argument that conflicts with Scalia’s clear rules principle: metaphoric reasoning. Metaphors are antagonistic to textualism both by nature and by design. The metaphor resists, and in fact is a substitute for, plain meaning. To the extent that the author intends the metaphor to reshape the boundaries of an existing legal concept, the metaphor’s lack of precision is intentional. Moreover, as the basis for a legal rule, a metaphor fails to constrain discretion because the next judge may understand the metaphor differently. By purporting to stand for a rule, judicial metaphors hide judicial discretion under the cover of evocative language. Therefore, it is not surprising that Scalia has also used clear rule arguments to criticize the Court when it resorted to metaphoric reasoning in a number of cases. See, e.g., Montana v. Egelhoff, 518 U.S. 37 (1996); American Dredging Co. v. Miller, 510 U.S. 443 (1994); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting). But see Zlotnick, supra note 36 (discussing Scalia’s use of metaphoric reasoning to obscure his manipulation of double jeopardy doctrine).
“seeing is believing.” Because Scalia believes so strongly in the need for clear rules, he often sees a clear rule in precedent where others find only ambiguity or a balancing test. \[126\]

C. The Interplay of the Methods: Hierarchy and Compatibility

Scalia’s contention that he has established a cohesive methodology rather than three independent tools of constitutional analysis depends upon several additional assertions about the relationship and interplay of the component parts.

First, to be capable of consistent application, the components of a methodology must be arranged in a definite hierarchy. Otherwise, the choice of component can be influenced by the desired result. Scalia’s stated hierarchy is that constitutional analysis should always begin with the plain meaning of the text, and if necessary, proceed to historical practices, and then to clear rules. \[127\] Moreover, this hierarchy is reinforced by Scalia’s assertion that each component relates back to the text of the Constitution as its ultimate source of authority. For example, in the context of the clear rules principle, Scalia has said that the Court cannot create rules “out of whole cloth, but must find some basis for them in the text that . . . the Constitution has provided.” \[128\]

Second, Scalia contends that his components are compatible and, indeed, mutually reinforcing. For example, he asserts that each component operates to constrain judicial discretion. \[129\] Thus, whatever part or parts of the methodol-

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\[126\] For example, in Grady v. Corbin, 495 U.S. 508 (1990), Scalia read an earlier case to stand for a narrow clear rule, while Justice Brennan relied on that same case to justify a more expansive test. Scalia cited the one paragraph per curiam opinion in Harris v. Oklahoma, 433 U.S. 682 (1977), to stand for the clear rule that the Court should look beyond the statutory elements of offenses in double jeopardy analysis only when one statute “expressly incorporates another statutory offense without specifying its elements.” Grady, 495 U.S. at 528 (Scalia, J., dissenting). Justice Brennan, writing for the majority, saw Harris as part of the Court’s movement towards a more expansive test that better protected the core interests of the Double Jeopardy Clause. Id. at 519-20 (majority opinion); see also United States v. Dixon, 509 U.S. 688, 757 (1993) (Souter, J., concurring in part and dissenting in part) (considering Harris to stand for the more open-ended proposition that the Court could declare two offenses the same if they appeared to be a “species of lesser included offense”); Illinois v. Vitale, 447 U.S. 410, 420 (1980) (same); Zlochick, supra note 36 (discussing Scalia’s use and misuse of Harris in more detail).

\[127\] For example, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), Scalia contended that it was irrelevant whether tradition supported a ban on interracial marriages because such a ban was prohibited by the text of the Equal Protection Clause. Id. at 980 n.1 (Scalia, J., concurring in the judgment in part, dissenting in part); see also McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting) (“(P)ostadoption tradition cannot alter the core meaning of a constitutional guarantee.”).

\[128\] Scalia, supra note 25, at 1183.

\[129\] Textualism and clear rules demand close attention to a semantic exegesis, either of the Constitution
ogy come into play in a given case, the resulting analysis still advances the motivating principle of the methodology. Each component also employs similar analytic tools. For example, textualism and the clear rules principle share a central faith in clarity of language to express and control meaning in judicial interpretation. Therefore, Scalia claims that in most cases, analysis under any component leads to the same outcome. Thus, even when the text provides a clear answer, he often will cite historical practices to buttress his textual interpretation. Scalia also relies on the professed compatibility of the components to adjust to the circumstances of different cases. Often, where constitutional language is too open-ended to be amenable to a plain meaning approach, Scalia either falls back on historical practices to limit the scope of the text or finds a general rule in (or crafts a general rule out of) historical practices or precedent. Therefore, while each component of the methodology is important in its own right, the principles of hierarchy and compatibility lie at the heart of Scalia's claim that he has achieved a consistent constitutional methodology with resilience against judicial discretion.
II. THE CRITIQUE OF SCALIA’S CONSTITUTIONAL METHODOLOGY

A. The Costs of the Methodology

Even for the conservative Rehnquist Court, wholehearted adoption of Scalia’s methodology would radically transform constitutional jurisprudence and significantly reduce the role of the Court in American society. Resolution of substantive due process issues likely would devolve entirely to Congress and state legislatures. More generally, unless moved by the “dead” hand of history, the Court would deem itself powerless to intervene in many areas in which it has been active for decades. At the same time, any legislative efforts to experiment with governmental structure or to regulate practices with historical pedigrees would be rejected by the Court. Additionally, in the interest of suppressing judicial discretion, the Court frequently would have to affirm the harsh but unintended consequences of applying “clear rules” from precedent in new and unforeseen contexts.

For Scalia, limiting judicial resolution of divisive social issues and legislative tinkering with governmental structure would be positive developments. For many, however, the Court has played too important a role in ameliorating longstanding social inequities and resolving gridlocked political issues, making Scalia’s emasculation of the Court impossible to stomach. The price Scalia demands to counter the countermajoritarian problem is simply too high for them.

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135 See Post, supra note 5, at 19 (arguing that Scalia’s textualism “is radical in the true sense of the word [and that] it seeks to overturn longstanding and established practices of both statutory and constitutional interpretation”). But see Rosen, supra note 19, at 27.


137 See Planned Parenthood v. Casey, 505 U.S. 833, 984 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part); see also Rebecca L. Brown, Tradition and Insight, 103 Yale L.J. 177, 202 (1993) (stating that Scalia’s “use of tradition is but a thinly-veiled effort to cut off all possibility of progressive interpretation of the past”).


141 See Sunstein, supra note 29, at 563-64 (listing decisions that might have to be overturned under a Scalian regime).
To demonstrate this point, some critics make convincing arguments that *Brown v. Board of Education*\(^{142}\) and a host of other civil rights and civil liberties decisions would never have come to pass under an originalist regime.\(^{143}\) According to these commentators, a constitutional methodology that would prevent the next *Brown* abandons the Court’s role as the ultimate guarantor of the broadly painted promises of liberty and justice found in the Constitution and Declaration of Independence.\(^{144}\) Robert Post believes that “[a]t some point every judge will say that one purpose of the Constitution is to consolidate the ‘whole experience’ of the nation, which may call the national ethos.”\(^{145}\) At such moments, the nation needs a broader interpretative methodology than Scalia advocates.\(^{146}\)

\(^{142}\) 347 U.S. 483 (1954).

\(^{143}\) See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response To Professor McConnell*, 81 VA. L. REV. 1881 (1995); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 950-53 & nn. 6-16 (1995); Mark Strasser, *Domestic Relations Jurisprudence and the Great Slumbering Bashr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 70-74 (1995) (arguing that Scalia’s historical practices approach would destroy not only a due process right to same-sex marriage but also rights to abortion, contraception, and interstitial marriage); David Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1713 (1992) (arguing that gender discrimination, school prayer, and malapportioned legislatures are all deeply rooted traditions). Recognizing this dilemma, Scalia argues that *Brown* is consistent with his methodology because the text of the Equal Protection Clause bars segregated schools. In other words, Scalia tries to use “plain meaning” to avoid the historical fact that segregated schools clearly were accepted as the norm before and after the adoption of the Fourteenth Amendment. See *Rutan v. Republican Party*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting). However, Scalia cannot escape history so easily. As Jeffrey Rosen and David Strauss separately note, the Equal Protection Clause says nothing explicitly about schools. Therefore, they convincingly argue that to be true to his methodology Scalia must look to the unpalatable historical practices as well. See Rosen, supra note 19, at 33; see also Strauss, supra, at 1712-13. Strauss also argues that tradition supports discrimination against women under the Fourteenth Amendment. Id. at 1712-13. Nor can Scalia avoid the implications of an originalist approach to segregation by justifying his acceptance of *Brown* under stare decisis, because he has upheld oppressive practices against other minorities, such as homosexuals, on historical grounds. See *Romer v. Evans*, 517 U.S. 620, 644-45 (1996) (Scalia, J., dissenting).


\(^{145}\) Post, supra note 5, at 62. Post adds, “[i]t is common ground among virtually all judges . . . that the Constitution serves at least three distinct purposes. It establishes particular understandings in a way that makes it difficult for them to be changed; it creates rules of law; and it crystallizes the principles that constitute the national ethos.” Id. Obviously, Scalia would concur in the first two principles but disagree with the third. However, Post believes that, at times, Scalia recognizes the national ethos rationally and employs a more open-ended interpretative method. See infra notes 263-64 and accompanying text.

