

Antonin Scalia – A Retrospective

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INTRODUCTION¹

Antonin Scalia took his seat on the Supreme Court on September 26, 1986. He died on February 13, 2016, a few months short of completing his 30th full term on the Court.

Justice Scalia has had a huge impact on Supreme Court jurisprudence. In sheer numbers, he was prodigious. He was the author of 338 majority opinions, 385 concurring opinions, 270 dissenting opinions, and 49 opinions where he concurred in part and dissented in part.² To put those numbers in perspective, Justice Kennedy joined the Court in February 1988, 17 months (one and one-half Terms) after Justice Scalia. He has written 312 majority opinions,³ which is roughly comparable to Justice Scalia's 338 majority opinions given Justice Scalia's slightly longer tenure on the Court. But he has written 208 concurrences, 107 dissents, and 17 opinions in which he concurred in part and dissented in part—a total of 332 non-majority opinions compared to the 704 such opinions written by Justice Scalia.

Justice Scalia's legacy cannot be fully known today because his opinions will impact the Court's jurisprudence for decades. But no one will doubt that he will always be remembered for his views on how to interpret and apply the Constitution and how to interpret statutes; his sharp, sometimes biting, pen; and his probing questioning of lawyers appearing before the Court. He will be missed by the other Justices for lots of reasons, but not the least of which is the fact that he made their opinions better, as Justice Ginsburg said as part of her eulogy for her remembrance of her friend.⁴

I never had the pleasure of meeting Justice Scalia. I know him only through his opinions of the past several years as part of the reviews I have written on the Roberts Court in connection with a program I have moderated at the American Bar Association Annual Meeting featuring true Supreme Court scholars. I have gone back

¹ I express my deepest gratitude to my colleague, Scott Dupree, who provided invaluable comments and helpful edits on this paper.

² A list of his opinions appears at <https://www.law.cornell.edu/supct/justices/scalia.dec.html>.

³ A list of his opinions appears at <https://www.law.cornell.edu/supct/justices/kennedy.dec.html>.

⁴ In her statement on Justice Scalia's passing, she wrote: "From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation." http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-14-16. The feeling was mutual, as Justice Scalia noted in a 2014 interview he and Justice Ginsburg jointly gave to journalist Marvin Kalb: "[O]ne reason we became such good friends on the D.C. Circuit was that we were both former academics. . . . [I]n academia, at a law school, when you wrote a Law Review article, you would circulate it to your colleagues. And they would make comments, helpful comments, not just, 'This is wrong.' But, you know, there's an additional point you could make. Well, Ruth and I did that with one another's opinions. We wouldn't do it to anybody else's. But, you know, she'd suggest some additional stuff that I could put in. And I would for her as well." *Justice Antonin Scalia and Justice Ruth Bader Ginsburg*, The Kalb Report, Apr. 17, 2014.

https://research.gwu.edu/sites/research.gwu.edu/files/downloads/45Words_Transcript.pdf.

through those reviews and captured in the attached Appendix a table of the opinions written by Justice Scalia beginning with the 2006-07 Term.⁵ And in this paper, I highlight just a brief sampling of his opinions, focusing primarily on his years on the Roberts Court but with the hope that I will provide sufficient examples of Justice Scalia’s jurisprudence to give readers a sense of his remarkable legal scholarship.

VOTE COUNT TRENDS

In Justice Scalia’s last full term on the Court, he had the honor of writing the highest number of the 76 opinions—nine. But it was also a Term where, in the 19 decisions with a 5-4 vote count, Justice Scalia had the most dissents—thirteen.⁶

The “dissenting” vote counts for the past five Terms appear in the table below. As the table reflects, Justice Scalia’s last full term on the Court was notable for the number of his full or partial dissents—23, six to 13 more than in the prior four Terms.

Full and Partial Dissents by Term

<i>Justice</i>	<i>2014-15</i>	<i>2013-14</i>	<i>2012-13</i>	<i>2011-12</i>	<i>2010-11</i>
Kennedy	9	4	7	5	5
Roberts	16	6	11	7	7
Scalia	23	7	17	15	10
Thomas	29	7	15	12	10
Alito	21	8	15	13	11
Breyer	6 ⁷	10	13	17	18
Kagan	11	7	14	19	11
Sotomayor	8	14	17	17	14
Ginsburg	9	11	16	23	18

⁵ The Chief Justice assumed his position on September 29, 2005 and I began tracking the Court under his leadership beginning with the 2006-07 Term through the 2014-15 Term. As a frame of reference, Justice O’Connor left the Court in 2006 and Justice Alito joined the Court on January 31, 2006. So the “conservative” Justices (the Chief Justice, and Justices Scalia, Thomas, and Alito) were members of the Court when I began to track opinions. Justice Kennedy, of course, has been on the Court throughout this time period. Justice Sotomayor replaced Justice Souter on in August 2009, just before the beginning of the 2009-10 Term. Justice Kagan replaced Justice Stevens on in July 2010 just before the beginning of the 2010-11 Term.

⁶ By way of contrast, Justice Kennedy wrote or joined in five dissents out of 19 decisions with five-vote majorities. Justice Breyer did as well. The Chief Justice wrote nine partial or full dissents (the same number as Justice Kagan), while Justice Ginsburg was a dissenter in seven five-vote-majority cases and Justice Sotomayor in only six such cases. The numbers for Justice Alito (10) and Justice Thomas (12) were also lower than Justice Scalia’s 13 dissents in the most contested decisions.

⁷ Justice Breyer did not participate in two decisions, *City and County of San Francisco v. Sheehan* (6-2 vote) and *Commil USA, LLC v. Cisco Systems, Inc.* (6-2 vote).

A BRIEF TOUR THROUGH JUSTICE SCALIA'S LEGACY

This tour is short, and not at all comprehensive, but will provide a sense of Justice Scalia's approach to decision making both constitutionally and statutorily.

The Independent Counsel Provisions of the Ethics in Government Act – Separation of Powers

The jurisprudential revolution started, or honed, by Justice Scalia has been linked most often to his lone dissent in *Morrison v. Olson*, which he wrote within two years of joining the Court.

Morrison v. Olson (1988)

Chief Justice Rehnquist's⁸ 7-1 decision⁹ upholding the independent counsel provisions of the Ethics in Government Act was met with a lone dissent: that of Justice Scalia. The majority held that "these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers." The opinion was quite lengthy, no doubt because the Chief Justice had to address Justice Scalia's dissent, which began like this:

It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47,

⁸ Justice Scalia once counseled lawyers presenting oral arguments to "[a]ddress the members of the court correctly. Don't call a justice a judge, or a judge a justice. Give the chief judge or chief justice the correct title. Chief Justice Rehnquist used to correct counsel in mid-argument if they referred to him as 'Justice Rehnquist.' Even judges who don't correct you will notice" Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 180-81 (2008).

⁹ Justice Kennedy recused himself from this case. He did not disclose the reason. The New York Times reported that "he may have been concerned that there could be an appearance of partiality if he voted in a case that could profoundly affect high-level Administration officials and former officials with whom he has had dealings in the past." Stuart Taylor, Jr., *Justice Kennedy Shuns Special Prosecutor Case*, N.Y. Times, Feb. 27, 1988. <http://www.nytimes.com/1988/02/27/us/justice-kennedy-shuns-special-prosecutor-case.html>.

p. 301 (C. Rossiter ed. 1961) (hereinafter Federalist). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

He framed the issue presented colorfully:

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

After describing the origin of the Independent Counsel, Justice Scalia explained why, in his view, the statutory provisions in issue violated “fundamental separation-of-powerd principles” since they deprived the President of exclusive control over the exercise of the power to conduct criminal prosecutions:

[I]t is ultimately irrelevant how much the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether "the President's need to control the exercise of [the independent counsel's] discretion is so central to the functioning of the Executive Branch" as to require complete control, ante, at 691 (emphasis added), whether the conferral of his powers upon someone else "sufficiently deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws," ante, at 693 (emphasis added), and whether "the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties," ante, at 696 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are.

(Citation omitted.)

The rest of the opinion merits a full reading by those interested. I will leave you with Justice Scalia’s eloquent conclusion:

... By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Worse than what it has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. Taking all things into account, we conclude that the power taken away from the President here is not really too much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it is too much. That opinion, like this one, will not be confined by any rule. We will describe, as we have today (though I hope more accurately) the effects of the provision in question, and will authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion is so central to the functioning of the Executive Branch as to require complete control." This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assume—all purely executive power must be under the control of the President.

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it ought to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that "[t]he executive Power shall be vested in a President of the United States."

(Emphasis in original.)

Due Process and Equal Protection

Justice Scalia is known as an “originalist” with respect to Constitutional interpretation.¹⁰

I will use his dissent in *Obergefell v. Hodges* (2015) and partial dissent in *Planned Parenthood v. Casey* (1992) and his plurality opinion in *Kerry v. Din* (2015) to illustrate his views on the meaning of “liberty” in the Due Process and Equal Protection Clauses.

Obergefell v. Hodges (2015)

Justice Scalia was not the happiest of Justices in his final full Term on the Court, and his upset with his brethren showed with particular force in his dissenting opinion in *Obergefell v. Hodges* (2015). Justice Kennedy’s 5-4 majority opinion was based on both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. In Justice Kennedy’s opinion, the *right* to marry belongs to an individual irrespective of the gender of the matrimonial participants and is a liberty interest protected by the Constitution.

¹⁰ Justice Scalia once said: "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the Court, thinks it ought to mean, but what it meant when it was adopted." See *Originalism: A Primer on Scalia's Constitutional Philosophy*, Nat'l Public Radio, Feb. 14, 2016, <http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy>.

Justice Scalia called Justice Kennedy’s opinion a “threat to American democracy” because it reflects a revision of the Constitution that “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.” He made it clear from the outset that the substance of Justice Kennedy’s opinion “is not of immense personal importance to me” but that it was important “who it is that rules me.” Using the imperious “Ruler” as his foil, he offered his views of the majority’s opinion:

[I]t is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

And his analysis of the issue presented to the Court was quite simple. Because every State limited marriage to one man and one woman in 1868 when the Fourteenth Amendment was adopted, the Court lacked the power to overrule the “People”:

When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.

(Footnote omitted.)

Then, in unvarnished contempt for Justice Kennedy’s argument that the Constitution is a living document in which the scope of the “liberty” interest in the Fourteenth Amendment may evolve, he reinforced his view that the majority opinion was inconsistent with our democratic system of government:

Thus, rather than focusing on the People’s understanding of “liberty”—at the time of ratification or even today—the majority focuses on four “principles and traditions” that, in the majority’s view, prohibit States from defining marriage as an institution consisting of one man and one woman.

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a

constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

(Emphasis in original. Footnote omitted.)

And then, to emphasize his philosophy as well as his biting pen, Justice Scalia characterized the majority opinion as an attempt to overthrow the government (a putsch) and foreshadowed the reactions of some clerks at marriage license bureaus to the Court's opinion:

But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices know that limiting marriage to one man and one woman is contrary to reason; they know that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

(Emphasis in original. Footnote omitted.)

It is an angry opinion using words like "pretentious" and "egotistic" to describe Justice Kennedy's opinion and is permeated by alliterations and plays on words. ("Of course the opinion's showy profundities are often profoundly incoherent.") And following a style he has honed over the years, he endeavors to pick apart Justice Kennedy's opinion:

And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court really dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The

world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.

(Emphasis in original. Footnote omitted.)

He ends his opinion as disdainfully as he began it, suggesting that the institution of the Court itself was in jeopardy:

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

(Emphasis in original.)

Planned Parenthood of S.E. Pennsylvania et al. v. Casey (1992)

Justice Scalia's dissent in *Obergefell* is a bit of *déjà vu* as is reflected by his dissent in *Planned Parenthood v. Casey*.

The Supreme Court affirmed its holding in *Roe v. Wade*, 410 U.S. 113 (1973), that a woman had a right to terminate her pregnancy "in its early stages" in upholding an injunction prohibiting the enforcement of those provisions of a Pennsylvania statute that imposed an undue burden on that right. The Court was fractured. Justices O'Connor, Kennedy, and Souter issued a joint opinion announcing the judgment of the Court. Foreshadowing Justice Kennedy's opinion in *Obergefell*, the plurality wrote: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." And later, the plurality emphasized the evolving nature of Constitutional interpretation:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

Justice Stevens and Justice Blackmun provided the votes to keep the basic holding of *Roe* intact.

The Chief Justice's concurrence in part and dissent in part argued that the judgment was erroneous and that *Roe* was wrong in concluding that the right to terminate a pregnancy was a fundamental right subject to review by strict scrutiny. Instead, he argued that "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest."

Justice Scalia joined in the Chief Justice’s opinion but made it clear that constitutionally-protected “liberty” is something different from “liberty” “in the absolute sense.”

As the Court acknowledges, “where reasonable people disagree the government can adopt one position or the other.” The Court is correct in adding the qualification that this “assumes a state of affairs in which the choice does not intrude upon a protected liberty,” —but the crucial part of that qualification is the penultimate word. A State’s choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a “liberty” in the absolute sense. Laws against bigamy, for example — with which entire societies of reasonable people disagree—intrude upon men and women’s liberty to marry and live with one another. But bigamy happens not to be a liberty specially “protected” by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a “liberty” in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the “concept of existence, of meaning, of the universe, and of the mystery of human life.” Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

(Citations omitted. Footnote omitted.)

Justice Scalia then embarked on a rebuttal of several points made in the joint opinion because “it is beyond human nature to leave [them] unanswered.” And then using words from the joint opinion, he dissected these words consistent with his views on the limits on judicial power. Here is but one example. The authors of the joint opinion emphasized the role of “reasoned judgment”: “The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”

Justice Scalia viewed this argument as vapid:

*The emptiness of the “reasoned judgment” that produced Roe is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in these and other cases, the best the Court can do to explain how it is that the word “liberty” must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in “liberty” because it is among “a person’s most basic decisions,” ante, 505 U.S. at 849; it involves a “most intimate and personal choic[e],” ante, 505 U.S. at 851; it is “central to personal dignity and autonomy,” *ibid.*; it “originate[s] within the zone of conscience and belief,” ante, 505 U.S. at 852; it is “too intimate and personal” for state interference, *ibid.*; it reflects “intimate views” of a “deep, personal character,” ante, 505 U.S. at 853; it involves “intimate*

relationships” and notions of “personal autonomy and bodily integrity,” ante, 505 U.S. at 857; and it concerns a particularly “important decision[n],” ante, 505 U.S. at 859 (citation omitted). But it is obvious to anyone applying “reasoned judgment” that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today’s majority, see Bowers v. Hardwick, 478 U.S. 186 [] (1986)) has held are not entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally “intimate” and “deep[ly] personal” decisions involving “personal autonomy and bodily integrity,” and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court’s decision; only personal predilection.