\(^{146}\) Cass Sunstein questions whether Scalia’s methodology, properly understood, actually promotes democracy, and claims that there are other methods to limit judicial discretion. Sunstein, supra note 29, at 530-31.
More pragmatic critics emphasize the current balance of power among the branches of government. Binding the Court to textualism and historical practices frustrates the judiciary’s fundamental responsibility under the separation of powers principle to check the excesses of the executive and legislative branches, whose powers have dramatically expanded since the founding of the nation.\textsuperscript{147} In addition, for those not obsessed with judicial discretion, there is no reason to adopt a myopic methodology that produces results out of accord with simple notions of fairness.\textsuperscript{148} As Judge Leventhal eloquently wrote, "[e]very mature system of justice must cope with the tension between rule and discretion. Rules without exceptions may grind so harsh as to be intolerable . . . .\textsuperscript{149} The clarity that semantic analysis allegedly delivers comes with a similar cost. As Judge Learned Hand stated, "[i]t is one of the surest indexes of a mature and developed jurisprudence not to make a fuss out of the dictionary."\textsuperscript{150} Nor were the pitfalls of over-reliance on historical practices overlooked by Justice Holmes, who once quipped that "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."\textsuperscript{151}

To safeguard their vision of the Constitution and the Court, the modern disciples of Holmes, Hand, and Leventhal have launched a counterattack on the legitimacy of Scalia’s methodology. This counterattack comes in two basic forms, although there is some overlap. The first consists of theoretical attacks that call into question the underpinnings of Scalia’s methodology; the second consists of “as applied” arguments that Scalia selectively fails, in practice, to apply his methodology faithfully where its results would conflict with his ideological values.

\textsuperscript{147} See Wood, supra note 57, at 50-55.
\textsuperscript{148} As David Strauss put it, “If I had to choose (behind some suitable veil of ignorance) between a judge who always did what she thought was traditional and a judge who always did what she thought was right, I am certain I would choose the latter.” Strauss, supra note 143, at 1711.
\textsuperscript{149} United States v. Barker, 546 F.2d 940, 965 (D.C. Cir. 1976) (Leventhal, J., dissenting).
\textsuperscript{150} Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (emphasis added).
\textsuperscript{151} Oliver Wendell Holmes, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 187 (1920). For a feminist take on Scalia’s originalism, see Kathleen T. Bartlett, Tradition, Change and the Idea of Progress in Feminist Thought, 1995 Wis. L. REV. 303, 328 (“Scalia’s view of tradition is . . . a jurisprudence of dominance and submission, in which decisionmakers of the present are required to respect a prior authority and [are] denied active collaboration in reshaping it.”) (citation omitted).
B. The Theoretical Attacks

1. Text and Original Intent

As noted in Part I, neither the Constitution’s text nor the historical record clearly mandates Scalia’s methodology. Others have gone further, arguing that the text and the historical record affirmatively require a broader interpretive methodology and a larger role for the Court. Under this rubric, scholars such as Ronald Dworkin and Lawrence Tribe assert that they, not Scalia, are the true textualists and originalists.

Dworkin states that “[t]he Framers were careful statesmen who knew how to use the language they spoke”: thus, “[t]hey are best understood as making a constitution out of abstract moral principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles.” The view that the Constitution’s broader clauses are aspirational guides rather than a series of fixed commands also “surely suggests that the authors originally intended that their successors should not be bound by their original understanding of these terms.” These critics also assert that their understanding of the text and original intent is more consistent with the intellectual backdrop of the period than is Scalia’s. Early American political figures and lawyers were comfortable with judge-made common law and with natural law concepts, both of which are inimical to the positivism of Scalia’s methodology. Jeffrey Rosen notes, “Originalism, in other words, sometimes leads inexorably to the common law constitutionalism that Scalia wants to avoid.” Additionally, H. Jefferson Powell asserts that the Framers opposed the use of their historical records to interpret the text of the Constitution.

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152 See supra notes 29-30 and accompanying text.
154 Robert Burt, Precedent and Authority in Antonin Scalia’s Jurisprudence, 12 CARDozo L. REV. 1685, 1689 (1991); see also Sosa, supra note 7, at 920 (“[T]he plain meaning of a text does not determine its proper application to novel circumstances.”).
156 Rosen, supra note 19, at 29.
157 Powell, supra note 30, at 885, 903. Scalia is willing to use the writings of the Framers because “their writings, like those of other intelligent and informed people of time, display how the text of the Constitution was originally understood.” Scalia, supra note 7, at 38. David Sosa attacks this idea by pointing
Others take a political realist’s view that some of the Constitution’s ambiguous language reflected political compromises, just as legislative drafting does today, leaving the messy details of elaboration to future generations and to the Court.\footnote{See Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980).}

Finally, some political scientists disagree with Scalia’s contention that leaving constitutional interpretation to the “dead hand” of history is more democratic than allowing living judges to make those decisions. Living judges at least share the same political, technological, and intellectual world of the current generation and are selected by this generation’s representatives. Thus, according to these theorists, Scalia’s methodology does not really solve the countermajoritarian difficulty because it also supplants the will of the current majority, choosing the obscure intent of the deceased Framers over the judgment of living judges.\footnote{See Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, 284-92 (1988); Klarman, supra note 143, at 1915 (“No originalist thinker of whom I am aware has convincingly explained why the present generation should be ruled from the grave.”).}

2. The Methodology and Judicial Discretion

To be uncertain is to be uncomfortable, to be certain is to be ridiculous.\footnote{Found in fortune cookie eaten by author. Lee Ho Food Restaurant, Washington, D.C. (May 23, 1996).}

Assuming neither text nor original intent requires Scalia’s methodology, its primary justification is its claim to restrain judicial discretion.\footnote{See Gerhardt, supra note 15, at 48-49 (“Justice Scalia’s goal in [the] area [of freedom of religion] has been to secure judicial restraint, despite arguably conflicting constitutional text or original meaning.”).} Substantial scholarship suggests, however, that on a theoretical level, Scalia’s methodology is incapable of delivering on this promise.\footnote{Scalia claims that the alternatives to originalism are an “equal opportunity scam” for both the left and the right. Antonin Scalia, Address at the Justinian Law Society of Rhode Island Distinguished Speaker Lecture Series (May 20, 1997) (notes on file with author). Nevertheless, this begs the question of whether his methodology is by its nature socially and politically conservative. Some argue that originalism is deeply conservative because it relies on the more religious and socially conservative practices of Eighteenth Century America. Similarly, Scalia’s semantic textualism has a conservative bias because it reads the Bill of Rights narrowly. See Steven G. Gey, A Constitutional Morphology: Text, Context, and Pretext in Constitu-
cases on the underlying assumptions of textualism, originalism, and the clear rules principle.

Hermeneutic theory challenges Scalia's overly optimistic belief in the clarity of language on several fronts. Boiled down to its essence, "modern linguistic theory teaches that words are not the mechanistic tools the textualists suppose [and that] [m]eaning is neither precise nor determinate; textual meaning changes along with each succeeding interpreter's need." Thus, while hermeneutic theory will not deny that text can have a plain meaning to Scalia, it refutes his assertion that his meaning is, or should be, plain to everyone involved. Contrary to Scalia's claim, textualist analysis of the Constitution by different judges can yield more than one "clear" meaning. Therefore, textualism cannot limit judicial discretion, nor is a deep understanding of linguistic theory essential to demonstrate this point. All that is necessary is to contrast the "plain meaning" of the Bill of Rights as defined by Justice Scalia with that of the other leading textualist of the twentieth century, Justice Hugo Black.

Scalia’s originalism also rests on an overly optimistic assumption that historical analysis can yield a precise legal meaning of discrete phrases in a two-hundred-year-old text. Scalia partially acknowledges this problem but fails

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163 The strongest hermeneutic claim is that, given the ambiguities of language, there can be no definitive reading of any text. See D'Amato, supra note 114, at 250-51. A weaker version asserts that it is problematic for succeeding generations to divine the meaning intended by the authors of an earlier generation's text. See id. at 252 ("[T]here can be no such thing as a single interpretation of any text that is absolute and unchanging for all time."). Both the Legal Realists and modern deconstructionists also claim that the canons of construction are themselves internally contradictory and therefore unable to yield a single meaning of an ambiguous text. See Kenney Hegland, Indeterminacy: I Hardly Knew Thee, 33 Ariz. L. Rev. 509, 510-13 (1991); see also Post, supra note 5, at 58 n.6 ("Canons of construction can at most offer 'simply one indication of meaning,' as Scalia himself concedes.").

164 Kay, supra note 159, at 287; see also Nicolas Zepos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1359-61 (1990).


166 See Gerhardt, supra note 15, at 48 (discussing the critical differences between Justice Scalia's and Justice Black's textualism in light of the First and Fourth Amendments).

167 Even if historical research and semantic analysis could determine the correct meaning of every passage of the Constitution when it was written, Scalia still cannot bridge the hermeneutic gap created by changed circumstances. While the framers might have desired a particular rule for society as it existed in
to appreciate the degree to which it undermines his premise that originalism can control judicial discretion.\textsuperscript{168} For example, Scalia notes that historical records can sometimes be incomplete and that lawyers are not always suited to the tasks involved in such research.\textsuperscript{169} Nevertheless, he argues that because he seeks the most specific relevant historical practice his discretion is confined to external and verifiable facts.\textsuperscript{170}

Commentators, however, point out that Scalia lacks an internal rule to identify the relevant tradition or the level of generality within that tradition that constitutes the “most specific historical practice.”\textsuperscript{171} Scalia also fails to distinguish between academic historical research and what historians derogatorily refer to as “lawyers’ histories.” As one scholar noted, “lawyers’ histories” force the past to yield an answer that can be stated as a legal rule, while academic historians, on the other hand, recognize that historical research generally offers only an incomplete, conflicting, or evolving process of

\textsuperscript{168} See Raskin, \textit{supra} note 144, at 73 (noting the “essential indeterminacy of the originalist method” by comparing Scalia’s opposition to the \textit{Dred Scott} decision with an examination of the originalist roots of that infamous case).


\textsuperscript{170} Therefore, Scalia argues that at least he knows what he is looking for and thus his discretion is guided and cabin’d. See Scalia, \textit{supra} note 7.

\textsuperscript{171} Andrew C. Cicca, \textit{A Wolf in Sheep’s Clothing?: A Critical Analysis of Justice Harlan’s Substantive Due Process}, 64 FORDHAM L. REV. 2241, 2276 (1996); see also Tribe & Dorf, \textit{supra} note 100, at 1090-93; Bethany A. Cook & Lisa C. Kahn, Note, \textit{Justice Scalia’s Due Process Model: A History Lesson in Constitutional Interpretation}, 6 ST. JOHN’S J. LEGAL COMMENT. 263, 285 (1991); see also City of Monterey v. Del Monte Dunes, Ltd., 119 S. Ct. 1624 (1999). In the \textit{Del Monte Dunes} case, which concerned the applicability of the Seventh Amendment right to a jury trial to actions brought under 42 U.S.C. § 1983 (1994 & Supp. III 1997), Justice Souter argued for a closer historical analogue to the specific issue in the case, namely, early suits for just compensation under the Fifth Amendment, for which a jury trial was required. \textit{Del Monte Dunes}, 119 S. Ct. at 1650-52. In taking issue with Souter’s position, Scalia argued that “the proper focus is on the prism [i.e., § 1983 actions] itself, not on the particular ray that happens to be passing through in the present case.” \textit{Id.} at 1654 (Scalia, J., concurring in part and dissenting in part). See Sunstein, \textit{supra} note 29, at 559 (arguing that Scalia advocates “a relatively low level of abstraction” for historical practices).

historical development. Therefore, isolating one practice or rule from historical materials to define a historical text distorts whatever "objective" history exists. Especially for the thorniest sections of the Constitution, historical practices originalism offers only the illusion of clarity.

A similar critique has been posed for the clear rules principle. While Scalia is correct that flexible standards openly permit judicial discretion, scholars demonstrate that the same results are possible under a clear rules system. For every clear rule, they maintain, a court can find an existing exception or a reason to create a new one. These critics even point to examples of rule manipulation in Scalia's own opinions to illustrate that Scalia hides what are really arbitrary distinctions under the cover of his confident textualist and originalist pronouncements. For example, Lawrence Lessig asks why Scalia accepts changes in the meaning of "search" in the Fourth Amendment to embrace technological developments but deems it impermissible to change the meaning of "reasonableness" based on a changed understanding of that term.

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172 See Morton J. Horwitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 HARV. L. REV. 30, 68-69 (1997) (reviewing disputes over the meaning of the Fourth Amendment); see also Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 29 (1997) (stating that there is no assurance that original understanding will always produce a rule). Scalia does acknowledge that the views of a large group (the Framers and ratifiers) cannot be reduced to a single meaning. See Horwitz, supra note 84, at 472. It is this problem that drives him away from traditional original intent to original meaning (as embodied in extant historical practices). See Gey, supra note 162, at 595. However, this version of original meaning creates a second hermeneutic problem. Traditional original intentionalists search for the meaning of the document in the writings of the drafters. Scalia is tied primarily not to the Framers' writings but to "the legislative and legal activities of the framers' contemporaries." Id. at 594. Thus, Scalia's originalism is actually two steps removed from the actual text of the document he is construing.

174 See Kennedy, supra note 113, at, 1700-01 (discussing why clear rules still produce variable results); James G. Wilson, The Forms of Doctrine On the Bright Line-Balancing Test Continuum, 27 ARIZ. ST. L.J. 773, 834 (1995) (stating that Scalia's aggressive attempt to forge formal rules is quixotic and may increase rather than decrease future judicial discretion).

175 See Winkfield F. Twyman, Jr., Justice Scalia & Facial Discrimination: Some Notes on Legal Reasoning, 18 VA. TAX REV. 103, 111-18 (1998) (arguing that Scalia's preference for a clear rule in state tax cases under the dormant Commerce Clause, which would require proof of facial discrimination, would not eliminate judicial discretion).

176 Lawrence Lessig, Understanding Changed Realities: Fidelity and Theory, 47 STAN. L. REV. 395, 398 (1995); see also Wyoming v. Houghton, 119 S. Ct. 1297, 1305 (1999) (Stevens, J., dissenting) (arguing that, contrary to Scalia's claim, the case law supports rule on searches of passenger property and that Scalia's opinion "fashions a new rule that is based on a distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse"); Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 947 (1999) (refusing to consider constitutional claims, holding that a "general rule" applies but leaving open the possibility of a "rare case in which alleged bias or discrimination is so outrageous" that an exception might be warranted).
3. The Methodology and Precedent

Scalia’s exact position on precedent has been unclear since his confirmation hearing. On one hand, Scalia acknowledges that stare decisis brings “certainty and stability into the law and protect[s] the expectations of individuals and institutions that have acted in reliance on existing rules.” Furthermore, the doctrine itself restrains “an arbitrary discretion in the courts.” Therefore, Scalia acknowledges that he sometimes votes to uphold precedents that conflict with his reading of text and tradition. On the other hand, he also has said that the doctrine of stare decisis is weakest in constitutional cases because text and tradition should control. Accordingly, Scalia has voted to overrule more cases than any sitting or recent Justice.

Laurence Tribe, Scalia’s chief critic in this area, argues in *A Matter of Interpretation* that Scalia’s partial acceptance of precedents that conflict with his methodology contains an implicit recognition that constitutional rights can evolve. Scalia disagrees with this assessment:

Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare

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177 See BRISBIN, supra note 37, at 60.
180 See Granfinanciera v. Nordberg, 492 U.S. 33, 66 (1989) (Scalia, J., concurring in part, concurring in the judgment) (suggesting that the public rights exception is inconsistent with the absolute language of Article III but accepting the doctrine based on its pedigree in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 56 U.S. 272 (1856), and on its sensible rationale).
181 See Rutan v. Republican Party, 497 U.S. 62, 110 (1990) (Scalia, J., dissenting). Robert Burt believes that for Scalia, precedent has no independent authority. Only those cases that agree with his originalist principles are worthy in their own right. For cases that are inconsistent, “there is a presumption—apparently strong though rebuttable—for discarding it.” Burt, *supra* note 154, at 1686.
182 See SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS 8 (1995). This makes sense given Scalia’s view that the modern Court’s analysis often is illegitimate. Robert Burt also points out the irony: “Scalia is prepared to overrule more constitutional precedents more openly and more quickly than his colleagues on the Court—but only for today, only to construct a better future which would constrain him and all other Justices.” Burt, *supra* note 154, at 1688; see also Strauss, *supra* note 143, at 1699 (“We knew from the start that Justice Scalia was not a great fan of *stare decisis*.”); cf. Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 109-10 (1993) (Scalia, J., concurring) (agreeing with majority because “the doctrine of prospective decisionmaking is not in fact protected by our flexible rule of *stare decisis*; and because no friend of *stare decisis* would want it to be”).
183 Lawrence Tribe, *Comment, in A MATTER OF INTERPRETATION*, supra note 7, at 65, 70. Tribe’s example is the original understanding of the Fourteenth Amendment, which, he argues, likely was opposed to the incorporation of the Bill of Rights against the States. Thus, Tribe argues that Scalia’s acceptance of the incorporation doctrine implicitly means that *stare decisis* can effect a change in the understanding of the Constitution. *Id.* at 82-83.
decisis; it cannot remake the world anew.... The demand that originalists alone "be true to their lights" and forswear stare decisis is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.... [Moreover,] stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it....

Scalia’s response to Tribe is unsatisfactory for two reasons. First, it is evasive. An evaluation of Scalia’s jurisprudential consistency can be fair only if it is based upon all of his opinions. He cannot omit a subset of cases without conceding that, at least for that group, an evolutionary Constitution is permissible. Second, Scalia’s claim to the mantle of pragmatism conflicts with his desire for a methodology that restricts judicial lawmaking. Pragmatism embraces discretionary, subtle judgments on the part of the decisionmaker. Given that virtually no provision of the Constitution remains unglossed by past decisions, Scalia’s partial willingness to accept precedents that conflict with his methodology conveniently opens a back door to value choice.