(Footnote omitted.)

And with respect to the joint opinion’s “undue burden” standard, Justice Scalia was contemptuous: “The ultimately standardless nature of the ‘undue burden’ inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.”

Justice Scalia used a different “Ruler” metaphor in responding to other statements in the joint opinion (e.g., “[T]o overrule under fire ... would subvert the Court’s legitimacy”):

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals—with the somewhat more modest role envisioned for these lawyers by the Founders.

“The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment” The Federalist No. 78, pp. 393-394 (G. Wills ed. 1982).

Justice Scalia ended his opinion by calling upon the Court to “get out of this area,” saying that the joint opinion’s “epic tone” seemed designed to bring the abortion debate to an end, a goal that Justice Scalia regarded as not achievable by analogy to the *Dred Scott* decision¹¹:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in Dred Scott. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and

¹¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (where the Court held, 7-2, that Scott and his wife were not citizens of the United States because of their African ancestry, and Scott’s owner could not constitutionally be deprived “of his legal property” by virtue of Scott’s temporary residence in Illinois and the Wisconsin Territory where, thereby, he claimed that they had been emancipated).

staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by Dred Scott cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself “call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.”

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be “speedily and finally settled” by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining

Kerry, Secretary of State v. Din (2015)

There was no majority opinion in this Fifth Amendment Due Process case involving the government’s refusal to issue a visa to the husband—Kanishka Berashk, a resident citizen of Afghanistan and a former civil servant in the Taliban regime—of a United States citizen, Fauzia Din. Justice Scalia was joined by The Chief Justice and Justice Thomas in concluding that Din was not deprived of life, liberty, or property in the denial of her husband’s visa application. Justice Kennedy, joined by Justice Alito, decided there was no need to decide whether Din had a protected liberty interest. Assuming that she had one, she received due process. In his dissent, Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) argued that Din had a protected liberty interest in wanting to spend her married life together with her husband¹² and that she did not receive due process in the denial of the visa application.

¹² Justice Breyer explained his basis for the liberty interest:

“The liberty interest that Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks *procedural*, not *substantive*, protection for this freedom. Compare *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (Due Process Clause requires compliance with fair *procedures* when the government deprives an individual of certain ‘liberty’ or ‘property’ interests), with *Reno v. Flores*, 507 U.S. 292, 302 (1993) (Due Process Clause limits the extent to which government can *substantively* regulate certain ‘fundamental’ rights, ‘no matter what process is provided’). Cf. *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 842, n. 48 (1977) (liberty interests arising under the Constitution for procedural due process purposes are not the same as fundamental rights requiring substantive due process protection).

Borrowing heavily from Justice Scalia’s description of the statutory scheme, here are the underlying facts. Under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, an alien may not enter and permanently reside in the United States without a visa. 8 U.S.C. § 1181(a). But the INA creates a special visa-application process for aliens sponsored by “immediate relatives” in the United States. 8 U.S.C. §§ 1151(b), 1153(a). “Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. See §§1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer. See §§1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA. §1361.”

Section 1182(a)(3)(B) of the INA lists “[t]errorist activities” as one ground for inadmissibility. The INA defines “terrorist activity” to include providing material support to a terrorist organization and serving as a terrorist organization’s representative. 8 U.S.C. § 1182(a)(3)(B)(i), (iii)–(vi). A consular officer in the U.S. Embassy in Pakistan interviewed Mr. Berashk in connection with the visa application and denied his application. The officer told Berashk that he was not admissible under Section 1182(a)(3)(B), “but provided no further explanation.” This litigation followed, resulting in the Ninth Circuit’s determination that Din had a protected liberty interest in marriage and that invoking Section 1182(a)(3)(B) without an explanation did not provide Din with due process.

In vacating the Ninth Circuit’s decision, Justice Scalia’s three-vote opinion focused on why Din did not have a cognizable liberty interest. He first traced the Due Process Clause to the Magna Carta to define the scope of a “liberty” interest:

As originally drafted, the Great Charter provided that “[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.” Magna Carta, ch. 29, in 1 E. Coke, The Second Part of the Institutes of the Laws of England 45 (1797) (emphasis added). The Court has recognized that at the time of the Fifth Amendment’s ratification, the words “due process of law” were understood “to convey the same meaning as the words ‘by the law of the land’” in Magna Carta. Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276 (1856). Although the terminology associated with the guarantee of due process changed dramatically between 1215 and 1791, the general scope of the underlying rights protected stayed roughly constant.

Then referring back to Coke’s Institutes (at 46-48), which were read “by virtually every student of law” in the American Colonies,¹³ Justice Scalia listed the scope of the interests that could be deprived “only pursuant to,

“Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow ‘implicit[ly]’ from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates ‘an expectation’ that a person will not be deprived of that kind of liberty without fair procedures.” (Citation omitted. Emphasis in original.)

¹³ Justice Scalia drew this quote from *Klopper v. North Carolina*, 386 U.S. 213, 225 (1967).

the ‘law of the land.’” Coke wrote that the Magna Carta ensured that, without due process, “no man [may] be”:

- “taken or imprisoned”;
- “disseised of his lands, or tenements, or dispossessed of his goods, or chattels”;
- “put from his livelihood without answer”;
- “barred to have the benefit of the law”;
- denied “the franchises, and priviledges [sic], which the subjects have of the gift of the king”;
- “exiled”; or
- “forejudged of life, or limbe, disherited, or put to torture, or death” [sic].

Against this backdrop, Justice Scalia held that the Due Process Clause did not provide Din with a protected liberty interest:

Din, of course, could not conceivably claim that the denial of Berashk’s visa application deprived her—or for that matter even Berashk—of life or property; and under the above described historical understanding, a claim that it deprived her of liberty is equally absurd. The Government has not “taken or imprisoned” Din, nor has it “confine[d]” her, either by “keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street.” Indeed, not even Berashk has suffered a deprivation of liberty so understood. (Citation omitted.)

Justice Scalia then had to deal with the jurisprudential—but, to him, disdainful—reality that the Due Process Clause has been expanded by the Court to include “certain implied ‘fundamental rights.’” Even if one assumes the existence of such rights, he wrote, Din still loses:

I think it worth explaining why, even if one accepts the textually unsupportable doctrine of implied fundamental rights, Din’s arguments would fail. Because “extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action,” Washington v. Glucksberg, 521 U.S. 702, 720 (1997), and because the “guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,” Collins v. Harker Heights, 503 U.S. 115, 125 (1992), “[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field,” ibid. Accordingly, before conferring constitutional status upon a previously unrecognized “liberty,” we have required “a careful description of the asserted fundamental liberty interest,” as well as a demonstration that the interest is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.” Glucksberg, supra, at 720–721 (citations and internal quotation marks omitted). (Emphasis in original.)

While acknowledging broad language on the scope of implied rights in prior Court decisions, Justice Scalia pointed out that, here, the government had not attempted to forbid a marriage, and concluded that “[n]othing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage . . . sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship.” He added that spousal immigration has been regulated in the United States for over 100 years,

further precluding a claim that the denial of Berashk's visa application deprived Din of a liberty interest because such regulation shows that Din's asserted liberty interest was not "deeply rooted in this Nation's history and tradition," again citing *Glucksberg*, 521 U.S. at 720. Justice Scalia concluded his opinion with a point-counterpoint discussion of Justice Breyer's dissenting opinion, which Justice Scalia dismissed as promoting a "novel theory of implied nonfundamental rights."

The Reach of the Right To Bear Arms Under the Second Amendment

Justice Scalia is often remembered for his 5-4 majority opinion in *District of Columbia v. Heller* (2008).

District of Columbia v. Heller (2008)

Justice Scalia framed the issue presented in *Heller* as whether the District of Columbia's prohibition on the possession of "usable handguns in the home" violates the Second Amendment. He held that it did.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Justice Scalia held that these words mean what they say, consistent with his views on Constitutional interpretation.

In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

(Citation omitted.) In response to the argument that the Second Amendment was limited to bearing arms in a militia, Justice Scalia explained that the "right of the people" in the Second Amendment refers to individual rights, not collective rights:

The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

(Footnote omitted.)

In contrast, the reference to "militia" in the prefatory clause to the Second Amendment referred to a subset of "the people":

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia

therefore fits poorly with the operative clause's description of the holder of that right as "the people."

Then turning to the phrase "keep and bear Arms," he explained that "Arms" referred to "weapons that were not specifically designed for military use and were not employed in a military capacity."¹⁴ By reference to historical documents, he then explained that "keep" means to "have" and "bear" means to "carry" and that neither connoted "participation in a structured military organization." And after a review of the history of the Colonies under British Rule,¹⁵ he concluded

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, e.g., United States v. Williams, 553 U.S. [285] (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.

(Emphasis in original.) After then explaining that the phrase "A well regulated Militia, being necessary to the security of a free State," refers to all able bodied men physically capable of acting in concert for the common defense, and that "state" had multiple meanings in the Constitution and meant here security of a "free polity" and not security of each individual State, he concluded that the preface to the Second Amendment fit "perfectly" with its operative language:

It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.

¹⁴ "The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary (1771); see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar)."

¹⁵ "In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936) (reprinted 1970); see also, e.g., Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1968). They understood the right to enable individuals to defend themselves."

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.

(Citations omitted.)

The rest of this richly historical opinion traces State constitutional text on the right to bear arms and explains through numerous historical references why the right to bear arms was not limited to arms in militia by references throughout the late 1700's and into the 1800's.¹⁶ Justice Scalia then explained why prior Court precedent are not inconsistent with his holding.¹⁷ He concluded by explaining, however, that the right to bear arms was not unlimited:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. [United States v.]Miller said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." ...

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact

¹⁶ Here is an example: "Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia."

¹⁷ "We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens."

that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

(Footnote and citations omitted.)

It followed, of course, from this analysis that the D.C. prohibition on possessing handguns could not stand:

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights,²⁷ banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.

(Footnote and citation omitted.)

Free Speech under the First Amendment

Justice Scalia was as staunch a defender of free speech rights as he was the right to bear arms.¹⁸ There are a number of examples that could be used, but I have chosen some recent ones.

Williams-Yulee v. Florida Bar (2015)

There are 39 States where voters elect trial or appellate judges. Many of these States prohibit judges and judicial candidates from personally soliciting funds for their campaigns because of the adverse impact such solicitation could have on the public confidence in the impartiality of the judiciary. Does this prohibition violate the First Amendment rights of the judges or judicial candidates? In *Williams-Yulee v. Florida Bar* (2015), Chief Justice Roberts, joined by Justices Breyer, Sotomayor, and Kagan in full, and joined by Justice Ginsburg except as to Part II of the Chief Justice’s opinion, held that it did not.

Justice Scalia’s dissent (joined by Justice Thomas) argued that this was an easy case; Florida’s restriction on free speech was unconstitutional.¹⁹ His prose is vintage Justice Scalia:

This Court has not been shy to enforce the First Amendment in recent Terms—even in cases that do not involve election speech. It has accorded robust protection to depictions of animal torture, sale of violent video games to children, and lies about having won military medals.

¹⁸ Even so, Justice Scalia famously expressed a preference for cases under the structural provisions of the Constitution over those implicating the First Amendment. "Every tin horn dictator in the world today, every president for life, has a Bill of Rights," he was reported as stating. "That's not what makes us free; if it did, you would rather live in Zimbabwe. But you wouldn't want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word `constitution'; it means structure." Randy DeSoto, *Scalia Defends The Constitution, Questions The 17th Amendment*, Western Journalism, May 13, 2015, <http://www.westernjournalism.com/scalia-defends-the-constitution-questions-the-17th-amendment/>.

¹⁹ Or, as Justice Scalia put it: "Faithful application of our precedents would have made short work of this wildly disproportionate restriction upon speech." And drawing on his uniquely colorful lexicon, Justice Scalia went on to lament the "twistifications" he found in the majority opinion.

See United States v. Stevens, 559 U.S. 460 (2010); [Brown v. Entertainment Merchants Ass'n, 564 U.S. ___ (2011)]; [United States v. Alvarez, 567 U.S. ___ (2012)]. Who would have thought that the same Court would today exert such heroic efforts to save so plain an abridgement of the freedom of speech? It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order. So it is—but so too are preventing animal torture, protecting the innocence of children, and honoring valiant soldiers. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.

Brown v. Entertainment Merchants Association (2011)

Brown v. Entertainment Merchants Association was a 7-2 decision written by Justice Scalia that demonstrates his very protective views on freedom of speech.

California law restricted the sale or rental of violent video games to minors. The trial court enjoined enforcement of the law because it violated the First Amendment. The Ninth Circuit affirmed, and so did the Supreme Court: “Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.”

Justice Scalia’s commentary on Justice Alito’s dissent illuminates the majority’s logic (citations omitted):

JUSTICE ALITO has done considerable independent research to identify video games in which “the violence is astounding.” “Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools.” JUSTICE ALITO recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of JUSTICE ALITO’s description of those video games he has discovered that have a racial or ethnic motive for their violence—“‘ethnic cleansing’ [of] . . . African Americans, Latinos, or Jews.” To what end does he relate this? Does it somehow increase the “aggressiveness” that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, JUSTICE ALITO’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

(Citations omitted. Emphasis in original.)

The State conceded that it could not show a direct link between the video games and harm to minors. Expert reports on the psychological effects of violent video games on minors were “not compelling.” “Even taking for granted Dr. Anderson’s conclusions that violent video games produce some effect on children’s feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the ‘effect sizes’ of children’s exposure to violent

video games are ‘about the same’ as that produced by their exposure to violence on television. And he admits that the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated ‘E’ (appropriate for all ages), or even when they ‘vie[w] a picture of a gun.’” (Record citations omitted. Emphasis in original.)