Scalia acknowledges that “stare decisis affords some opportunity for arbitrariness, though [he] attempt[s] to constrain [his] own use of the doctrine by consistent rules.” Even accepting Scalia’s premise that a rule-governed
approach to stare decisis is theoretically consistent with his methodology, a secondary level of critique alleges that he has failed to articulate any consistent clear rules to determine when contrary precedents can stand and when they must fall. A review of Scalia's various statements on this subject reveals what is, at best, a flexible standard and, at worst, a series of contradictory and malleable axioms. Thus, under his own clear rules standard, his approach to precedent appears to be more patchwork than pattern.\footnote{In Casey, Scalia stated that he would abide by precedent when either: 1) the case was correctly decided, or 2) the case had "succeeded in producing a settled body of law." Planned Parenthood v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part) (stating that he is not bound by Roe v. Wade because that case was "plainly wrong"). Determining what is a "settled body of law," however, is a malleable standard, not a formally realizable rule. See Lamf v. Gilbertson, 501 U.S. 350, 364-66 (1991) (Scalia, J., concurring in part, concurring in the judgment) (reluctantly accepting implied causes of action under principle of stare decisis); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in judgment) (arguing against a rootless analysis of due process not dictated by the Court's precedent). Among the various factors Scalia considers is the age of the precedent. Because the purpose of stare decisis is stability, newer cases have lesser claims for respect. Older precedents, particularly those upon which society has relied more, are harder to overrule. Yet Scalia has never said how old is old enough or how much societal reliance is sufficient to protect a case from being overruled. In addition, Scalia asks whether the precedent itself established the disputed rule or if that rule can be traced to older cases or historical practices, see Payne v. Tennessee, 501 U.S. 808, 833-35 (1991); if the precedent at issue was contradicted or weakened by later holdings; and if the precedent disagreed with earlier cases without expressly overruling them, see Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 104-10 (1993); Haslip, 499 U.S. at 37-38 (Scalia, J., concurring in the judgment). Scalia also appears to look more harshly at precedents that include multiple violations of his methodology. See BMW of North Amer. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) (arguing that the precedent violated textualism and originalism and was "insusceptible of principled application"). However, even without contending a core methodology, a precedent can be discarded if its rule is "unworkably rigid," Walton v. Arizona, 497 U.S. 639, 715 & n.7 (1990) (Stevens, J., dissenting) (quoting Woodson v. North Carolina, 428 U.S. 280, 292 (1976)) (arguing that rules for capital punishment on aggravating and mitigating factors are in conflict and hence incompatible), or if the decision has been shown over time to have "unacceptable consequences," Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part, concurring in the judgment). See Eskridge, supra note 7, at 1519-20 (arguing that Scalia's opinion in Printz disregards the applicable plain language of the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause); Nichol, supra note 167, at 918 (arguing that the rule in Printz is not supported by the text); Stephen

C. The "As Applied" Attacks

1. Sacrificing Methodology for Result

A smaller group of scholars do battle with Scalia on his own turf. These critics examine the components of Scalia's methodology in action, arguing that whatever the theoretical viability of the system, Scalia does not faithfully implement it in practice. They identify particular cases or doctrinal areas in which Scalia distorts the applicable text,\footnote{See Eskridge, supra note 7, at 1519-20 (arguing that Scalia's opinion in Printz disregards the applicable plain language of the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause); Nichol, supra note 167, at 918 (arguing that the rule in Printz is not supported by the text); Stephen} misstates historical practices,\footnote{See Eskridge, supra note 7, at 1519-20 (arguing that Scalia's opinion in Printz disregards the applicable plain language of the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause); Nichol, supra note 167, at 918 (arguing that the rule in Printz is not supported by the text); Stephen}
misinterprets precedent, or misapplies an existing clear rule. Some of these commentators also identify what they believe are the political or ideological forces driving Scalia’s actions in a particular area. For example, Daniel Reisman believes that Scalia’s repeated historical errors in his separation of powers doctrine are motivated by his vision “of government characterized by a preeminent Executive.”

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A. Plass, The Illusion and Allure of Textualism, 40 VILL. L. REV. 93, 110-21 (1995) (chronicling Scalia’s infidelity to textualism in statutory construction cases including civil rights, immigration, and family law cases); Nadine Strossen, Religion and Politics: A Reply to Justice Antonin Scalia, 24 FORDHAM URB. L. REV. 427, 434 (contending that Scalia’s textualism is inconsistent because he is willing to deviate from the Fourth Amendment’s strict warrant and probable cause requirements on the grounds that society has not “now or ever been able to tolerate such an indulgence”); Tribe, supra note 183, at 78 n.25 (criticizing Scalia for joining majority in Seminole Tribe v. Florida, 517 U.S. 44 (1996), which held the Eleventh Amendment a restriction on congressional power rather than only a restraint on the federal courts as the text and history strongly suggest); Robert S. Nix, Comment, Bennet v. Spear: Justice Scalia Oversees the Latest “Battle” in the “War” Between Property Rights and Environmentalism, 70 TEMPLE L. REV. 745, 773-74 (1997) (contesting Scalia’s argument that the “plain meaning” of a statute supported property owners’ prudential standing to sue under “zone of interests” test).

190 See Douglas Laycock, The Origins of the Religion Clauses of the Constitution: “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986) (demonstrating, contrary to Scalia’s historical conclusions in Lee v. Weisman, 505 U.S. 577 (1992), that the Framers rejected narrow formulations of the Establishment Clause); Michael W. McConnell, Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia’s Historical Arguments in City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998); Nichol, supra note 167, at 963-65 (arguing against Scalia’s claim in Printz v. United States, 521 U.S. 898 (1997), that there is no strong historical support for state officials’ performing acts for the federal government); Reisman, supra note 7, at 56-58 (arguing that Scalia’s historical assertion that prosecutorial power is exclusively executive, as well as his assertions regarding other separation of powers issues, is not supported by historical records); Jeffrey Rosen, Conservatives v. Originalism, 19 HARR. J. & PUB. POL’Y 465 (1996) (arguing that Scalia has betrayed his originalist roots); Mark V. Tushnet, Scalia and the Dormant Commerce Clause: A Foolish Formalism?, 12 CARDozo L. REV. 1717, 1718-24 (1991) (asserting that Scalia’s historical attack on the dormant Commerce Clause is weak).

191 See Brisbin, supra note 37, at 88. Scalia objects to the entire negative Commerce Clause doctrine, yet he has chosen to endorse two core areas of that doctrine on the grounds of stability while opposing other open-ended aspects of the doctrine. See General Motors Corp. v. Tracy, 519 U.S. 278, 312-13 (1997) (Scalia, J., concurring); ITEL Containers Int’l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Scalia, J., concurring in part, concurring in the judgment).

192 See Nichol, supra note 167, at 960 (asserting that Scalia offers almost nothing “to define the appropriate line of demarcation between” the separate spheres for federal and state power in Printz); Popkin, supra note 14, at 1138 (focusing on Scalia’s statutory interpretation decisions). Compare Boyle v. United Technologies Corp., 487 U.S. 500, 511-12 (1988) (finding federal military contractors implicitly shielded from state law liability), with Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring in the judgment) (advocating a rule that private rights of action should not be inferred). Popkin also argues that Scalia shifts away from clear rules methodology to traditional legal reasoning to reach the result he seeks. Popkin, supra note 14; see also Zlotnick, supra note 36 (maintaining that Scalia has ignored the clear rule from precedent and history and created a new test for double jeopardy cases involving contempt).

193 Reisman, supra note 7, at 50; see also Edelman, supra note 14, at 1800-01 (finding conservative patterns in Scalia’s early decisions that suggest Scalia would protect property rights of the “haves” and his
Michael McConnell believes that Scalia’s historical arguments in *City of Boerne v. Flores* 194 were wrong to the point of misleading. 195 While Scalia did cite various colonial charters, McConnell points out that these quotations are “selective” and that review of the complete charters undermines Scalia’s restrictive view of the Free Exercise Clause. 196 Other critics have identified examples in which Scalia failed to apply the most specific tradition to the issue in the case or was otherwise selective in his use of historical materials. 197

narrow vision of tradition, family, and religion, and concluding that Scalia’s “‘neutral principles’ are no more neutral than anyone else’s”); Nichol, supra note 167, at 969-71 (discussing cases in which Scalia abandoned his methodology to reach a politically conservative result). In general, however, the scholars and the Justices who disagree with Scalia too often fail to retrace Scalia’s historical assertions. Instead, they bend to his views. Scalia’s historical research is vulnerable to attack. But see Rosen, supra note 19, at 27 (arguing that Scalia has changed the terms of the debate on the Court, making history the focus when it once was ignored).

195 McConnell, supra note 190, at 834-85.
196 *Id.* *Boerne* invalidated the Religious Freedom Restoration Act, which in turn attempted to circumvent Scalia’s interpretation of the Free Exercise Clause in *Employment Div. v. Smith*, 494 U.S. 872 (1990). In *Boerne*, writing a concurring opinion, Scalia noted that the Clause provided protection only against government action that singled out or was directed against religion. 521 U.S. at 507 (Scalia, J., concurring in part). Therefore, neutral laws of general application cannot be challenged under the First Amendment no matter how much they interfere with religious practices. McConnell believes that Justice O’Connor was correct when she wrote that the “drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion,” rather than a mere block against active discrimination. McConnell, supra note 190, at 820 (quoting *Boerne*, 521 U.S. at 549 (O’Connor, J., dissenting)). In addition to pointing out Scalia’s selective use of language from colonial charters, McConnell also engages in a point by point refutation of Scalia’s other historical claims and notes that Scalia ignores the work of the one historian who supported his position. *Id.* at 834-45.

197 See Strasser, supra note 143, at 973 (criticizing Scalia’s selective use of tradition in abortion and family law cases); L. Benjamin Young, Jr., Note, *Justice Scalia’s History and Tradition, the Chief Nightmare in Professor Tribe’s Anxiety Closet*, 78 VA. L. REV. 581, 601, 616 (1992) (asserting that Scalia failed to use the most specific historical tradition relevant to personal jurisdiction in divorce cases in *Burnham v. Superior Court*, 495 U.S. 604 (1990)).

198 Post, supra note 5, at 62. Post cites *Printz v. United States*, 521 U.S. 898 (1997), as an example of this. *Printz* struck down provisions of the Brady Handgun Violence Prevention Act. In deciding what authority the federal government had to require state officials to perform background checks on handgun purchasers, Scalia conceded that there was no constitutional text or historical evidence from the ratification period that resolved the issue of whether state officers could be required to perform background checks on gun purchasers. *Printz*, 521 U.S. at 915. Instead, Scalia divined the “structure” of the Constitution and concluded that the implicit principle of federalism required that this provision of the Brady Act be held unconstitutional. *Id.* at 918-23. Scalia argued that with its emphasis on the separation of power between the spheres of the state and federal governments, like the federal separation of powers, federalism is “one of the Constitution’s structural protections of liberty,” *Id.* at 921. However, as Post points out, the general principle of federalism could as easily require “a flat rule prohibiting the federal government from ever requiring state officers to perform any action” rather than the more limited holding of the case. Post, supra note 5, at 62. *Printz* ultimately distinguished between ministerial actions such as reporting and the active enforcement
More broadly, Robert Post argues that beyond mere manipulation, Scalia sometimes completely abandons text, history and rules in favor of arguments based upon broad principles that are antithetical to his methodology and motivating ideology. For example, Scalia’s “passionate opinions opposing race-based affirmative action make no serious effort to explore the original meaning ... of the Equal Protection Clause.... They turn instead on an urgent appeal to the ‘American principle’ that ‘men and women’ should not be classified on ‘the basis of ... the color of their skin.’” While this principle may indeed be fundamental to “the very character of the nation,” resort to this type of argument leaves enormous leeway for Scalia to interpret the “delphic generalities of the Fourteenth Amendment.” In fact, given the strong historical evidence that the congressional framers of the Fourteenth Amendment passed legislation whose benefits were “expressly limited to blacks,” it can be argued that they would have supported affirmative action. Similarly, others argue that Scalia abandons his methodology by default when he joins majority opinions that advance broad policy or principle arguments with no

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of a federal regulatory program at issue. 521 U.S. at 935. Post adds that this compromise was forced on Scalia by Justice O’Connor’s unwillingness to endorse a stronger rule. Post, supra note 5, at 62; see also Nichol, supra note 167, at 967 (arguing that Scalia made no affirmative originalist case in Planned Parenthood v. Casey as is required by his methodology); Gene R. Nichol, Jr., Justice Scalia, Standing, and Public Law Litigation, 42 Duke L.J. 1141 (1993) (arguing that Scalia ignored text and history in fashioning new Article III standing doctrine that invalidated statutory standing).

199 Post, supra note 5, at 60.

200 Id.

201 See Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754 (1985). See generally Strauss, supra note 143, at 1709 (arguing that Scalia failed to inquire into whether there was a tradition of ethnic groups using local government power to benefit themselves and, instead, “relied entirely on abstractions about affirmative action”); Young, supra note 197, at 614 (finding that Scalia did not consult relevant historical practices at all in Employment Division v. Smith but rather conducted an analysis based upon assertions supported only by snippets from court precedent).
basis in the text or history.\textsuperscript{202} For example, in the five-to-four decisions in the voting rights cases \textit{Shaw v. Reno}\textsuperscript{203} and \textit{Miller v. Johnson},\textsuperscript{204} Scalia’s vote was essential to the majority, but he did not write separate opinions even though the majority opinions in both cases were based primarily on the principle that legislation that classifies and segregates voters by race injures voters by reinforcing racial stereotypes and otherwise undermines democracy,\textsuperscript{205} rather than on text, history or precedent.\textsuperscript{206}

While perhaps a few of these articles might be suspect as idiosyncratic approaches to history or text themselves,\textsuperscript{207} the pedigree and quality of the “as applied” critique makes a compelling case that Scalia’s implementation of his methodology is neither consistent nor free of the influence, conscious or not, of his political values.

2. \textit{The Interplay of the Methods: Heterarchy, not Hierarchy}

In defending Scalia’s methodology, George Kannar invokes the child’s game of “rock, paper, scissors.”\textsuperscript{208} Kannar asserts that for Scalia, “text ‘takes’ precedent, precedent ‘takes’ policy, and ordinary meaning, legalistically construed, takes all.”\textsuperscript{209} However, this analogy is ill-chosen because Kannar has

\textsuperscript{202} See Twyman, \textit{supra} note 175, at 129-30 (criticizing Scalia’s failure to write separately in \textit{Associated Industries v. Lohman}, 511 U.S. 641 (1994), to explain why the decision did not conflict with his narrow conception of impermissible discrimination under the dormant Commerce Clause).

\textsuperscript{203} 509 U.S. 630 (1993).

\textsuperscript{204} 515 U.S. 900 (1995).

\textsuperscript{205} See Rosen, \textit{supra} note 190, at 465-66 (arguing that voting rights cases are an example of conservative Justices’ betrayal of originalist principles); see also Nichol, \textit{supra} note 167, at 953 (arguing that Scalia joined \textit{Adarand Constructors v. Pena}, 515 U.S. 200 (1995), which held that all racial classifications, including affirmative action, imposed by the federal, state or local government are subject to strict scrutiny, despite lack of historical or textual support).

\textsuperscript{206} In \textit{Shaw}, the Court used the Equal Protection Clause to authorize judicial intervention in “extremely irregular” apportionments. 509 U.S at 642. The dissenters argued that the Court ignored text, history, and precedent. \textit{Id.} at 677 (Stevens, J., dissenting) (noting there is “no independent constitutional requirement of compactness or contiguity. . .”); \textit{id.} at 679 (remarking on the irony that the Court allows districts to be drawn to accommodate Jews or Polish Americans but overturns a district created to benefit “the very minority group whose history in the United States gave birth to the Equal Protection Clause”); \textit{id.} at 667-70 (White, J., dissenting) (arguing that the majority ignored and distorted the relevant cases).

\textsuperscript{207} For example, Jeffrey Rosen has argued that Scalia’s interpretation of the Fourteenth Amendment ignores the historical understanding of the Privileges and Immunities Clause. Rosen, \textit{supra} note 19, at 30. However, Scalia’s son, Eugene, notes that Rosen’s interpretation of the Privileges and Immunities Clause was rejected by the Supreme Court over one hundred years ago. Eugene Scalia, \textit{Judge Not, The New Republic, Correspondence,} June 9, 1997, at 4 (letter to Editor responding to Rosen’s \textit{Originalist Sin} article).

\textsuperscript{208} Kannar, \textit{supra} note 16, at 1342.

\textsuperscript{209} \textit{Id.} Kannar’s formulation seems peculiar. Scalia more likely would characterize it as text takes history and clear rules, history takes clear rules. \textit{See supra} notes 23-25 and accompanying text.
the rules of the child’s game all wrong. In “rock, paper, scissors,” no choice always “takes all” (if it did, it would be a pretty pointless game to play). Rather, rock takes scissor, scissor takes paper, but paper takes rock. As a result, each game is a fluid system in which the “strength of each contestant's position is always relative.”

James Ogilvy has termed this a heterarchy: a system with an established set of rules but lacking “an unambiguous pecking order.”

Heterarchy, not hierarchy, could be the battle cry of those critics who focus on the interplay of Scalia’s methods rather than on the individual components. Led by Jeffrey Rosen, this group argues that, even if Scalia's methodology is hierarchical in theory, his opinions reflect a more opportunistic picking and choosing of the method that leads to his preferred result. Rosen's contention is that “in case after case, Scalia chooses among mutually inconsistent interpretive principles—textualism, originalism, traditionalism—in order to reach results that he finds politically congenial.” For example, Rosen challenges Scalia’s claim that the Due Process Clause of the Fourteenth Amendment

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211 JAMES OGISLY. MANY DIMENSIONAL MAN 113 (1977).

212 Rosen, supra note 19, at 28. In addition, Rosen includes a theoretical swipe within his “as applied” attack. He argues that, irrespective of Scalia’s inconsistent application of the methodology, two of its components—textualism and originalism—are “mutually inconsistent” because a nineteenth century understanding of the text “sometimes leads inexorably to the common law constitutionalism that Scalia wants to avoid.” Id. at 29. This point goes only so far. If Scalia truly applied his methods hierarchically, textualism would trump historical practices, and thus Rosen’s point would undermine only Scalia’s claim to compatibility of the component parts. David Strauss attacks Scalia’s compatibility assertion, arguing that the clear rules principle is “in tension with [his] traditionalism” in areas where there are heterogeneous traditions that are difficult to capture in rules. For example, Scalia ignores the fact that the separation of powers doctrine has developed along both functional and strictly formalistic lines. Strauss, supra note 143, at 1709-10.