With respect to California’s effort to give parents some control, Justice Scalia was again not persuaded:

California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

(Citation omitted.)

Free Exercise Clause of the First Amendment

The First Amendment also protects the free exercise of religion: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” Justice Scalia addressed the Free Exercise Clause in *Employment Division v. Smith* (1990).

Employment Division v. Smith (1990)

This 6-3 decision (Justice O’Connor joined in the judgment only) by Justice Scalia spawned two federal statutes on religious freedom that have received prominence in light of the Affordable Care Act litigation over insurance coverage for contraceptives. But I am getting ahead of myself.

The issue was whether applicants for unemployment benefits could be denied coverage because their dismissal from employment resulted from their use of peyote for religious reasons. Oregon law prohibited the non-prescribed possession of controlled substances. Peyote was a controlled substance. The Oregon Supreme Court held that Oregon’s prohibition on “religiously inspired use” violated the Free Exercise Clause.

There was precedent that arguably supported the applicants. *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), had held that a State “could not condition the availability of unemployment insurance on an individual’s willingness to forgo conduct required by his religion.” But the conduct in these cases did not amount to a violation of a criminal law. And that fact became outcome dispositive.

Justice Scalia began his analysis by exploring the scope of the Free Exercise Clause with respect to limitations on beliefs:

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." Sherbert v. Verner, supra, 374 U.S. at 402, 83 S.Ct. at 1793. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

(Emphasis in original. Citations omitted.) He then explained that the performance of physical acts (e.g., “participating in sacramental use of bread and wine”) also could not be prohibited only when they are engaged in for religious reasons: “It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.”

But violating a criminal law for religious reasons received no jurisprudential sympathy from Justice Scalia when newspaper companies cannot claim a violation of freedom of the press because they are required to pay taxes. Notice the emphasis on “text” in Justice Scalia’s explanation:

It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Respondent applicants then fell back on the argument that their claim for religious exemption must be evaluated under the “compelling state interest” standard set forth in *Sherbert*. If Oregon could not demonstrate such an interest, respondents said, the substantial burden placed on the exercise of their religious practices must be unconstitutional. There was basis for the argument in the Court’s earlier decisions involving unemployment compensation laws, but Justice Scalia rejected it:

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," Reynolds v. United States, 98 U.S., at 16—contradicts both constitutional tradition and common sense.

(Citations omitted.)

And in another example of Justice Scalia’s delight with words, he explained why the use of the compelling state interest standard to evaluate different treatment on the basis of race or the regulation of the content of speech is not comparable to using it “for the purpose asserted here”: “What it produces in those other fields—

equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.”

Justice Scalia recognized that a number of States had made an exception to their drug laws for sacramental peyote use. But that fact did not affect the outcome:

But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

The Aftermath of Employment Division v. Smith

Three years after this decision, Congress adopted the Religious Freedom Restoration Act of 1993 (RFRA), the focus of *Burwell v. Hobby Lobby Stores* (2014).

Justice Alito, joined by the conservative members of the Court, addressed the interplay of the RFRA, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the Patient Protection and Affordable Care Act of 2010 (ACA), all in relation to three closely held corporations’ claims that a Department of Health and Human Services (HHS) requirement under ACA that they must provide insurance coverage to female employees for certain contraceptives violated RFRA. With respect to two of the corporations, the Tenth Circuit held that the requirement violated RFRA. With respect to the other, the Third Circuit reached a different conclusion.²⁰ The Court agreed with the Tenth Circuit and reversed the Third Circuit.

Justice Alito explained that Congress reacted to Justice Scalia’s decision not to apply the compelling state interest standard in *Smith* by adopting RFRA:

RFRA’s enactment came three years after this Court’s decision in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in Sherbert that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S., at 408–409. And in Yoder, the Court held that Amish

²⁰ Specifically, the Third Circuit held, “in a divided opinion, . . . that ‘for-profit, secular corporations cannot engage in religious exercise’ within the meaning of RFRA or the First Amendment.”

children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U.S., at 210–211, 234–236.

In *Smith*, however, the Court rejected “the balancing test set forth in *Sherbert*.” 494 U.S., at 883. *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause. 494 U.S., at 875.

This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” 494 U.S., at 888. The Court therefore held that, under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

Congress responded to *Smith* by enacting RFRA “[L]aws [that are] ‘neutral’ toward religion,” Congress found, “may burden religious exercise as surely as laws intended to interfere with religious exercise.” 42 U.S.C. § 2000bb(a)(2); see also § 2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” § 2000bb–1(a).² If the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” § 2000bb–1(b).

(Footnotes omitted.)

After the Court determined in *City of Boerne v. Flores*, referenced by Justice Alito, that Section 5 of the Fourteenth Amendment did not give Congress authority to apply RFRA to the States,²¹ Congress passed RLUIPA. This law was adopted under Congress’s Commerce and Spending Clause powers, Justice Alito explained, and “imposes the same general test as RFRA but on a more limited category of governmental actions.” Applying both RFRA and RLUIPA, the Court in *Hobby Lobby* then assumed that there was a

²¹ “Congress’ power under § 5, however, extends only to ‘enforc[ing]’ the provisions of the Fourteenth Amendment. The Court has described this power as ‘remedial.’ The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the ‘provisions of [the Fourteenth Amendment].’” *City of Boerne v. Flores*, 521 U.S. 507, 519 (1987). (Citation omitted.)

compelling state interest to justify the HHS insurance coverage mandate for contraceptives, but that the government had not employed the least restrictive means to further the state interest.

That was hardly the last word. On March 23, the Court heard oral argument in *Zubik v. Burwell*, a decision of the Third Circuit that has been consolidated with six other decisions. In *Zubik*, the question presented is:

Whether the HHS Mandate and its “accommodation” violate the Religious Freedom Restoration Act (“RFRA”) by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest.

In one of the consolidated cases, *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Burwell*, two questions are presented:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS’s contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA’s demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS’s regulatory objective—namely, the provision of no-cost contraceptives to the objector’s employees?

Justice Scalia’s seat was vacant at the oral argument. But no one should be surprised to hear his voice in one or more of the opinions issued when the Court rules.

Cruel and Unusual Punishment

Justice Scalia believed that only the People could decide whether to ban the death penalty. His concurring opinion in *Glossip v. Gross* (2015) rebutted Justice Breyer’s call to the Court to bring an end to the death penalty under the Eighth Amendment’s prohibition on cruel and unusual punishment.

Glossip v. Gross (2015)

This case presented the question of whether the method of execution of a death row inmate could cross the “cruel and unusual” threshold. Writing for a five-Justice majority, Justice Alito held that the three-drug protocol followed by Oklahoma did not, on the record presented, represent an Eighth Amendment violation.

Justice Breyer's dissent (joined by Justice Ginsburg) urged that the Court was answering the wrong question and that the Court, once and for all, should declare the death penalty itself unconstitutional.²² "At the very least, the Court should call for full briefing on the basic question," he wrote. Justice Scalia responded forcefully to Justice Breyer, concluding that only the People, not the Court, could make such a change, since executions were well-established at the time the Constitution was adopted. I provide only a sampling here of Justice Scalia's point-by-point dissection of Justice Breyer's opinion:

Welcome to Groundhog Day. The scene is familiar: Petitioners, sentenced to die for the crimes they committed (including, in the case of one petitioner since put to death, raping and murdering an 11-month-old baby), come before this Court asking us to nullify their sentences as "cruel and unusual" under the Eighth Amendment. They rely on this provision because it is the only provision they can rely on. They were charged by a sovereign State with murder. They were afforded counsel and tried before a jury of their peers—tried twice, once to determine whether they were guilty and once to determine whether death was the appropriate sentence. They were duly convicted and sentenced. They were granted the right to appeal and to seek postconviction relief, first in state and then in federal court. And now, acknowledging that their convictions are unassailable, they ask us for clemency, as though clemency were ours to give.

The response is also familiar: A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that now, at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly contemplates. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life . . . without due process of law." Nevertheless, today JUSTICE BREYER takes on the role of the abolitionists in this long-running drama, arguing that the text of the Constitution and two centuries of history must yield to his "20 years of experience on this Court," and inviting full briefing on the continued permissibility of capital punishment, post, at 2 (dissenting opinion).

²² In 2012, Connecticut adopted legislation abolishing the death penalty for all crimes committed on or after April 25, 2012. On August 25, 2015, the Connecticut Supreme Court abolished the death penalty for any crime committed before that date. Citing Justice Breyer's opinion in *Glossip* several times, the Court summarized its holding: "In the present appeal, the defendant, Eduardo Santiago, ... [contends] that, following the decision by the elected branches to abolish capital punishment for all crimes committed on or after April 25, 2012, it would be unconstitutionally cruel and unusual to execute offenders who committed capital crimes before that date. Upon careful consideration of the defendant's claims in light of the governing constitutional principles and Connecticut's unique historical and legal landscape, we are persuaded that, following its prospective abolition, this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose. For these reasons, execution of those offenders who committed capital felonies prior to April 25, 2012, would violate the state constitutional prohibition against cruel and unusual punishment." *State of Connecticut v. Santiago* (Conn. Sup. Ct. Aug. 25, 2015) (emphasis in original.) (<https://www.jud.ct.gov/external/supapp/Cases/AROCr/CR318/318CR306.pdf>).

Historically, the Eighth Amendment was understood to bar only those punishments that added “terror, pain, or disgrace” to an otherwise permissible capital sentence. Baze v. Rees, 553 U.S. 35, 96 (2008) (THOMAS, J., concurring in judgment). Rather than bother with this troubling detail, JUSTICE BREYER elects to contort the constitutional text. Redefining “cruel” to mean “unreliable,” “arbitrary,” or causing “excessive delays,” and “unusual” to include a “decline in use,” he proceeds to offer up a white paper devoid of any meaningful legal argument.

Even accepting JUSTICE BREYER’s rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook. He says that the death penalty is cruel because it is unreliable; but it is convictions, not punishments, that are unreliable. Moreover, the “pressure on police, prosecutors, and jurors to secure a conviction,” which he claims increases the risk of wrongful convictions in capital cases, flows from the nature of the crime, not the punishment that follows its commission. Post, at 6. JUSTICE BREYER acknowledges as much: “[T]he crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure.” Ibid. That same pressure would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases. The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. (Which, again, JUSTICE BREYER acknowledges: “[C]ourts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue,” post, at 5.) The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.

Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, JUSTICE BREYER does not just reject the death penalty, he rejects the Enlightenment.

(Emphasis in original.)

A Staunch Defender of Individual Rights Under the Fourth Amendment

Justice Scalia’s Fourth Amendment jurisprudence was very protective of the rights of citizens to be free of unreasonable searches and seizures.

United States v. Jones (2012)

United States v. Jones was a 9-0 decision. Four other Justices joined in the opinion written by Justice Scalia. Justice Sotomayor joined the majority opinion but wrote separately to discuss “privacy” in the digital era. Justice Alito concurred in the judgment in an opinion joined in by Justices Ginsburg, Breyer, and Kagan.

The case involved a Global-Positioning-System (GPS) tracking device that FBI agents attached to a suspected drug trafficker's vehicle (specifically, to a vehicle registered to the suspect's wife) to track the movements of the suspect in the vehicle. The agents had obtained a warrant from the United States District Court for the District of Columbia to install the device in the District of Columbia within a 10-day period. In fact, the GPS device was attached to the vehicle in Maryland, not the District of Columbia, and on the 11th day, not within 10 days. The agents then monitored the suspect's movements for the next 28 days, replacing the battery once when the vehicle was parked in Maryland. Jones was later indicted. He moved to suppress the data obtained from the GPS device. Part of the data (that collected when the car was parked in the garage next to Jones' home) was suppressed but not the bulk of it. After a hung jury in a first trial, Jones was tried again and convicted. The GPS data used in the first trial were introduced against Jones in the second trial.

The Court of Appeals reversed, holding that the GPS data represented a search or seizure and since the data were obtained without a warrant, the Fourth Amendment was violated. Justice Scalia agreed that the installation of the GPS device on the vehicle and its use to monitor the vehicle's movements was a search:

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. Entick v. Carrington, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law'" with regard to search and seizure. Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (quoting Boyd v. United States, 116 U.S. 616, 626 (1886)). In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

"[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." Entick, supra, at 817.

Justice Scalia explained that Fourth Amendment jurisprudence "was tied" to common-law trespass as part of a "property-based" approach to interpretation until *Katz v. United States*, 389 U.S. 347, 351 (1967), introduced the concept of a "reasonable expectation of privacy" as a basis to hold that an eavesdropping device in a public telephone booth violated the Fourth Amendment. Justice Scalia rejected *Katz*-based arguments, however, saying that Jones' Fourth Amendment rights do not depend upon the *Katz* formulation because *Katz* did not repudiate the protection the Fourth Amendment had historically afforded against trespass upon "persons, houses, papers, and effects."

What of the next case? Tracking by tapping into a vehicle's own GPS system; i.e., without a physical intrusion? Justice Scalia wrote: "Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." (Emphasis in original.)

Justice Sotomayor echoed Justice Scalia in her concurrence: "[T]he trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs." But she also echoed Justice Alito's concurrence in the

judgment: “As JUSTICE ALITO incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. Under that rubric, I agree with JUSTICE ALITO that, at the very least, ‘longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.’” (Citations omitted.) While she recognized that much information is voluntarily disclosed to third parties in the digital age,²³ she also was unwilling to “assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.” Or as she also put it: “[W]hatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.”

Justice Alito’s concurrence argued that the majority’s reliance on “18th-century tort law” to decide the case was unwise, strained the language of the Fourth Amendment, has little support in the “current” Fourth Amendment case law, and was highly artificial. He argued that *Katz* “did away” with the “old approach” and recognized that a trespass was not needed for a Fourth Amendment violation. Urging a legislative solution to the issue of GPS tracking but recognizing none was imminent, Justice Alito explained that the “best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated.” Here was his answer:

Under this approach, relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant. We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

(Footnote and citation omitted.)

Florida v. Jardines (2013)

The trespasser/expectation of privacy debate continued in the 2012-13 Term.

²³ “People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers.”