213 Rosen, supra note 19, at 28. Absent from Rosen’s description is the clear rules principle, which Scalia considers a distinct part of his constitutional methodology. Both Rosen and Michael McConnell differentiate “originalism” from “traditionalism.” McConnell understands originalism to define the Constitution as “understood by the ratifying public at the time of enactment.” Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 Geo. Wash. L. Rev. 1127, 1136 (1998). Traditionalism, however, also considers how the Constitution has been understood by the people over the course of our constitutional history, from enactment through the present. See id. Scalia does not make this distinction in theory, although he may in practice. For Scalia’s originalism, the understanding at ratification is all that matters. See supra notes 22-24 and accompanying text. He considers later historical developments for two limited reasons. First, events just after ratification shed light on how the document was understood at the relevant time. Thus, the acts of the First Congress are important. Consideration of later developments in the nineteenth and early twentieth centuries are necessary solely to ensure that the faint-hearted component of originalism is not required. Usually, Scalia finds continuity throughout, making the later developments helpful but not controlling. See Zlounick, supra note 36, at 914 & n.444; see also supra notes 93, 96, 109-11 and accompanying text.
should be read to refer only to procedural rights. He argues that a historical understanding reveals a "substantial overlap ... between notions of due process of law and notions of equal protection of the law," as well as a "view [of] the due process clause as a mandate that judges should protect certain fundamental economic rights."214

A number of scholars have come to similar conclusions in other areas.215 In his examination of Scalia’s takings jurisprudence, William Fisher found that in *Lucas v. South Carolina Coastal Council*,216 Scalia devised a precedent-based clear rule for takings without first exploring the Framers’ understanding of the Takings Clause.217 If he had, Fisher contends, he would have discovered that the original understanding of this clause “proscribed only formal expropriations of private property,” not the effects of regulations on property value that Scalia’s rule encompassed.218 In terms of the rock, paper, scissors game, therefore, these scholars allege that Scalia puts out his hand (text, historical practices, or clear rule) only after first seeing what the other side has played.219

214 Rosen, supra note 19, at 30. Other Rosen examples include an argument that a true textualist understanding of the Privileges and Immunities Clause of the Fourteenth Amendment would directly incorporate the Bill of Rights, replacing the Warren Court’s awkward use of the Due Process Clause. Id. at 20. Rosen also skewers Scalia’s defense of political patronage in *Rutan v. Republican Party*, 497 U.S. 62 (1990). Rosen, supra note 19, at 32-33; see also Rosen, supra note 190, at 465-66 (arguing that the voting rights cases violate the original understanding of the Fourteenth Amendment, which was intended to cover only civil rights, not political rights).


218 Id. at 1394. Fisher also asserts that “Justice Scalia selects from a large and eclectic set of constitutional principles those that best suit his purposes in a given case ... . The result is that, although it is usually easy to predict how he will vote in a constitutional case, it is often difficult to predict how he will justify his vote.” Id.; see also Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 759 n.101 (1998) (agreeing that Scalia failed to consider text of Takings Clause in *Lucas* and instead relied upon precedent and “traditional cultural ‘understandings’ of the contours of property”).

219 If the controlling rule in Scalia’s system is to “choose the rule that serves my political ends” then it fails to qualify even as a heterarchy, which requires a set formula. Instead, it could best be described simply as cheating. Michael McConnell generally defends Scalia’s approach, but even he acknowledges that “Justice Scalia may fairly be criticized for failing to address the relation between the various aspects of his constitutional jurisprudence. At times he writes as if ‘plain meaning’ were the alpha and omega of constitutional interpretation. At other times, he stresses history in the form of original meaning.” McConnell, supra
Normally, Scalia evades these contradictions by resorting to overly confident textualist assertions or by abdicating his commitment to conduct historical research. Once in a while, however, Scalia comes close to admitting that he does not always follow a strictly hierarchical approach beginning with text and proceeding to history and clear rules. For example, in Waters v. Churchill, he acceded to a judicially created First Amendment doctrine (a clear rule) but admitted that he had not “inquired into the historical justification” of that rule.

Rather than that of a systemic ideologue with a hierarchy of methods, Scalia’s constitutional practice better resembles that of a practical handyman who reaches into his workbox to select the tool best suited to accomplish a particular job. The question that remains, however, is how often his political values influence his methodological choices.

3. The Globalists, the Contrarian Cases and the Methodology

Both strands of the “as applied” critique provide powerful evidence that, consciously or unconsciously, Scalia’s values affect his analysis. In particular, those studies that retrace Scalia’s historical steps or parse Scalia’s logic do

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Note 213, at 1136 n.45 (citation omitted). Yet, McConnell defends all of Scalia’s methodologies as consistent with respect for the will of the people. *Id.* Only Scalia’s failure to explain this “leaves [him] open to the charge of inconsistency.” *Id.* McConnell’s argument, however, ignores that Scalia’s fundamental mission is to restrict discretion, not respect the will of the people, and is by this goal that Scalia’s methodology should be judged. *See supra* note 34 and accompanying text.

220 For example, he avoids the *Brown v. Board of Education* dilemma, *see supra* note 142 and accompanying text, by asserting that the plain reading of the text supports the result in *Brown* despite the clear historical evidence to the contrary. *See Klarman, supra* note 143, at 1881.

221 *See Rosen, supra* note 190, at 466 (noting Scalia’s failure to cite to research on historical understanding of substantive due process).


223 *Id.* at 686 (Scalia, J., concurring in the judgment). Scalia has clashed with Chief Justice Rehnquist in cases where Scalia’s understanding of the plain meaning of the text appears to conflict with Rehnquist’s resort to historical practices. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 1026 (1988) (Blackmun, J., dissenting) (Rehnquist joined the dissent, which argued that Scalia’s reading of the Confrontation Clause to require a face-to-face meeting has no historical support.).

224 *See Fisher, supra* note 217, at 1393 (noting that Scalia “is typically portrayed as a brilliant, systemic ideologue”).

225 I appropriated this metaphor from Scalia’s opinion in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), a substantive due process case about abortion rights. In *Hodgson*, Scalia complained that “the tools for this job are not to be found in the lawyer’s—and hence not in the judge’s—work box.” *Id.* at 480 (Scalia, J. concurring in the judgment in part, dissenting in part). Or, to borrow a term from deconstruction, Scalia is more a “bricoleur” than an “engineer.” *See Mark Tushnet, The Bricoleur at the Center*, 60 U. Chi. L. Rev. 1071 (1993); *see also Claude Levi-Strauss*, *The Savage Mind* 17 (1966) (asserting that the bricoleur is “adept at performing a large number of diverse tasks . . . mak[ing] do with ‘whatever is at hand’”).
much to undermine his claims of judicial neutrality. However, some scholars go too far when they assign a dominant purpose to Scalia’s jurisprudence.\(^{226}\) One group focuses on Scalia’s substantive politics as the underlying key to his jurisprudence. For example, Jeffrey Rosen argues that “Scalia’s real allegiance is simply to preserving ‘traditional American moral values’ at all costs. . . . He strives in his jurisprudence to conserve traditional moral values against legal and cultural change. He is exercised not by the methodology of recent Supreme Court decisions, but by the results.”\(^{227}\) In a similar vein, Richard Brisbin argues that Scalia’s methodology is ultimately an artifice that masks his politics “favored by the conservative revival: executive policy leadership and a reinforcement of the status of interests that are already powerful.”\(^{228}\)

\(^{226}\) In addition, few attempts have been made to trace Scalia’s doctrinal manipulation carefully within particular cases or to check Scalia’s historical assertions for accuracy. Instead, many of these commentators paint with a rather broad brush rather than deeply pursue Scalia’s arguments on his own terms. See supra notes 171-72 and accompanying text.

\(^{227}\) Rosen, supra note 19, at 32, 34 (quoting Romer v. Evans, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting)). Rosen also points to Scalia’s analysis in Rutan v. Republican Party, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting) (traditional political patronage) and United States v. Virginia, 518 U.S. 515, 566 (Scalia, J., dissenting) (long tradition of all male military colleges) to support this argument. Rosen, supra note 19, at 32-33. Rosen adds that Scalia “has an uncanny ability to reach the result that happens to coincide with his own preferences.” Id. at 34.

\(^{228}\) BRISBIN, supra note 37, at 325; see also David Schultz, Scalia on Democratic Decision Making and Long Standing Traditions: How Rights Always Lose, 31 Suffolk U. L. Rev. 319, 332 (1997) (asserting that Scalia “has selectively used judicial power to support those interests and groups which he favors at the expense of those he does not”). Schultz and Smith have also tried to explain Scalia’s jurisprudence as a post-Carolene Products jurisprudence that seeks to reorder the Court’s hierarchy of values away from individual rights and towards economic rights. See SCHULTZ & SMITH, supra note 37, at xxii-xxiii. But see Steven P. Brown, Schultz’s and Smith’s The Jurisprudential Vision of Justice Antonin Scalia, 12 J.L. & Pol. 813, 819 (1996) (book review) (suggesting the post-Carolene Products paradigm is not a perfect fit and has been imposed by Schultz and Smith). More recently, Schultz has argued that Scalia’s jurisprudence “endorses a political ideology sympathetic to classical Manchester Liberalism.” David Schultz, Judicial Review and Legislative Deference: The Political Process of Antonin Scalia, 16 Nova L. Rev. 1249, 1250 (1992) (maintaining that this philosophy stresses “limited government, faith in the marketplace, commitment to legalism, materialism, property rights, and enforcement of majoritarian morality as essential to the creation of a free society”); see also Strauss, supra note 143, at 1715 (“Justice Scalia’s reverence for tradition and dislike of precedent are consistent because they derive from the same source: a profoundly antigovernment substantive agenda.”); James G. Wilson, Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter, 40 U. Miami L. Rev. 1171 (1986) (judicial deference and limits on federal court jurisdiction); Jean Morgan Meaux, Comment, Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State, 62 Tul. L. Rev. 225 (1987).