In an atypical assembly of majorities, except perhaps when the Fourth Amendment is in issue, Justices Thomas, Ginsburg, Sotomayor, and Kagan joined Justice Scalia's opinion eschewing an "expectation of privacy" approach to Fourth Amendment jurisprudence as he did in *United States v. Jones*.

The facts are uncomplicated. A detective received an unverified tip that Jardines was growing marijuana in his home. The detective went to the home with a police dog trained to detect the scent of marijuana and other drugs. As the dog approached Jardines' front porch, the dog sensed one of the odors it had been trained to detect and "began energetically exploring the area for the strongest point source of that odor." At the base of the front door, the dog sat, "which is the trained behavior upon discovering the odor's strongest point." The detective then applied for a warrant to search the residence. The warrant was executed later that day, and Jardines attempted to flee and was arrested. The search revealed marijuana plants, and Jardines was charged with trafficking in marijuana.

The Florida trial court suppressed the evidence based on a Fourth Amendment violation. The state appellate court reversed, but the Florida Supreme Court reinstated the trial court's decision. The U.S. Supreme Court affirmed.

Saying that a home is "first among equals" in entitlement to Fourth Amendment protection, Justice Scalia observed that the right of a person to retreat into the person's home free from unreasonable governmental intrusion would be of "little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." Since there was also no question that the detective and the drug-sniffing canine had entered into the "curtilage" of the home (the front porch), a Fourth-Amendment-protected area, and they had no license to do so, the search was unreasonable.

As for *Katz*, Justice Scalia explained that there was no need to decide whether the investigation violated Jardines' expectation of privacy: "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."

Justice Alito's dissent repeated his view in *Jones* that there is no trespasser-based jurisprudence to support the application of the Fourth Amendment's prohibition on unreasonable searches.²⁴ The detective's visit with his dog represented a lawful visit to someone's front door, and the odors emanating from a house are inconsistent with an expectation of privacy, Justice Alito argued. Hence, there was no Fourth Amendment violation, he concluded.

It remains to be seen whether Justice Alito's voice on the Fourth Amendment will become more persuasive in Justice Scalia's absence.

Maryland v. King (2013)

Maryland v. King resulted in another atypical configuration of Justices in the majority. Justice Breyer swapped places with Justice Scalia in joining the conservative members of the Court to reject a Fourth Amendment

²⁴ "While the Court claims that its reasoning has 'ancient and durable roots,' its trespass rule is really a newly struck counterfeit." (Citation omitted.)

challenge to the collection of a DNA sample from King after he was arrested in 2009 for assault by menacing a group of people with a shotgun. Justice Kennedy delivered the opinion of the Court. Justice Scalia wrote a powerful dissent.

Under a Maryland statute that authorized collection of DNA samples from an individual charged with “a crime of violence or an attempt to commit a crime of violence” or a “burglary or an attempt to commit burglary,” intake officials took a “buccal swab” (a cotton swab was used to collect skin cells from the inside of King’s cheeks) for DNA testing. This is a routine booking procedure not only in Maryland but also in the other 49 states where a “felony convict” is involved, Justice Kennedy explained. Under the supervision of the Federal Bureau of Investigation, these DNA sample results are collected in the Combined DNA Index System (CODIS) which allows for matching individual samples with extreme accuracy (a random match probability was approximately one in 100 trillion).

In King’s case, the DNA sample might have been uneventful but for the fact that King’s DNA matched the DNA of a previously unidentified rapist from a 2003 rape. King was charged with the rape, convicted, and appealed to the Maryland Court of Appeals. That Court vacated the conviction, holding that the cheek swab represented an unreasonable search. The Supreme Court reversed.

The Maryland statute allowing the DNA samples had some built-in protections. Unless the individual provides consent, before the DNA sample could be processed or sample results could be placed in a DNA database, the individual must be arraigned and a judicial officer must ensure that there is probable cause to detain the individual on a qualifying serious offense. If there is not a finding of probable cause, the DNA sample had to be destroyed. The DNA sample is also destroyed if a conviction does not result, a conviction is reversed and no new trial is permitted, or the individual receives an unconditional pardon. Only DNA records that “directly relate to the identification of individuals” could be collected and stored in a database under the Maryland law. And a DNA sample was not allowed to be tested for any purpose other than identification of individuals. Tests for “familial matches” (looking through a DNA database to find biological relatives) were prohibited. In King’s case, the police officers fully complied with the Maryland law.

Justice Kennedy did not dispute that the collection of the buccal swab was a search but emphasized the minimal intrusion that it represented: “The fact that an intrusion is negligible is of central relevance to determining reasonableness,” he wrote.

He then focused on the reasonableness of the search in its scope and execution, concluding that government has an interest in a “safe and accurate way to process and identify the persons and possessions they must take into custody.” He distinguished a search of a person in custody and the search of a place. The latter requires a “fair probability” that contraband or evidence of a crime will be found. The former focuses on knowing with certainty who is arrested, what the criminal history is of the person arrested (suggesting the only difference between DNA testing and fingerprinting is the accuracy of DNA testing), whether the person arrested is dangerous (both in relation to the safety of officers, the “detainee population,” and the public), and whether the person is a flight risk. Suggesting that DNA testing can be conducted relatively quickly, he concluded:

In sum, there can be little reason to question “the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.” 3 W. LaFave, Search and Seizure §5.3(c), p. 216 (5th ed. 2012). To that end, courts have confirmed

that the Fourth Amendment allows police to take certain routine “administrative steps incident to arrest—i.e., . . . book[ing], photograph[ing], and fingerprint[ing].” DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is “no more than an extension of methods of identification long used in dealing with persons under arrest.” In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

(Citations omitted.)

Because (1) the intrusion of a cheek swab to obtain a DNA sample is both brief and minimal and does not create any indignity beyond that already linked to being arrested, (2) an individual arrested for a serious offense has a diminished expectation of privacy, (3) the processing of the DNA sample does not reveal information about the individual beyond identification, and (4) the statute contains numerous safeguards against “further invasion of privacy,” DNA identification of arrestees “is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.”

Justice Scalia wrote an impassioned dissent, which, no doubt, explains why Justice Kennedy’s majority opinion was so extensive. He questioned whether the purpose of the DNA sample was identification, arguing that its purpose, in fact, was to detect evidence of wrongdoing. In such a circumstance, a search requires individual suspicion, and a pure reasonableness analysis is improper, he argued:

So while the Court is correct to note (ante, at 8–9) that there are instances in which we have permitted searches without individualized suspicion, “[i]n none of these cases . . . did we indicate approval of a [search] whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” (Citation omitted.) That limitation is crucial. It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form “reasonableness” inquiry that the Court indulges at length today. To put it another way, both the legitimacy of the Court’s method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong.

Justice Scalia then discussed the timing of DNA testing, the length of time to obtain sample results, the databases against which the sample result is compared, and limitations in the Maryland statute, before concluding:

DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court’s purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid

(“official investigation into a crime”). Against all of that, it is safe to say that if the Court’s identification theory is not wrong, there is no such thing as error.

He added forcefully:

Today’s judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the “identity” of the flying public), applies for a driver’s license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.

Prado Navarette v. California (2014)

This Fourth Amendment decision reflected a split between Justices Thomas and Scalia over the proper interpretation of the Fourth Amendment’s prohibition of unreasonable searches.

A 911 dispatcher relayed to California Highway Patrol (CHP) officers a “tip” that the driver of a Silver Ford 150 pickup with a license tag number of 8-D-94925 had run a 911 caller off the road at mile marker 88 on the road in question about five minutes earlier. A CHP officer spotted the pickup truck and pulled the truck over. A second officer who responded to the dispatch also arrived at the scene. As they approached the vehicle, they smelled marijuana. They searched the truck and found 30 pounds of marijuana. The driver and his passenger were arrested. After their motion to suppress the evidence failed, they pleaded guilty to a charge of transporting marijuana, preserving the right to appeal their Fourth Amendment claim. A California appellate court rejected the argument, concluding that the officer who stopped the truck had reasonable suspicion to conduct an investigative stop.

In *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), the Court held that a law enforcement officer is permitted to make an investigative stop when the officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” The “reasonable suspicion” required to justify such a stop is a function of the content of the information the officer has available and the reliability of the information. *Alabama v. White*, 496 U.S. 325, 330 (1990).

Does an anonymous 911 caller providing a tip satisfy this standard? Quoting from *Alabama v. White*, 496 U.S. at 327, Justice Thomas wrote that it could: “[U]nder appropriate circumstances, an anonymous tip can demonstrate ‘sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.’” Here, because the truck was identified by make, model, and license tag, the 911 caller “necessarily claimed eyewitness knowledge of the alleged dangerous driving.” The 911 caller’s information was also reliable in that the truck was located about 19 miles from the mile-marker number reported in the 911 call and about 18 minutes after the 911 call. “That sort of contemporaneous report has long been treated as especially reliable,” Justice Thomas explained. The mere use of the 911 system also lent credibility to the tip, Justice Thomas explained, since 911 calls are recorded and callers can be identified and are subject to prosecution if a false report is made. Finally, Justice Thomas concluded that the 911 caller’s statement that the driver of the truck had run the caller off the road is sufficient to create reasonable suspicion that the driver of the truck was drunk—providing the necessary predicate under *Terry v. Ohio*, 392 U.S. 1, 30 (1968), that “criminal activity may be afoot.” Calling this a “close case,” Justice Thomas nonetheless concluded that the traffic stop was lawful: “Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to

provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop.”

Justice Scalia focused on the Court’s jurisprudence that an anonymous tip must be corroborated before it can be relied upon to justify a search. He dissected the Court’s various justifications to demonstrate why he felt that each was flawed, not the least of which was the fact that the officer followed the truck for five minutes without seeing any evidence of careless or reckless driving (thereby questioning whether indeed a crime of reckless driving had been or would be committed).

The Court’s opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police. If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim’s.

Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference. To prevent and detect murder we do not allow searches without probable cause or targeted Terry stops without reasonable suspicion. We should not do so for drunken driving either. After today’s opinion all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness, based upon a phone tip, true or false, of a single instance of careless driving. I respectfully dissent.

City of Los Angeles, California v. Patel (2015)

Justice Scalia did not find every warrantless search to be unreasonable, however.

In this matter, the Los Angeles Municipal Code requires every hotel operator to keep records of certain information on each hotel guest and to make the information available to officers of the Los Angeles Police Department on demand. If the hotel operator fails to do so, it will be penalized. This sounds like a search and seizure governed by the Fourth Amendment. Does the Fourth Amendment permit a facial challenge to this ordinance? And if it does, is the ordinance unconstitutional? These are the questions that Justice Sotomayor answered in the affirmative. Justice Sotomayor ((joined by Justices Kennedy, Ginsburg, Breyer, and Kagan) held that the ordinance is facially unconstitutional “because it fails to provide hotel operators with an opportunity for precompliance review.” She explained:

The Court has held that absent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. See [See v. Seattle, 387 U.S. 541, 545 (1967)]; [Donovan v. Lone Steer, Inc., 464 U.S. 408, 415 (1984)] (noting that an administrative search may proceed with only a subpoena where the subpoenaed party is sufficiently protected by the opportunity to “question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising

objections in an action in district court”). And, we see no reason why this minimal requirement is inapplicable here. While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that §41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid.

Justice Scalia’s dissent was joined by The Chief Justice and Justice Thomas. He argued that the warrantless search here “easily” meets the standards set forth in *New York v. Burger*, 482 U.S. 691, 702-03 (1987).²⁵ He explained that there was a long tradition of regulation of motels and their “commercial forebears.”

As Blackstone observed, “Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behavior.” 4 W. Blackstone, Commentaries on the Laws of England 168 (1765). Justice Story similarly recognized “[t]he soundness of the public policy of subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder.” J. Story, Commentaries on the Law of Bailments §464, pp. 487-488 (5th ed. 1851). Accordingly, in addition to the obligation to receive any paying guest, “innkeepers are bound to take, not merely ordinary care, but uncommon care, of the goods, money, and baggage of their guests,” id., §470, at 495, as travellers “are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers,” id., §471, at 498.

The ordinance was also not an outlier, Justice Scalia explained: “The City has pointed us to more than 100 similar register-inspection laws in cities and counties across the country.” (Citation omitted.)

The “relevant constitutional test” is more than met by this evidence, Justice Scalia argued:

This copious evidence is surely enough to establish that “[w]hen a [motel operator] chooses to engage in this pervasively regulated business . . . he does so with the knowledge that his business records . . . will be subject to effective inspection.” United States v. Biswell, 406 U. S. 311, 316 (1972). And that is the relevant constitutional test—not whether this regulatory superstructure is “the same as laws subjecting inns to warrantless searches,” or whether, as an historical matter, government authorities not only required these documents to be kept but permitted them to be viewed on demand without a motel’s consent. Ante, at 16.

²⁵ “Recognizing that warrantless searches of closely regulated businesses may nevertheless *become* unreasonable if arbitrarily conducted, we have required laws authorizing such searches to satisfy three criteria: (1) There must be a “substantial” government interest that informs the regulatory scheme pursuant to which the inspection is made”; (2) “the warrantless inspections must be ‘necessary to further [the] regulatory scheme’”; and (3) “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.”” (Emphasis in original.)

Justice Scalia then argued that the City's ordinance "easily satisfies" the other two *Burger* requirements: "It furthers a substantial governmental interest, it is necessary to achieving that interest, and it provides an adequate substitute for a search warrant."

As to the former, no one questions the substantial interest of the City in "detering criminal activity." "The private pain and public costs imposed by drug dealing, prostitution, and human trafficking are beyond contention, and motels provide an obvious haven for those who trade in human misery." As to the latter and the Court's suggestion that an administrative subpoena could be obtained to search a guest register, Justice Scalia had an animated response: "This proposal is equal parts 1984 and Alice in Wonderland. It protects motels from government inspection of their registers by authorizing government agents to seize the registers (if 'guarding' entails forbidding the register to be moved) or to upset guests by a prolonged police presence at the motel." (Footnote omitted.)

In the end, Justice Scalia returned to his roots: the text of the Fourth Amendment:

The Court reaches its wrongheaded conclusion not simply by misapplying our precedent, but by mistaking our precedent for the Fourth Amendment itself. Rather than bother with the text of that Amendment, the Court relies exclusively on our administrative-search cases, [Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967), See v. Seattle, 387 U. S. 541 (1967), and [Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)]. But the Constitution predates 1967, and it remains the supreme law of the land today. Although the categorical framework our jurisprudence has erected in this area may provide us guidance, it is guidance to answer the constitutional question at issue: whether the challenged search is reasonable. An administrative, warrantless-search ordinance that narrowly limits the scope of searches to a single business record, that does not authorize entry upon premises not open to the public, and that is supported by the need to prevent fabrication of guest registers, is, to say the least, far afield from the laws at issue in the cases the Court relies upon. The Court concludes that such minor intrusions, permissible when the police are trying to tamp down the market in stolen auto parts, are "unreasonable" when police are instead attempting to stamp out the market in child sex slaves.

I believe that the limited warrantless searches authorized by Los Angeles's ordinance are reasonable under the circumstances, I respectfully dissent.

The Confrontation Clause of the Sixth Amendment

Justice Scalia's views on the Confrontation Clause were also at odds with his conservative brethren on the Court, as reflected by these decisions.

Bullcoming v. New Mexico (2011)

Bullcoming v. New Mexico was a 5-4 decision written by Justice Ginsburg where Justice Scalia joined the opinion in full and Justices Thomas, Sotomayor and Kagan joined in most of the opinion.

Bullcoming had been arrested for driving while intoxicated (DWI). A forensic laboratory report showed that Bullcoming's blood-alcohol level was above the threshold for aggravated DWI. At trial, the prosecution called an analyst who was familiar with laboratory testing procedures but who had not participated in or observed the

actual test on Bullcoming's blood sample. The question presented was whether the Sixth Amendment guaranteed Bullcoming the right to confront the analyst who actually conducted the test that resulted in the forensic laboratory report. The Court held that it did: "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist."

Michigan v. Bryant (2011)

In the same Term, Justice Scalia and Justice Ginsburg both dissented in another matter where the Confrontation Clause was held not to be applicable where otherwise hearsay testimony is learned in an emergency setting.

In this matter, the trial court admitted the testimony of police officers regarding statements that the victim, Covington, made to the officers before he died about who had shot him. Bryant was convicted. The Michigan Supreme Court held that the Sixth Amendment's Confrontation Clause prohibited admission of the statements because they were hearsay and reversed the conviction.

Justice Sotomayor reinstated the conviction: "We hold that the circumstances of the interaction between Covington and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency.' (Citation omitted.) Therefore, Covington's identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant's trial did not violate the Confrontation Clause." Justice Sotomayor applied *Davis v. Washington*, 547 U.S. 813, 822 (2006), which, with respect to admissibility of statements made in response to interrogation by police, said that the focus had to be on whether the primary purpose of the interrogation was to enable police to meet an ongoing emergency. That test was met here where police found Covington bleeding in a service station parking lot, asked him what happened, and learned "Rich shot me" or "I was shot," and where and how Covington was shot, all while Covington was in considerable pain and had difficulty breathing and talking. As for the police, Justice Sotomayor explained: "The questions they asked—'what had happened, who had shot him, and where the shooting occurred,' 483 Mich., at 143, 768 N.W.2d, at 71—were the exact type of questions necessary to allow the police to "'assess the situation, the threat to their own safety, and possible danger to the potential victim'" and to the public, *Davis*, 547 U.S., at 832 (quoting *Hibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186 (2004)), including to allow them to ascertain 'whether they would be encountering a violent felon,' *Davis*, 547 U.S., at 827. In other words, they solicited the information necessary to enable them 'to meet an ongoing emergency.' *Id.*, at 822." (Footnote omitted.)

Justice Scalia was relentless in his withering criticism of this decision:

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation

Clause that the People adopted, as described in Crawford v. Washington, 541 U.S. 36 (2004), I dissent.

Justice Scalia then proceeded to explain the reach of the Confrontation Clause:

The Confrontation Clause of the Sixth Amendment, made binding on the States by the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403 (1965), provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In Crawford, we held that this provision guarantees a defendant his common-law right to confront those “who ‘bear testimony’” against him. 541 U.S., at 51. A witness must deliver his testimony against the defendant in person, or the prosecution must prove that the witness is unavailable to appear at trial and that the defendant has had a prior opportunity for cross-examination. Id., at 53–54.

While acknowledging that not all hearsay “falls within the Confrontation Clause’s grasp,” Justice Scalia chastised the majority for leaving it to the totality of the circumstances for a court to determine whether to admit testimony that an accused could not challenge:

The only virtue of the Court’s approach (if it can be misnamed a virtue) is that it leaves judges free to reach the “fairest” result under the totality of the circumstances. If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police’s intent and declare the statement testimonial. If the defendant “deserves” to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix-and-match perspectives to reach its desired outcome. Unfortunately, under this malleable approach “the guarantee of confrontation is no guarantee at all.”

(Citation omitted.)

And Justice Scalia cautioned against making exceptions to the Confrontation Clause:

The Court’s distorted view creates an expansive exception to the Confrontation Clause for violent crimes. Because Bryant posed a continuing threat to public safety in the Court’s imagination, the emergency persisted for confrontation purposes at least until the police learned his “motive for and location after the shooting.” Ante, at 27. It may have persisted in this case until the police “secured the scene of the shooting” two-and-a-half hours later. Ante, at 28. (The relevance of securing the scene is unclear so long as the killer is still at large—especially if, as the Court speculates, he may be a spree-killer.) This is a dangerous definition of emergency. Many individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act. If the police can plausibly claim that a “potential threat to . . . the public” persisted through those first few hours, ante, at 12 (and if the claim is plausible here it is always plausible) a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses. His conviction could rest (as perhaps it did here) solely on the officers’ recollection at trial of the witnesses’ accusations.

The Framers could not have envisioned such a hollow constitutional guarantee. No framing-era confrontation case that I know of, neither here nor in England, took such an enfeebled view of the right to confrontation. For example, King v. Brasier, 1 Leach 199, 200, 168 Eng. Rep. 202, 202–203 (K. B. 1779), held inadmissible a mother’s account of her young daughter’s statements “immediately on her coming home” after being sexually assaulted. The daughter needed to testify herself. But today’s majority presumably would hold the daughter’s account to her mother a nontestimonial statement made during an ongoing emergency. She could not have known whether her attacker might reappear to attack again or attempt to silence the lone witness against him. Her mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities. Cf. ante, at 29–30. Utter nonsense.

The 16th- and 17th-century English treason trials that helped inspire the Confrontation Clause show that today’s decision is a mistake. The Court’s expansive definition of an “ongoing emergency” and its willingness to consider the perspective of the interrogator and the declarant cast a more favorable light on those trials than history or our past decisions suggest they deserve. Royal officials conducted many of the ex parte examinations introduced against Sir Walter Raleigh and Sir John Fenwick while investigating alleged treasonous conspiracies of unknown scope, aimed at killing or overthrowing the King. See Brief for National Association of Criminal Defense Lawyers as Amicus Curiae 21–22, and n. 11. Social stability in 16th- and 17th-century England depended mainly on the continuity of the ruling monarch, cf. 1 J. Stephen, A History of the Criminal Law of England 354 (1883), so such a conspiracy posed the most pressing emergency imaginable. Presumably, the royal officials investigating it would have understood the gravity of the situation and would have focused their interrogations primarily on ending the threat, not on generating testimony for trial. I therefore doubt that under the Court’s test English officials acted improperly by denying Raleigh and Fenwick the opportunity to confront their accusers “face to face,” id., at 326.

Under my approach, in contrast, those English trials remain unquestionably infamous. Lord Cobham did not speak with royal officials to end an ongoing emergency. He was a traitor! He spoke, as Raleigh correctly observed, to establish Raleigh’s guilt and to save his own life. See 1 D. Jardine, Criminal Trials 435 (1832). Cobham’s statements, when assessed from his perspective, had only a testimonial purpose. The same is true of Covington’s statements here.

After reviewing the insult Justice Scalia felt was done to the Court’s prior Confrontation Clause jurisprudence,²⁶ he concluded by reminding all readers that exceptions can be dangerous even in the face of a violent act:

²⁶ “It can be said, of course, that under *Crawford* analysis of whether a statement is testimonial requires consideration of all the circumstances, and so is also something of a multifactor balancing test. But the ‘reliability’ test does not replace that analysis; it supplements it. As I understand the Court’s opinion, even when it is determined that no emergency exists (or perhaps before that determination is made) the statement would be found admissible as far as the Confrontation Clause is concerned if it is not testimonial.

Judicial decisions, like the Constitution itself, are nothing more than “parchment barriers,” 5 Writings of James Madison 269, 272 (G. Hunt ed. 1901). Both depend on a judicial culture that understands its constitutionally assigned role, has the courage to persist in that role when it means announcing unpopular decisions, and has the modesty to persist when it produces results that go against the judges’ policy preferences. Today’s opinion falls far short of living up to that obligation—short on the facts, and short on the law.

For all I know, Bryant has received his just deserts. But he surely has not received them pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all.

Class Actions

Justice Scalia’s opinion in *Wal-Mart Stores, Inc. v. Dukes* (2011) has had a profound effect on class action decisionmaking that was accented by his decision in *Comcast Corp. v. Behrend* (2013).

Wal-Mart Stores, Inc. v. Dukes (2011)

While the vote was 9-0, *Wal-Mart Stores, Inc. v. Dukes* was a 5-4 decision on a key component of Justice Scalia’s majority opinion.

To put the decision into perspective, a quick review of Fed. R. Civ. P. 23 is required. Under Rule 23, the requirements of Rule 23(a) must be satisfied before consideration of class certification can be made under Rule 23(b). Under Rule 23(a)(2) a party seeking certification must demonstrate that “there are questions of law or fact common to the class.”²⁷ If Rule 23(a) is satisfied, then a prospective class can be certified if any of the requirements of Rule 23(b) are met. Specifically, Rule 23(b)(2) allows for certification when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” This was the prong of Rule 23(b) that the plaintiffs relied upon in *Wal-Mart*.

Rule 23(b)(3) is another avenue to certification if the requirements of Rule 23(a) can be satisfied. Rule 23(b)(3) requires a finding that “questions of law or fact common to class members predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

²⁷ “In any case, we did not disavow multifactor balancing for reliability in *Crawford* out of a preference for rules over standards. We did so because it ‘d[id] violence to’ the Framers’ design. *Id.*, at 68. It was judges’ open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries. See, e.g., *Throckmorton’s Case*, 1 How. St. Tr. 869, 875–876 (1554); *Raleigh’s Case*, 2 How. St. Tr., at 15–16, 24. The Framers placed the Confrontation Clause in the Bill of Rights to ensure that those abuses (and the abuses by the Admiralty courts in colonial America) would not be repeated in this country. Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security. See *Crawford, supra*, at 67–68; cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 576–578 (2004) (SCALIA, J., dissenting).”

²⁷ The other requirements of Rule 23(a) relate to the numerosity of the class so that joinder of all members is impractical; the typicality of the class representatives’ claims or defenses in relation to the claims or defenses of the class; and the ability of the representative parties to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(1), (3)-(4).

Against this procedural backdrop, three named plaintiffs sought to represent a class of 1.5 million current or former Wal-Mart employees who alleged that Wal-Mart discriminated against them on the basis of their sex by denying them equal pay or promotions. Plaintiffs alleged that the discrimination to which they were allegedly subjected was part of an alleged “corporate culture.” Justice Scalia explained: “The basic theory of their case is that a strong and uniform ‘corporate culture’ permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart’s stores in a nationwide class action.” A class was certified. A divided *en banc* Ninth Circuit affirmed.

The Supreme Court reversed, voting 5-4 that Rule 23(a)(3)’s requirement of “questions of law or fact common to the class” was not satisfied, but voting 9-0 that Rule 23(b)(2) did not provide an avenue for class certification.

As to Rule 23(a)(2), Justice Scalia explained that “commonality” requires the plaintiff to demonstrate that class members have suffered the same injury and be of such a nature that it is “capable of classwide resolution.” Justice Scalia wrote that the only corporate policy that the plaintiffs’ evidence “convincingly establishes” is that Wal-Mart had a policy of allowing discretion by local supervisors over employment matters. “[D]emonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.” Both (1) evidence of discrimination based on an expert’s presentation of allegedly statistically-significant disparities and (2) anecdotal evidence submitted in affidavit form were insufficient to meet plaintiffs’ Rule 23(a)(2) burden as well because they did not show uniform, store-by-store disparities “upon which the plaintiffs’ theory of commonality depends” or an employment practice that ties all of the 1.5 million claims together, and did not create an inference that the entire company operated under a general policy of discrimination.

As to Rule 23(b)(2), all nine Justices agreed that claims for backpay were not properly certified. Justice Scalia held that one possible reading of the rule was that it does not authorize any monetary claims since only declaratory and injunctive relief are mentioned (“the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”). But Justice Scalia concluded he did not have to go that far here:

We need not reach that broader question in this case, because we think that, at a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” Nagareda, 84 N. Y. U. L. Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

(Emphasis in the original.)

Justice Scalia recognized that individualized backpay claims belong in Rule 23(b)(3). And, indeed, Justice Ginsburg’s dissent was premised on the Court’s failure to allow consideration of such a class. However, that option was foreclosed by virtue of the majority’s holding that Rule 23(a)(2) was not satisfied.

Comcast Corp. v. Behrend (2013)

This class-action decision continued the Court’s tightening of standards for certification of class actions under Fed. R. Civ. P. 23. Justice Scalia, joined by the Chief Justice, and Justices Kennedy, Thomas, and Alito, rejected certification of an antitrust class action of more than 2 million current and former subscribers of Comcast.

Comcast provides cable-television services to subscribers. From 1998 to 2007, Comcast and its subsidiaries (Comcast), engaged in transactions the parties described as “clustering”: a strategy of concentrating operations within a particular region of the country. The claims at issue here centered on the Philadelphia “cluster” or “Designated Market Area (DMA),” a 16-county area covering parts of Pennsylvania, Delaware, and New Jersey. To implement the strategy, Comcast (1) acquired competitor cable providers in the region and (2) swapped Comcast systems outside the region for competitor systems inside the region. As a result of nine “clustering transactions,” Comcast’s share of subscribers in the Philadelphia DMA allegedly increased from 23.9% in 1998 to 69.5% in 2007.