\(^{229}\) See Segall, supra note 34, at 1003-04 (Scalia’s “preference for originalism is based on his search for a clear rule of constitutional interpretation that will deter judges from imposing their own value judgments . . . . These goals correspond to the justification and ordering prongs of the rule of law.”).
At the opposite pole, another kind of globalist argument focuses exclusively on one aspect of Scalia’s methodology rather than on his politics and exaggerates its significance to his overall jurisprudence. For example, Eric Segall suggests that Scalia’s rule of law principles also explain his originalism, thereby conflating distinct and independent components of the methodology. Similarly, Kannar’s fascinating study of the roots of Scalia’s semantic formalism unduly minimizes the impact of Scalia’s politics on a subset of his opinions.

Regardless of whether these scholars argue that Scalia is motivated by his conservative values, his substantive stand on the issue, or process-related goals such as formalism and the rule of law, the attempt to formulate a global explanation for Scalia’s jurisprudence is bound to fail. On the one hand, those who define Scalia’s jurisprudence by process goals cannot explain the growing scholarship that provides examples of Scalia’s chicanery with his methodology in cases involving politicized issues. On the other hand, those who argue that Scalia’s political agenda controls his jurisprudence cannot account for the

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230 See Kannar, supra note 16.


232 Some find that Scalia’s degree of deference to the legislature is based upon the political issue at stake, and that accordingly he will defer on some issues, such as abortion and capital punishment, but not on others, such as affirmative action or property rights. See SCHULTZ & SMITH, supra note 37, at 40. But see Arthur Stock, Note, Justice Scalia’s Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses, 1990 Duke L.J. 160 (suggesting that Scalia consistently chooses sources with an eye to restricting legislative power).

233 See Daniel Farber, The Ages of American Formalism, 90 Nw. U. L. Rev. 89, 100 (1995) (arguing that Scalia favors textualism and originalism only to the extent they further his passion for clarity, logic and stability); see also Karen M. Geibba-Pinetti, Statutory Interpretation, Democratic Legitimacy and Legal System Values, 21 Seton Hall Legis. J. 233, 321 (1997) (asserting that Scalia chooses textual democracy in order to ensure “predictability and coherence in the law”); Post, supra note 5, at 61; Schultz, supra note 228, at 1254-56 (cataloguing the scholars who stress process over politics); Christopher E. Smith, Justice Antonin Scalia and the Institutions of American Government, 25 Wake Forest L. Rev. 783, 785 (1990) (maintaining that Scalia’s separation of powers doctrine makes him an “outspoken guardian of American governmental institutions” and a protector of the Supreme Court’s legitimacy).

234 See Rosen, supra note 19, at 32-33 (discussing cases in which Scalia has ignored “his purported methodology”).
contrarian cases in which Scalia chooses to remain faithful to the methodology despite his political distaste for the result.\textsuperscript{235} Scalia himself frequently refers to his vote in \textit{Texas v. Johnson}\textsuperscript{236} as an example. To the disdain of many conservatives and even of his own vote,\textsuperscript{237} Scalia voted with his liberal colleagues to hold that the flag burning statute in \textit{Texas v. Johnson} was unconstitutional under the First Amendment.\textsuperscript{238} Although Scalia himself admitted that he too did not "like scruffy people who burn the American flag," he asserted that the text of the Constitution gave him no other choice.\textsuperscript{239}

Occasionally reaching "liberal" results such as this has proven very useful to Scalia. He holds up the contrarian cases as proof that his methodology is politically neutral and constrains judicial discretion.\textsuperscript{240} Scalia's defenders cite these cases to dismiss those "who say that Scalia has a rigid view of the Constitution that benefits powerful interests and neglects individual rights,"\textsuperscript{241} and even his honest critics are forced to acknowledge these cases.\textsuperscript{242} By not


\textsuperscript{236} 491 U.S. 397, 418-20 (1989).

\textsuperscript{237} Scalia told a group of Montana lawyers, "I came down to breakfast the next morning and my wife was humming Stars and Bars Forever." Sally K. Hilander, \textit{Justice Scalia Debunks the "Living Constitution" Theory}, \textit{Mont. Law.}, October 1998, at 1, 34.

\textsuperscript{238} 491 U.S. 397 (1989).

\textsuperscript{239} Hilander, \textit{supra} note 237, at 34.

\textsuperscript{240} \textit{See} Plass, \textit{supra} note 231, at 131-45 (discussing statutory interpretation cases in which Scalia's textualism allegedly yielded "liberal" results but then questioning whether these decisions were properly characterized).

\textsuperscript{241} Hilander, \textit{supra} note 237, at 34.

\textsuperscript{242} \textit{See} William N. Eskridge, Jr., \textit{The New Textualism}, 37 \textit{UCLA L. Rev.} 621, 668-69 (1990) (critiquing Scalia's textualism but agreeing that he "sometimes deploys his methodology to endorse a liberal interpretation of a statute, over the objections of traditional conservatives").

\textsuperscript{243} Schultz & Smith suggest that "Scalia's opinions may reflect a more outcome-oriented approach when they concern issues he cares about, such as in the case of abortion or property. Yet, sometimes, more of a jurisprudential mode may dominate when the issue is not as important to him." \textit{Schultz & Smith, supra} note 37, at xxiii. While this may be true, this theory still does not explain the contrarian cases in which Scalia definitely does oppose the result. \textit{See supra} notes 235-38 and accompanying text.
incorporating the contrarian cases into their theories, though, the political
globalist scholars miss an important point. Because Scalia’s self-professed
agenda is to promote his methodology, not his politics, no theory should
overlook that at least some of his opinions are self-consciously drafted to make
clear that they contradict his personal politics. Without these cases, Scalia
would have no proof that his methodology works as he claims, considering
that the inherent biases of his methodology so often lead to conservative
outcomes anyway. Moreover, by not studying the contrarian cases, these
scholars miss an important opportunity to understand better the complexity of
Scalia’s true, although perhaps unconscious, motives. For example, such a
study might offer an explanation for why Scalia chose these particular cases to
make his methodology the focus of his opinion, and thus accept a distasteful
result, rather than manipulate text, history or precedent to produce a result
consistent with his political stand on that issue.

The failure to account for the contrarian cases also reveals another
weakness of the “as applied” globalists’ accounts of Scalia’s jurisprudence in
action. Such scholars generally portray Scalia’s doctrinal manipulation as the
result of a two-way battle between his neutral methodology and his
conservative politics, with his politics winning out. In fact, Scalia’s opinions
reflect a more complex interaction of sometimes consistent and sometimes
warring influences. As discussed in Part I, Scalia’s claim is that his method-
ology is motivated not by his conservative politics, but by his antipathy to
judicial discretion. Thus, for Scalia, it is really just a convenient fortuity that
his methodology’s narrow textualism and reliance on traditions from a more
conservative era generally produce politically conservative results (although
certainly this tendency may have had something to do with his initial
willingness to adopt it). Accepting Scalia’s assertion that judicial discretion is
his most important value, when a faithful application of the methodology
would produce a politically liberal result, Scalia really does have two choices.
He can either accept the result and fashion an opinion that trumpets the
neutrality of his methodology, producing a contrarian case, thereby advancing

\[244\] My tentative hypothesis focuses on the limited impact of these cases on broader policy or structural
issues. For example, the flag burning cases, although a hot-button political issue for elected officials, are not
a significant part of overall crime policy. Other contrarian criminal cases are similarly limited. For ex-
ample, in Jones v. Thomas, 491 U.S. 376 (1989), the clear rule Scalia supported in double jeopardy law affected
very few cases, if any, beyond the one defendant who would be released early. On the other hand, when a
double jeopardy case affects issues important to him, such as judicial power, Scalia is more likely to ma-
nipulate his methods to achieve the result he seeks. See Zlotnick, supra note 36.
his methodological agenda, or engage in doctrinal or historical manipulation, thereby producing an opinion that advances his political values.\footnote{Actually, there is a third possibility: inaction. The tension between Scalia’s methodological principles and his political agenda may explain why he does not write separate opinions in some cases. See supra notes 202-05 and accompanying text.}

Moreover, within this framework, there is a subset of cases that is even dearer to Scalia than those generally viewed as “political.” These cases involve the motivation for the methodology: issues of judicial power and hence judicial discretion. As with the blatantly political cases, his methodology sometimes yields a reasonable inference that text, historical practices, or precedent are hostile to an expansive interpretation of judicial power.\footnote{See supra notes 33-38 and accompanying text.} However, this is not always the case. In fact, given the broad authority of the common law courts and the American judiciary’s long history of judicial activism, Scalia’s methodology yields quite the opposite result on a number of judicial power issues.\footnote{See Reisman, supra note 7, at 56 (attacking Scalia’s separation of powers opinions that diminish the judicial branch in favor of the executive as unsupported by historical materials).} In particular, given the common law courts’ legacy, originalism often comes into conflict with his motivating ideology.\footnote{See id. at 81 (noting that Scalia does not apply his interpretative methods neutrally when applied to the judicial power issue in cases such as Morrison v. Olson, 485 U.S. 957 (1988) (Scalia, J., dissenting), and Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787 (1987) (Scalia, J., concurring in the judgment)); Zlotnick, supra note 36 (arguing that Scalia’s narrow view of judicial contempt power is at odds with the expansive contempt power of the common law courts).} Several “as applied” studies, in fact, suggest that the Scalia opinions most likely to contain severe deviations from his methodology are not the hot-button political and social issues like abortion, but those that involve judicial power.\footnote{See generally Sullivan, supra note 218, at 758 (noting that constitutional conservatism is a complex blend of “1) originalism; 2) textualism; 3) judicial restraint (deference to legislatures); 4) libertarianism (deregulation); 5) state’s rights; 6) traditionalism; 7) stare decisis; 8) capitalism; and 9) law and order. These different strands of judicial conservatism pull in competing directions . . . even within a single Justice across an array of cases.”); Edwin M. Yoder, Trying to Figure Out Scalia, WASH. POST, Aug. 1, 1989, at A21 (“[T]hose who impute rigid patterns to the thought of [J]ustices will often be misled. Few general theo-}

Scalia’s opinions, therefore, can be best understood as the product of the three-way tension between a faithful application of his methodology, the ideological motivation for the methodology, and his distinct conservative political values on particular issues.\footnote{See Reisman, supra note 7 (citing several cases); see also Zlotnick, supra note 36.} Thus, rather than a pointless search for
one explanation for Scalia’s jurisprudence, scholarly research would be better spent carefully retracing his footsteps through text, history, and precedent to determine in each case which force has triumphed. Because Scalia personally identifies the motivating principle for his methodology as his fear of an unrestrained judiciary let loose in a constitutional democracy, it makes sense in particular to test whether the methodology succeeds first and foremost in restraining him in cases, not just when conservative political issues are involved, but when the central jurisprudential issue for the methodology—judicial discretion—is at stake.