Plaintiffs claimed that the swap agreements were unreasonable restraints of trade in violation of Section 1 of the Sherman Act and represented monopolization or an attempt to monopolize in violation of Section 2 of the Act. They eliminated competition and allowed pricing above competitive levels, plaintiffs further asserted.

Plaintiffs sought to certify a Rule 23(b)(3) class. Rule 23(b)(3) allows certification only if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.”²⁸

It was uncontested that the district court was correct in holding that to meet this test, plaintiffs had to show:

(1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as “antitrust impact”) was “capable of proof at trial through evidence that [was] common to the class rather than individual to its members”; and (2) that the damages resulting from that injury were measurable “on a class-wide basis” through use of a “common methodology.”

Plaintiffs offered four theories to meet this standard, but the district court accepted only one of them: deterring the entry of companies that would have built competing networks, called “overbuilders,” in the Philadelphia DMA. The district court limited plaintiffs’ “proof of antitrust impact” to this overbuilders-deterrence theory. However, Plaintiffs proffered an expert, Dr. McClave, to establish that damages could be calculated on a class-wide basis taking into account all four of its theories of antitrust liability. Dr. McClave offered a model “comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed”

²⁸ As previously noted, under Rule 23, class plaintiffs must satisfy the requirements of Rule 23(a) first (sufficiently numerous parties, common questions of law or fact, typicality of claims, and adequacy of representation) and if they do, then they must also fit into one of the categories of Rule 23(b).

but for the allegedly anticompetitive activities. Class-wide, the model generated damages of \$875 million, with Justice Scalia noting—ominously for plaintiffs—that the model “did not isolate damages resulting from any one theory of antitrust impact.” A divided court of appeals affirmed.

On appeal, Comcast argued that the model failed to attribute damages resulting solely from overbuilder deterrence, but the court of appeals felt that this was a merits issue, not a class certification issue. The court of appeals said that plaintiffs needed only to show that if they can prove antitrust impact, damages are capable of measurement and would not involve “labyrinthine individual calculations.”

Building on his decision in *Wal-Mart Stores, Inc. v. Dukes*, Justice Scalia explained that Rule 23(b)(3)’s “predominance criterion is even more demanding than Rule 23(a),” and is designed for situations “in which class action treatment is not as clearly called for.” (Citation and internal quotation marks omitted.) In the majority’s view, by this measure, the class was improperly certified:

*By refusing to entertain arguments against respondents’ damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents’ model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.*²⁹

Justices Ginsburg and Breyer wrote a joint dissent joined by Justices Sotomayor and Kagan that recounted the docket history including the reformulation by the Court of the question originally presented—“[W]hether a district court may certify a class action without resolving ‘merits arguments’ that bear on [Federal Rule of Civil Procedure] 23’s prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)” —and the question reformulated for review: “Whether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” (Emphasis in original.) The dissenters then argued that in hindsight the “reformulated question was inapt” because Comcast failed to preserve a claim of error in the admission of Dr. McClave’s damages model under Federal Rule of Evidence 702 or *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). “Nor did Comcast move to strike his testimony and expert report. Consequently, Comcast forfeited any objection to the admission of Dr. McClave’s model at the certification stage. At this late date, Comcast may no longer argue

²⁹ Justice Scalia explained that if the plaintiffs prevailed, they could only recover damages based on reduced overbuilder competition because that was the only theory of liability accepted for class-action treatment. “It follows,” he wrote, “that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).” Relying on *Dukes* again, Justice Scalia explained that the lower courts’ belief that there was no reason to link each theory of antitrust impact to a calculation of damages because that would involve consideration of the merits of the claims rather than the merits of class certification, “flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim.” By the court of appeals’ logic, he said, “[A]t the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.” (Emphasis in original.)

that respondents' damages evidence was inadmissible." As a result, they argued to no avail that the writ should have been dismissed as improvidently granted. On the merits, they suggested that Justice Scalia's opinion "breaks no new ground" on class certification standards under Rule 23(b)(3). "In particular," they noted, "the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable 'on a class-wide basis'" since the parties had not disputed this question in argument before the Court. (Citation and internal quotation marks omitted.)

Arbitration and Class Actions

There is little doubt that Justice Scalia's interpretation of the Federal Arbitration Act as applied to class action arbitration will resonate for decades.

AT&T Mobility LLC v. Concepcion (2011)

In the 2010-11 Term, Justice Scalia wrote only one decision with a majority of five votes, but it was a significant one: *AT&T Mobility LLC v. Concepcion*. This decision will likely have a huge impact on consumers for a long time to come unless Congress amends the Federal Arbitration Act (FAA).

Section 2 of the FAA provides that an arbitration agreement is valid, irrevocable and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." The scope of this savings clause was in issue. The Concepcions, California residents, had entered into a cellular telephone contract with AT&T. The contract required arbitration of any disputes but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The Concepcions disputed the payment of sales tax on mobile phones that had been advertised by AT&T as "free" phones and brought an action that was later consolidated with a putative class action against AT&T for fraud and false advertising associated with sales tax charges for "free" phones.

AT&T moved to compel arbitration. The Concepcions argued that the arbitration agreement was unconscionable under California law which, under the rule established in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), prohibits enforcement of consumer arbitration agreements where: (a) the agreement bars class actions; (b) the agreement is a contract of adhesion; (c) disputes under the agreement are likely to involve a small amount of money; and (d) the party with inferior bargaining power alleges a deliberate scheme to defraud large numbers of consumers. The district court and the Ninth Circuit agreed that the arbitration clause fell both within the contours of *Discover Bank* and within the savings clause of Section 2 of the FAA, and thus was unconscionable and unenforceable.

Justice Scalia disagreed. "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." After a lengthy discussion explaining why California's encouragement of class-

wide arbitration where contracts of adhesion are involved was inconsistent with the FAA,³⁰ Justice Scalia concluded that because California's *Discover Bank* rule is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), it was preempted by the FAA.

American Express Co. v. Italian Colors Restaurant (2013)

Justice Scalia was joined by the Chief Justice and Justices Kennedy, Thomas, and Alito³¹ in determining that an antitrust suit had to be arbitrated even where the arbitration clause prohibited class actions (echoing Justice Scalia's 2011 five-vote majority decision in *AT&T Mobility LLC v. Concepcion*) and the plaintiff asserted that its cost of arbitrating would far exceed its potential individual recovery. Instead of mobile telephone consumers, however, plaintiffs here were merchants who had agreements with American Express that required arbitration of disputes and prohibited claims "to be arbitrated on a class action basis."

The merchants sued under the federal antitrust laws, claiming that American Express used its alleged monopoly power in a product market defined as "charge cards" to force merchants to accept credit cards at rates about 30% higher than the rates charged by competitors. American Express won its motion to compel arbitration, but the court of appeals reversed because individual merchants could not afford the cost of arbitration if there was a class action waiver. As in *Concepcion*, the Court invoked Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 which provides in pertinent part that a written provision in a contract "evidencing a transaction involving commerce to settle by arbitration a controversy ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Justice Scalia explained that courts must "rigorously enforce" arbitration agreements according to their terms, including claims for alleged violation of a federal statute, unless it can be shown that the FAA's mandate has been overridden by Congress. There was not such showing. "Respondents argue that requiring them to litigate their claims individually—as they contracted to do—would contravene the policies of the antitrust laws. But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Justice Scalia also explained that the antitrust laws do not preclude a contractual waiver of class actions.

The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." (Citation omitted.) The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

³⁰ In the preamble to this discussion, Justice Scalia wrote: "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."

³¹ Justice Kagan wrote the dissent for the remaining justices except for Justice Sotomayor who did not participate in the matter because she had participated on the Second Circuit panel whose decision was now before the Supreme Court.

The Court also rejected the argument that “effective vindication” of the antitrust claims rendered the arbitration clause unenforceable. This argument comes from dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n. 19 (1985), where the Court suggested it might invalidate on public policy grounds an arbitration agreement that operated as a prospective waiver of a party’s right to pursue statutory remedies. But there the Court decided that an arbitral remedy was adequate and declined to invalidate the clause. And it declined here as well.³²

Justice Scalia then concluded his opinion by returning to the requirements of the FAA:

The regime established by the Court of Appeals’ decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

Statutory Interpretation: A Dim View of Legislative History

Justice Scalia was hardly a fan of legislative history,³³ as I describe further below, but even Justice Scalia had difficulty at times discerning the meaning of Congress’ work product.

Zedner v. United States (2006)

In *Zedner v. United States*, a 9-0 decision which involved an interpretation of the Speedy Trial Act of 1974, Justice Scalia joined the majority opinion written by Justice Alito except for one paragraph of the opinion, in which Justice Alito cited legislative history. In a two-paragraph concurring opinion in that case, Justice Scalia

³² The Court explained that the exception would cover “a provision in an arbitration agreement forbidding the assertion of certain statutory rights,” and that it might “cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.” But it would not cover a requirement that a statutory claim be arbitrated even if the costs of arbitrating were high. “[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy. (Citation omitted.) The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. (Citation omitted). Or, to put it differently, the individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.” (Emphasis in original. Footnote omitted.)

³³ A recent post-Scalia unanimous decision has been cited as “a win for the judicial philosophy of the late Antonin Scalia.” Justice Thomas’ opinion in *Nebraska v. Parker* (2016) looked to the plain language of an 1882 statute and disregarded evidence of statements contemporaneous with the statute’s enactment and Interior Department policies in deciding in favor of an Indian tribe and its claim to jurisdiction over certain lands. As one legal writer suggested, it was the kind of decision that might have made Justice Scalia proud. “Scalia is responsible, more than anyone else, for steering the judiciary away from using evidence such as congressional debates and contemporaneous history to determine what Congress ‘meant’ when it wrote a law. The law means what the words of the text say, Scalia argued, and while no text is self-explanatory he did succeed in moving the baseline for statutory interpretation closer to his view.” Daniel Fisher, *Indian Victory At Supreme Court Is An 8-0 Tribute to Scalia’s Textualism*, Forbes, Mar. 22, 2016, <http://www.forbes.com/sites/danielfisher/2016/03/22/indian-victory-at-supreme-court-is-8-0-tribute-to-scalias-textualism?ref=yfp#2e6463282d86>.

noted, “the use of legislative history is illegitimate and ill advised in the interpretation of any statute.” He explained his constitutional view:

*I believe that the only language that constitutes “a Law” within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute. See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 518–528 (1993) (SCALIA, J., concurring in judgment). Here, the Court looks to legislative history even though the remainder of its opinion amply establishes that the Speedy Trial Act is unambiguous. The Act’s language rejects the possibility of a prospective waiver, and even expresses the very point that the Court relies on legislative history to support—that the Act protects the interests of the public as well as those of the defendant. ****

It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that “Congress has expressed” thus-and-so. See, e.g., Conroy, supra, at 516–517. There is no basis either in law or in reality for this naive belief. Moreover, if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. Because the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face—I do not join this portion of the Court’s opinion.

(Citation omitted.)

Utility Air Regulatory Group v. EPA (2014)

This is a complicated Clean Air Act (CAA) opinion, but only because the Clean Air Act is such a byzantine law. But it also demonstrates that even Justice Scalia had to be flexible at times in dealing with statutory text.

Under the Act, the Environmental Protection Agency (EPA) establishes what are called “national ambient air quality standards,” or “NAAQS.” To date, EPA has established standards for six pollutants. States apply these standards by creating “state implementation plans,” or “SIPs.” A SIP is a map of the State showing areas that “attain” standards for each of these six pollutants and those that don’t, as well as areas that are “unclassifiable.” An area might attain the NAAQS for one of the six pollutants but might be a “nonattainment area” for one or more of the others.

As one might expect, sources of air pollution within each area of a SIP are then permitted. In attainment or unclassifiable areas, sources obtain a “PSD” permit, designed for “prevention of significant deterioration” of the air quality. In other words and not illogically, if an area meets the air quality standard, the goal is to ensure that existing or new sources within the area maintain the standard.

Putting aside mobile sources of air pollution (e.g., a vehicle) for the moment, the CAA refers to new or existing sources as “stationary” (e.g., a factory). Within the PSD program, which is part of Title I of the statute, the Act focuses on “major emitting facilities” (a stationary source with the potential to emit 250 tons per year of “any air pollutant”). It is unlawful to construct or modify a major emitting facility without obtaining a PSD permit. Compliance with the permit means that the major emitting facility will not cause or contribute to the violation of an applicable air-quality standard and that the source uses the “best available control technology” (BACT) for each pollutant subject to regulation under the Act.

Separately, under Title V of the CAA, it is unlawful to operate any “major source” (one with the potential to emit 100 tons per year of “any air pollutant”) wherever it might be located without a comprehensive operating permit. Title V does not impose a substantive pollution-control requirement on a facility; rather, it identifies all emissions limitations and standards that are applicable to the source and associated inspection, monitoring, and reporting requirements.

Under Title II of the Act, EPA regulates mobile sources. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that Title II authorizes EPA to regulate greenhouse gases from new motor vehicles if EPA decides that such emissions contribute to climate change. Here’s the rub: if EPA made that decision, then EPA felt it had to regulate greenhouse gases under both the PSD and Title V permitting programs. Because emissions of greenhouse gases are much larger than emissions of conventional pollutants, EPA projected that large numbers of small sources not regulated under the PSD or Title V programs (e.g., large office and apartment buildings or retail establishments) would require permits.

In 2009, treating motor-vehicle six greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) as a single air pollutant, EPA decided that they contributed to climate change. In 2010, EPA announced its “Triggering Rule,” deciding that stationary sources would be subject to PSD and Title V permits if they emitted greenhouse gases once EPA applied greenhouse-gas standards to motor vehicles. EPA then announced its “Tailoring Rule” to limit the number of sources that would have to be regulated under the PSD and Title V permitting programs. EPA also adopted a “phase-in” approach for permitting purposes. A source that had to obtain a permit because of emissions of conventional pollutants—referred to as an “anyway source”—would have to immediately comply with BACT for greenhouse gas emissions that exceeded a certain threshold. Other sources had later deadlines to become permitted.

The questions before the Supreme Court were: (1) did EPA properly determine that a stationary source may be subject to the PSD and Title V permitting programs solely because the source emitted greenhouse gases; and (2) did an “anyway” source (already subject to the permitting programs based on conventional pollutant emissions) have to employ BACT to limit greenhouse gas emissions?

The answer to the first question turned on a statutory interpretation. Under the Clean Air Act, the words “air pollutant” are given a very broad meaning. But the PSD permitting program applies to major emitters of “any air pollutant.” Are the pollutants referred to in the permitting program part of the CAA, a subset of “air pollutant” as defined for the CAA as a whole? Phrased another way, does “any air pollutant” refer to the same pollutants as “air pollutant”?

Based on EPA's past interpretations of the Act that "any air pollutant" refers only to "regulated" air pollutants, five members of the Court answered this question in the negative. They also held that *Massachusetts* supported this view:

Massachusetts does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme. The Act-wide definition to which the Court gave a "sweeping" and "capacious" interpretation, id., at 528, 532, is not a command to regulate, but a description of the universe of substances EPA may consider regulating under the Act's operative provisions. Massachusetts does not foreclose the Agency's use of statutory context to infer that certain of the Act's provisions use "air pollutant" to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. As certain amici felicitously put it, while Massachusetts "rejected EPA's categorical contention that greenhouse gases could not be 'air pollutants' for any purposes of the Act," it did not "embrace EPA's current, equally categorical position that greenhouse gases must be air pollutants for all purposes" regardless of the statutory context. Brief for Administrative Law Professors et al. as Amici Curiae 17.

(Emphasis in original. Footnote omitted.)

Justice Scalia acknowledged this approach might raise statutory-construction eyebrows:

To be sure, Congress's profligate use of "air pollutant" where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes "that identical words used in different parts of the same act are intended to have the same meaning." In this respect (as in countless others), the Act is far from a chef d'oeuvre of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."

(Citations and internal quotation marks omitted.)

Having dispensed with the view that the CAA "compelled" an interpretation that required EPA to include greenhouse gases within the phrase "any air pollutant" under the PSD and Title V permitting requirements, the five-member majority then held that *Chevron* deference³⁴ did not permit EPA to reach this conclusion as a reasonable interpretation of the statute. After first agreeing with EPA's own suggestion that "requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be 'incompatible' with 'the substance of Congress' regulatory scheme'" (citation omitted), the Court also determined that "EPA's interpretation is also unreasonable because it would bring

³⁴ In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court held that when an agency-administered statute is ambiguous, it may be presumed that Congress authorized the agency to resolve the ambiguity, and a reviewing court should determine only whether the agency acted reasonably and within the scope of its statutory authority in doing so.

about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”³⁵

But what about “anyway sources”? Since they were using best available control technology for conventional pollutants, could they be required to have permits imposing BACT for greenhouse gas emissions also? In this part of the opinion, Justices Alito and Thomas abandoned Justice Scalia, but Justices Breyer, Ginsburg, Sotomayor, and Kagan joined him and the Chief Justice and Justice Kennedy in answering this question “yes,” but only as to an “anyway” source that emits more than a “de minimis” amount³⁶ of greenhouse gases:

The text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers. It states that BACT is required “for each pollutant subject to regulation under this chapter” (i.e., the entire Act), §7475(a)(4), a phrase that—as the D.C. Circuit wrote 35 years ago— “would not seem readily susceptible [of] misinterpretation.” Alabama Power Co. v. Costle, 636 F.2d 323, 404 (1979). Whereas the dubious breadth of “any air pollutant” in the permitting triggers suggests a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggests that the necessary judgment has already been made by Congress. The wider statutory context likewise does not suggest that the BACT provision can bear a narrowing construction: There is no indication that the Act elsewhere uses, or that EPA has interpreted, “each pollutant subject to regulation under this chapter” to mean anything other than what it says.³⁷

Just before reaching this conclusion, back to a 5-4 part of the holding, Justice Scalia does offer some comfort to “anyway sources,” saying that BACT cannot be used to order a fundamental redesign of a facility; that EPA has interpreted BACT as required only for pollutants emitted by the source; and that EPA guidance “suggests that BACT should not require every conceivable change that could result in minor improvements in energy efficiency.”

Michigan v. EPA (2015)

This case illustrates Justice Scalia’s literalness in applying federal statutes.

First, some context. The CAA establishes National Ambient Air Quality Standards for six “criteria pollutants” (particulate matter, ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead). In an elaborate system, the United States is broken down into what are called “attainment” and “nonattainment” areas based on the ambient air concentrations of each of these six compounds. Existing and new sources of these six pollutants

³⁵ Saying that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms,” the Court also invalidated the Tailoring Rule that was designed by EPA to ameliorate the effects of its own interpretation of the Act.

³⁶ The Court held that EPA had to establish an appropriate *de minimis* threshold below which BACT is not required and justify its selection on “proper grounds.”

³⁷ Justice Scalia did caution EPA that the Court’s holding was a narrow one: “We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of EPA’s current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by ‘anyway’ sources.”

are then regulated through a maze of federal and state regulation either to prevent deterioration of an attainment area or to achieve attainment in a nonattainment area.

Separately, the CAA regulates emissions of toxic air pollutants. Originally, EPA was tasked to develop a list of such pollutants, but that process was too slow. Hence, in 1990, at 42 U.S.C. § 7412(b), Congress listed 187 toxic air pollutants and delegated to EPA the task of regulating their sources.

But there was an exception. “Electric utility steam generating units”—power plants—were excluded, in part because they were already regulated for emissions of the six criteria pollutants and, in 1990, Congress also set up a program to address “acid rain” from power plants. The thinking was that this regulatory scheme was sufficient, as a collateral benefit, to reduce emissions of the toxic air pollutants so that power plants would not have to be subject to additional regulation.

The exception, however, was not absolute. Under 42 U.S.C. § 7412(n)(1)(A), EPA was directed to study the release of toxic air pollutants by power plants to determine if additional regulation was necessary. Here’s the relevant statutory text:

*(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of [toxic air pollutants] after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator’s report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is **appropriate and necessary** after considering the results of the study required by this subparagraph. (Emphasis added.)*

It was the “appropriate and necessary” phrase that was the focus of Justice Scalia’s opinion (joined by the Chief Justice and Justices Kennedy, Thomas, and Alito). EPA produced its study and eventually promulgated the “Mercury and Air Toxics Standards” for power plants. To quote from the opinion:

*The Agency found regulation “appropriate” because (1) power plants’ emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions. 77 Fed. Reg. 9363. It found regulation “necessary” because the imposition of the Act’s other requirements did not eliminate these risks. Ibid. **EPA concluded that “costs should not be considered” when deciding whether power plants should be regulated under §7412.** Id., at 9326. (Emphasis added.)*

It was EPA’s decision not to consider costs that represented what some might call a “legal technicality” in comparing Justice Scalia’s opinion with Justice Kagan’s dissent (joined by Justices Ginsburg, Breyer, and Sotomayor).

Let me explain. EPA was not ignoring cost. It was just a matter of where in the process of regulation costs would be taken into account. Justice Scalia focused on EPA’s Regulatory Impact Analysis, which showed that reducing power plants’ emissions of hazardous air pollutants would produce benefits valued at \$4 to \$6 million per year, compared to the costs to power plant owners of \$9.6 billion per year to comply with the regulations. “Wow!,” you might say. And that was the majority’s reaction as well: “The costs to power plants were thus

between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants.”

Not so fast, said Justice Kagan:

EPA conducted a formal cost-benefit study which found that the quantifiable benefits of its regulation would exceed the costs up to nine times over—by as much as \$80 billion each year. Those benefits include as many as 11,000 fewer premature deaths annually, along with a far greater number of avoided illnesses.

“Wow!,” you might say again. But which Justice is right? Well, they both were right. However, the majority decided that these “ancillary benefits” were not properly before the Court because they were not part of the “appropriate-and-necessary” finding:

The Agency continued that its regulations would have ancillary benefits—including cutting power plants’ emissions of particulate matter and sulfur dioxide, substances that are not covered by the hazardous-air-pollutants program. Although the Agency’s appropriate-and-necessary finding did not rest on these ancillary effects, the regulatory impact analysis took them into account, increasing the Agency’s estimate of the quantifiable benefits of its regulation to \$37 to \$90 billion per year. EPA concedes that the regulatory impact analysis “played no role” in its appropriate-and-necessary finding. (Citations omitted.)

And while I could explain in detail why the majority decided that “appropriate and necessary” requires consideration of cost as part of the study instead of as a part of implementing regulations resulting from the study, suffice it to say that context plays a role in statutory interpretation,³⁸ and both Justice Scalia and Justice Kagan recognized the role of cost in developing regulations:

All in all, the dissent has at most shown that some elements of the regulatory scheme mitigate cost in limited ways; it has not shown that these elements ensure cost-effectiveness. If (to take a hypothetical example) regulating power plants would yield \$5 million in benefits, the prospect of mitigating cost from \$11 billion to \$10 billion at later stages of the program would not by itself make regulation appropriate. In all events, we need not pursue these points, because EPA did not say that the parts of the regulatory program mentioned by the dissent prevent the imposition of costs far in excess of benefits. “[EPA’s] action must be measured by what [it] did, not by what it might have done.” (Citation omitted.)

³⁸ Justice Scalia, for example, wrote: “Statutory context reinforces the relevance of cost. The procedures governing power plants that we consider today appear in §7412(n)(1), which bears the caption ‘Electric utility steam generating units.’ In subparagraph (A), the part of the law that has occupied our attention so far, Congress required EPA to study the hazards to public health posed by power plants and to determine whether regulation is appropriate and necessary. But in subparagraphs (B) and (C), Congress called for two additional studies. One of them, a study into mercury emissions from power plants and other sources, must consider ‘the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.’ §7412(n)(1)(B) (emphasis added). This directive to EPA to study cost is a further indication of the relevance of cost to the decision to regulate.”

Justice Scalia’s conclusion—“We hold that EPA interpreted §7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants”—resulted in a remand for EPA to consider costs more directly in evaluating the scope of power plant regulation of toxic air pollutants.

Jesinoski v. Countrywide Home Loans, Inc. (2015)

Justice Scalia had no difficulty in this Truth in Lending case, a 9-0 decision holding that a borrower exercises his right to rescind a transaction in satisfaction of the requirements of Section 1635 of the Truth in Lending Act by “notifying the creditor” in writing within three years of the consummation of the transaction.

The Jesinoskis refinanced a mortgage on their home on February 23, 2007. On February 23, 2010, three years later, they wrote to the lender, Bank of America, purporting to rescind the loan. The Bank rejected the notice. The Jesinoskis then sued seeking a declaration of rescission. The claim was rejected by the Eighth Circuit because the Jesinoskis did not sue within three years; they merely wrote a letter.

In reversing, Justice Scalia held that words mean what they say; a letter was all that was needed:

Section 1635(a) [15 U.S.C. §1635(a)] explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower “shall have the right to rescind . . . by notifying the creditor, in accordance with regulations of the Board, of his intention to do so” (emphasis added). The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.

(Emphasis in original.)

Preemption

The following case illustrates a fidelity to statutory text and respect for reasonable agency decisionmaking.

Bruesewitz v. Wyeth LLC (2011)

Justice Scalia, in a 6-2 decision³⁹ in *Bruesewitz v. Wyeth LLC*, held that the National Childhood Vaccine Injury Act of 1986 (NCVIA) preempted state-law design-defect claims against vaccine manufacturers. NCVIA establishes a no-fault compensation program that allows a special master to make an informal adjudication of a claim within 240 days. The Court of Federal Claims then reviews any objections to the special master’s decision and enters final judgment within a similarly tight statutory deadline. A claimant then has two options: to accept the judgment or to reject it and seek tort relief from the manufacturer. There are also certain vaccine side effects that *prima facie* allow an affected claimant to recover, and there are no requirements that a claimant prove a defect in the vaccine. In addition, attorneys’ fees are recoverable even for unsuccessful claims that are not frivolous. In return, vaccine manufacturers receive “significant tort-liability protections.” They are “generally immunized” from failure-to-warn claims and from punitive damages except in certain

³⁹ Justice Kagan recused herself from the matter.

limited circumstances (e.g., fraud). Most significantly, NCVIA eliminates liability for a vaccine's "unavoidable, adverse side effects."

Plaintiff received the DTP vaccine after her birth in 1991. She suffered seizures within 24 hours thereafter. She filed a vaccine injury petition under NCVIA and lost. Her parents then filed suit in the Pennsylvania state court alleging defective design of the DTP vaccine among other state law claims. The suit was removed. The district court granted summary judgment to Wyeth and the court of appeals affirmed. Rejecting the argument that the failure of the statute to specifically mention design defects, as opposed to defective manufacture or inadequate warnings or directions, eliminated preemption, Justice Scalia wrote:

Design-defect torts, broadly speaking, have two beneficial effects: (1) prompting the development of improved designs, and (2) providing compensation for inflicted injuries. The NCVIA provides other means for achieving both effects. We have already discussed the Act's generous compensation scheme. And the Act provides many means of improving vaccine design. It directs the Secretary of Health and Human Services to promote "the development of childhood vaccines that result in fewer and less serious adverse reactions." It establishes a National Vaccine Program, whose Director is "to achieve optimal prevention of human infectious diseases . . . and to achieve optimal prevention against adverse reactions." The Program is to set priorities for federal vaccine research, and to coordinate federal vaccine safety and efficacy testing. The Act requires vaccine manufacturers and health-care providers to report adverse side effects, and provides for monitoring of vaccine safety through a collaboration with eight managed-care organizations. And of course whenever the FDA concludes that a vaccine is unsafe, it may revoke the license.

These provisions for federal agency improvement of vaccine design, and for federally prescribed compensation, once again suggest that §300aa-22(b)(1)'s silence regarding design-defect liability was not inadvertent. It instead reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.

(Footnotes omitted.)

Employment Discrimination

Justice Scalia read statutory text literally and then produced what some might not realize were favorable opinions for individual employment discrimination plaintiffs.