CONCLUSION

Despite Scalia’s desire to turn judges into automatons, the theoretical critique makes a strong case that his methodology cannot eliminate the need for judges to make difficult, nuanced, and indeed, political judgments in constitutional interpretation. Because words cannot be defined in a vacuum, textualism neither precludes malleable arguments based on the structure of the Constitution nor answers questions unforeseen by the Framers. Originalism rests not just on difficult historical research, but on an evaluation of incomplete and conflicting records. And, whether Scalia considers stare decisis part of his methodology or not, the Court often is faced with precedent that conflicts with his methodology. Ultimately, then, Scalia’s methodology provides no cure for the countermajoritarian difficulty, because like any system of interpretation, Scalia’s system leaves ample room for judicial discretion and the intrusion of judicial values. As Mark Tushnet notes, there “can never be a political justification” for Scalia’s methodology. Rather, to the extent judges are constrained, it is not by their methodologies, but by their personal choice in each case to respect the elected branches’ resolution of an issue. With self-restraint as the measure, the “as applied” critique shatters Scalia’s assertion that his methodology cabins judicial discretion. These scholars have shown that when his strongest jurisprudential and political values are at stake, Scalia’s vaunted constitutional methodology does not constrain even its own creator.

ries of adjudication ever quite work; Scalia is a good bellwether to watch . . . [b]ut not even his deliberations can be reduced to a general theory.”).

252 See supra notes 29-38 and accompanying text.
253 Tushnet, supra note 190, at 1741.
254 See generally Sunstein, supra note 29, at 562 (suggesting additional reasons judges might choose to act with restraint, including respect for precedent).
Moreover, if Scalia’s methodology fails in its core political objective, perhaps its attendant costs are not worth bearing: its parsimonious view of the Court’s authority to resolve social and political issues, its reliance on outdated historical practices, and its limits on the Court’s ability to ameliorate the harsh results of its own precedent-based rules. Thus, the proven failure of Scalia’s methodology in practice should reinvigorate proponents of less rigid models of constitutional interpretation and encourage a more honest debate about judicial restraint and the impact of personal values on judicial decisions.

The failure of Scalia’s methodology to restrain even him also brings into focus his misguided effort to incite a crisis in American constitutional democracy. This charge brings me back to my initial comparison of Gary Hart’s and Bill Clinton’s marital infidelity with Scalia’s methodological infidelity. My original purpose, I admit, was just to be humorous. But, in retrospect, perhaps Scalia, Hart and Clinton share not just a personality trait, but a profession as well. As a variety of scholars have noted, despite Scalia’s claim that the Court should stick to “lawyer’s work,” his opinions “[appear] more like the rhetoric of the militant political activist.” He bemoans the protesters who mass outside the Supreme Court on the anniversary of Roe v. Wade and the political hate mail the Justices now receive, placing the blame entirely on the judicial activism of the legal elites. Beyond the sniping of his opinions, Scalia is unique in that he has taken his case directly to the American public. Year in and year out, before lawyers’ groups, students assemblies, and a host of

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255 Planned Parenthood v. Casey, 505 U.S. 833, 1000 (Scalia, J., concurring in the judgment in part, dissenting in part).
256 BRESLIN, supra note 37, at ix; see also Rosen, supra note 19, at 36 (arguing that Scalia’s labors are now unabashedly political). The public passion Scalia engenders is also unique on the current Court. For example, he is the only current Justice whose followers have created Internet sites devoted exclusively to promoting his views. See Jonathan Mitchell, The Scalia Shrine (visited Nov. 14, 1999) <http://home.uchicago.edu/~jmitch/Scalia/index.html>; John E. Schwenkler, Cult of Scalia (visited Nov. 14, 1999) <http://member.aol.com/schwenkler/scalia/index.htm>.
257 See Casey, 505 U.S. at 999 (Scalia, J., concurring in the judgment in part, dissenting in part).
259 See, e.g., Tracy Breton, Let the Constitution Stand, PROV. J. BULL., May 21, 1997, at B1; Scalia, supra note 162.
public speaking engagements, Scalia delivers his standard stump speech. He tells the people about his “dead” Constitution, and that only his methodology can preserve the legitimacy of the Court and the Constitution. In essence, Scalia’s frustration with the Court’s unwillingness to adopt his methodology has led him to become not just a politicized judge but a true politician.

My complaint, however, is not just the hypocrisy of a public campaign to promote a methodology allegedly designed to de-politicize the judiciary. More importantly, a serious problem exists with Scalia’s “political platform.” Despite Scalia’s promise to these wider audiences, there are no simplistic answers to the important constitutional questions or to the overarching issue of judicial review. As Robert Post notes in his review of Scalia’s book, A Matter of Interpretation, “[t]he Constitution is not a puzzle to be solved, and there is no escaping the hard responsibility for judgment that the practice of constitutional adjudication imposes upon our judges.” Post believes that Scalia’s opinions hint that Scalia really does know “that our Constitution is an untidy and complex charter of governance which cannot be reduced to the purposes and procriptions of any single interpretative method.” And in fact, in rarified academic debates, Scalia will admit, for example, that his methodology does not necessarily tell him for certain when to accept or reject precedent.

Therefore, Scalia misses the irony that his public message actually undermines his goal of preserving the citizenry’s trust in the Court. Scalia’s error is not just that he is a Justice behaving like a politician, but that he has chosen to be the worst kind of politician. By demonizing his opponents, he delegitimizes the judicial branch whenever the “wrong side” wins. Whether issues are framed as political or legal, the radicalization and degradation of the political process begins by painting difficult choices as black and white. Scalia’s claim that his constitutional methodology yields results devoid of

252 See Hilander, supra note 237, at 33.
253 Post, supra note 5, at 62.
254 Id; see also Nichol, supra note 167, at 971 (suggesting that as a “very able lawyer,” Scalia surely “knows that these inconsistencies exist in his approach to constitutionalism”).
255 See Scalia, supra note 7, at 140.
256 Taking abortion as an example, the extreme political view is that all abortions are murder, hence pro-choice activists and doctors are murderers. Within the legal framework, the radical “Scalini” view is that abortion is a policy issue forever and always beyond the reach of the Constitution and that the Court has no authority over abortion legislation. See Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring).
personal values misleads the public into believing that constitutional adjudication is easy. To the public, Scalia is selling not just a dead Constitution, but a "Constitution Lite." Thus, when he denounces difficult decisions of the Court as judicial usurpation of the democratic process, Scalia gives aid and comfort to political extremists who would disregard and flout the Court’s authority.

Moreover, both Scalia’s unworkable methodology and his destructive political campaign borne of countermajoritarian pique are completely unnecessary. According to constitutional theorists such as Barry Friedman, in reality all three branches of government, not just the courts, are countermajoritarian by design; part and parcel of the checks and balances established by the Framers. And, at the same time, all three branches, including the Court, have majoritarian features as well. Thus, according to Friedman, the process of constitutional interpretation that actually occurs is a complex dialogue among the Court, the President, Congress, state and local government, and the People. The Court is constrained not by a particular interpretative methodology but by this fluid political process, which includes the Senate’s role in appointments and the Court’s own recognition of the limits of its power. In fact, one could argue that Scalia’s public campaign is itself part of this dynamic. What Scalia misses by viewing the Court as the sole repository of countermajoritarian evil in the Constitution, however, is the Court’s special role as facilitator and molder of the debate over the current meaning of the Constitution. Ultimately then, only when Scalia explicitly acknowledges the substantial gap between what he preaches and what he practices can he enter into a meaningful debate with those who believe in “the metaphor of the ‘living’ Constitution.” Only then will Scalia thereby invigorate rather than diminish this societal dialogue about the Constitution and, correspondingly, the prestige and legitimacy of the Court he claims to love.

267 See id.
269 Friedman notes that the Court defers to decisions of the majority through a variety of means including judicial restraint, reliance on expert opinions or professional standards, and the use of reasonableness tests. Id. at 590-614.
270 See id. at 645-47, 675.
271 See id. at 668-71.
272 Post, supra note 5, at 60 (arguing that the concept of the living Constitution “derives from an authentic strand of our constitutional heritage that has been manifest since its inception”).