Thompson v. North American Stainless, LP (2011)

Thompson v. North American Stainless, LP involved retaliation under Title VII. Justice Scalia's 8-0 opinion answered the question of whether Title VII permitted third-party retaliation claims. Thompson and Regalado were both employees of North American Stainless (NAS) and were also engaged to be married. Regalado filed a sex discrimination charge against NAS. Three weeks later, Thompson was fired. He then filed his retaliation charge, saying NAS fired him because of Regalado's charge. The district court granted summary judgment to NAS and dismissed the action. The Sixth Circuit affirmed in a 10-6 *en banc* decision. Accepting Thompson's allegations as true, which the Court was required to do under the procedural posture of the case, Justice Scalia

had “little difficulty concluding” that Thompson stated a retaliation claim. “We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”

As for line-drawing concerns (what about firing a “girlfriend, close friend, or trusted co-worker?”), Justice Scalia acknowledged them and offered the following guidance:

*We expect that firing a close family member will almost always meet the Burlington standard,⁴⁰ and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in Burlington, 548 U.S., at 69, “the significance of any given act of retaliation will often depend upon the particular circumstances.” Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII’s antiretaliation provision is simply not reducible to a comprehensive set of clear rules. We emphasize, however, that “the provision’s standard for judging harm must be objective,” so as to “avoi[d] the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.” *Id.*, at 68–69.⁴¹*

EEOC v. Abercrombie & Fitch Stores, Inc. (2015)

Justice Scalia’s opinion for the Court involved a practicing Muslim (Elauf) who wore a headscarf because of religious requirements. She was rejected for a retail job because wearing the headscarf conflicted with the retailer’s dress code (its “Look Policy”).

In pertinent part, Title VII makes it unlawful for an employer to refuse to hire an individual because of the individual’s religion. 42 U.S.C. § 2000e–2(a)(1). The word “religion” is defined in Section 2000e(j) to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate” a “religious observance or practice without undue hardship on the conduct of the employer’s business.”

There was no dispute that Elauf was treated disparately. Even though Section 2000(e)-2(a)(1) does not impose a knowledge requirement, Abercrombie argued that it had to have “actual knowledge” of Elauf’s need for a religious accommodation before there was a Title VII violation. Justice Scalia disagreed. “Instead, an applicant need only show that his need for an accommodation was a motivating factor in the employer’s decision.” (Footnote omitted.)

⁴⁰ *Burlington N&S. F. R. Co. v. White*, 548 U.S. 53, 68 (2006) (Title VII’s antiretaliation provision prohibits any employer action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”).

⁴¹ An issue of standing also was addressed by Justice Scalia. He held that a person aggrieved under Title VII is one with an interest arguably sought to be protected by the statute. He then concluded: “[W]e conclude that Thompson falls within the zone of interests protected by Title VII. Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers’ unlawful actions. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation—collateral damage, so to speak, of the employer’s unlawful act. To the contrary, injuring him was the employer’s intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue.”

The disparate-treatment provision forbids employers to: (1) “fail . . . to hire” an applicant (2) “because of” (3) “such individual’s . . . religion” (which includes his religious practice). Here, of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely believes that her religion so requires) Elauf’s wearing of a headscarf is (3) a “religious practice.” All that remains is whether she was not hired (2) “because of” her religious practice.

The term “because of” appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. ____ (2013). Title VII relaxes this standard, however, to prohibit even making a protected characteristic a “motivating factor” in an employment decision. 42 U.S.C. §2000e–2(m). “Because of” in §2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual’s actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on. . . .

[T]he intentional discrimination provision prohibits certain motives, regardless of the state of the actor’s knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.

(Emphasis in original.)

The Affordable Care Act: Commerce Clause, Taxing Power, and Statutory Construction

Justice Scalia twice dissented from the Court’s opinions upholding the Affordable Care Act in full or in part and in the process his views of the reach of the Commerce Clause, the Taxing Power, and interpreting statutes were illuminated.

National Federation of Independent Business v. Sebelius (2012)

Justice Scalia did not write a separate dissent in this matter. Instead, he and Justices Kennedy, Thomas, and Alito wrote a joint dissent.

The holding of the case is well known. The “headline” issue in *National Federation of Independent Business v. Sebelius* was whether the “individual mandate” was constitutional—that is, whether individuals could be required to buy “minimum essential” health insurance and, if they failed to do so, could be charged a “shared responsibility payment.” This payment would be made to the Internal Revenue Service as part of the individual’s tax return, and was to be “assessed and collected in the same manner” as tax penalties. Chief Justice Roberts, joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan, held that the individual mandate portion of the Act was constitutional because the individual mandate was within the Taxing Power of the

United States Congress.

Article I, § 8, cl. 1 of the Constitution gives Congress the power to “lay and collect Taxes.” Chief Justice Roberts wrote that the statute must be given “every reasonable construction” to save it from unconstitutionality, and because it was “fairly possible” to interpret the mandate as a tax, the mandate was constitutional. Following a “functional” approach, the Chief Justice justified the holding by explaining that the payment (1) was not so high that an individual would have no choice but to buy coverage, (2) was not limited to willful violations, and (3) is going to be collected solely by the IRS.

The Taxing Power question had to be reached because Chief Justice Roberts, joined by Justices Kennedy, Scalia, Thomas, and Alito, held that the individual mandate could not be sustained under the Commerce Clause or the Necessary and Proper Clause. In the case of the Commerce Clause, the individual mandate did not regulate “existing commercial activity” but instead compelled individuals to “*become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.” (Emphasis in original.) “Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority,” he wrote. (Emphasis in original.)

Beauty can be in the eyes of the beholder in constitutional litigation. The Chief Justice rejected the application of the Necessary and Proper Clause in *Sebelius* because the individual mandate did not involve the exercise of an authority “derivative of, and in service to, a granted power.” Rather, it would create the “necessary predicate to the exercise of an enumerated power.”⁴²

Finally, Chief Justice Roberts, joined by Justices Breyer and Kagan, held that a provision of the Affordable Care Act that penalized States that chose not to participate in a Medicaid expansion program could not be enforced as written. Noting that Congress cannot legislate using the Spending Clause to effectively commandeer States' legislative or administrative machinery for federal purposes, they asserted that the Act's Medicaid expansion plan, which threatened withholding of all Medicaid funds from non-participating States, was too coercive to pass constitutional muster. “In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.” Congress can offer funds to States to expand Medicaid and impose conditions on States that accept the funds, the Chief Justice wrote, but Congress may not withhold Medicaid payments to States that fail to participate in the program. The joint dissent of Justices Kennedy, Scalia, Thomas, and Alito, concurred in this view.

Chief Justice Roberts’ conclusion summarizes the holdings with an ultimate paragraph that expresses the philosophy that Acts of Congress are enforced by the Court, not rewritten by it:

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress’s power under the Commerce Clause.

⁴² “The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding. There is no reason to depart from that understanding now. ... Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a ‘necessary and proper’ component of the insurance reforms. The commerce power thus does not authorize the mandate.” (Emphasis in original.)

That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

The joint dissent summarized its position in these words:

What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

*That clear principle carries the day here. The striking case of *Wickard v. Filburn*, 317 U.S. 111 (1942), which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the ne plus ultra of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity.⁴³*

As for the constitutional power to tax and spend for the general welfare: The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those

⁴³ The Court in *Wickard* traced the development of the Commerce Clause jurisprudence from *Gibbons v. Ogden*, 22 U.S. 1 (1824), holding that even though "local," the farmer's activity had a substantial economic effect on interstate commerce, especially where home-grown wheat represented about 20 percent of average production nationally, and thus could have an impact on the price of wheat if not regulated. 317 U.S. at 127-29.

aspects of the general welfare that were within the Federal Government's enumerated powers, see United States v. Butler, 297 U.S. 1, 65–66 (1936). Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development. The principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system. That obstacle can be overcome by granting funds to the States, allowing them to administer the program. That is fair and constitutional enough when the States freely agree to have their powers employed and their employees enlisted in the federal scheme. But it is a blatant violation of the constitutional structure when the States have no choice.

(Emphasis in the original.)

The joint dissent of Justices Scalia, Kennedy, Thomas, and Alito then built upon the distinction between regulating activity and “affecting” commerce:

Wickard v. Filburn has been regarded as the most expansive assertion of the commerce power in our history. A close second is Perez v. United States, 402 U.S. 146 (1971), which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial activity. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the “market” for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

(Emphasis in original.)

Gonzales v. Raich (2005)

Justice Scalia foreshadowed the Commerce Clause aspect of *Sebelius* in his concurring opinion in *Gonzales v. Raich* (2005).

Raich was a 6-3 ruling written by Justice Stevens, who dissented in both *United States v. Lopez* (1995)⁴⁴ and *United States v. Morrison* (2000),⁴⁵ and held that the Commerce Clause permitted Congress to prohibit the

⁴⁴ The case involved the Gun-Free School Zones Act of 1990, which made it a federal offense for an individual knowingly to possess a firearm within a school zone. Because the Act “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce,” the Court held that the Act exceeded the authority of Congress “[t]o regulate Commerce . . . among the several States” U.S. Const., Art. I, § 8, cl. 3.

⁴⁵ The Court held that a statute that provided a federal remedy for victims of gender-motivated violence was not authorized by the Commerce Clause because the activity being regulated did not have a substantial effect on interstate commerce.

local cultivation and use of marijuana for medicinal purposes in compliance with California law, relying in large part on *Wickard*.⁴⁶

Justice Scalia’s concurring opinion distinguished between regulating channels of interstate commerce and instrumentalities of interstate commerce and persons or things in interstate commerce, on the one hand, and activities that “substantially affect” interstate commerce, on the other: “The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden*, 9 Wheat. 1, 189–190, 6 L.Ed. 23 (1824). The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.”

He explained why it was misleading and why intrastate activities that have a substantial effect on interstate commerce can only be impacted by Congress under the Necessary and Proper Clause:

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least United States v. Coombs, 12 Pet. 72 (1838), Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. Id., at 78; Katzenbach v. McClung, 379 U.S. 294, 301–302 (1964); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); Shreveport Rate Cases, 234 U.S. 342, 353 (1914); United States v. E. C. Knight Co., 156 U.S. 1, 39–40 (1895) (Harlan, J., dissenting). And the category of “activities that substantially affect interstate commerce,” Lopez, supra, at 559, is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

(String citations and footnote omitted. Emphasis in original.)

King v. Burwell (2015)

Four words—“established by the State”—were the reason why this second Affordable Care Act (ACA) case created a controversy that the Court decided to resolve. In a 6-3 opinion, the Chief Justice agreed with the position of the United States that when read in context, these words did not eviscerate a key provision of the

⁴⁶ “The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed ‘to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses ...’ and consequently control the market price, a primary purpose of the [Controlled Substances Act] is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” (Citations and footnote omitted.)

ACA and eliminate health insurance coverage for millions of persons. Petitioners' argument would have required the Court to conclude that Congress intended to punish residents of States that did not establish a Health Insurance Exchange by depriving them of tax credits for purchase of health insurance. That is contrary to one of the goals of the ACA: to make insurance coverage to citizens of all States available at an affordable cost through the competition that was expected to be fostered by the States' Health Insurance Exchanges. Petitioners' argument, thus, would have presented an Equal Protection concern. The Court never got to that point because the ACA provides that if a State does not establish an Exchange, then the Federal Exchange becomes available to its residents. The Chief Justice held that an Exchange "established by the State" means the Federal Exchange when the State fails to establish an Exchange.

Even though the votes of four Justices are required before a petition for a writ of certiorari is granted, the vote count was not surprising. We cannot know for sure, but my guess is that Justice Kennedy had a change of heart by the time of oral argument. I say this based on this question he asked of counsel for the petitioner:

JUSTICE KENNEDY: Let me say that from the standpoint of the dynamics of Federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral. We'll have people pay mandated taxes which will not get any credit on – on the subsidies. The cost of insurance will be sky-high, but this is not coercion. It seems to me that under your argument, perhaps you will prevail in the plain words of the statute, there's a serious constitutional problem if we adopt your argument.

Oral Arg. Tr. 16:12:23.

Justice Scalia tried to help out counsel for petitioner (who could not answer Justice Kennedy's question) by suggesting that if the statutory text is clear, the Court cannot rewrite the law to avoid unconstitutionality, but Justice Kennedy was undeterred:

JUSTICE KENNEDY: I – I fully understand that, but I think the Court and the counsel for both sides should confront the proposition that your argument raises a serious constitutional question. Now, I'm not sure that the government would agree with that, but it – it is in the background of how we interpret this – how we interpret this statute.

Oral Arg. Tr. 18:7-13.

The Chief Justice's opinion framed the question presented as whether the ACA's "tax credits are available in States that have a Federal Exchange." Under Section 36B of the Internal Revenue Code (added by the ACA), a person purchasing insurance coverage under the ACA is entitled to receive a "premium assistance credit amount" (or what most persons call a "subsidy"). Section 36B (specifically, 26 U.S.C. §§ 36B(b)(2)(A) and (c)(2)(A)(i)), defines a "premium assistance amount" by reference to an insurance plan that is enrolled in through "an Exchange established by the State." Petitioners argued that the Federal Exchange is not an Exchange "established by the State" and that, therefore, subsidies were not available to any State resident who acquired insurance through the Federal Exchange.

The Chief Justice held that this was the “extraordinary” case where *Chevron* deference to the Internal Revenue Service’s interpretation of these four words was not appropriate.⁴⁷ He then held that the statutory text was ambiguous.⁴⁸ Once he crossed that threshold, the outcome was clear because the ACA was designed to provide coverage, not to penalize persons without coverage:

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988). Here, the statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very “death spirals” that Congress designed the Act to avoid. See New York State Dept. of Social Servs. v. Dublino, 413 U.S. 405, 419–420 (1973) (“We cannot interpret federal statutes to negate their own stated purposes.”)

(Footnote omitted.)

The Chief Justice explained that the ACA was designed to encourage healthy individuals to acquire insurance before they became sick, or else face a tax penalty, and then to provide subsidies to those individuals to make insurance affordable. Under petitioners’ reading of the law, tax credits would not be available and insurance

⁴⁷ “The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.” (Citation omitted.) A question by Justice Kennedy and a follow-up question by Chief Justice Roberts presaged this conclusion. Justice Kennedy asked: “Well, if it’s -- if it’s ambiguous, then we think about *Chevron*. But it seems to me a drastic step for us to say that the Department of Internal Revenue and its director can make this call one way or the other when there are, what, billions of dollars of subsidies involved here? Hundreds of millions?” Oral Arg. Tr. 74:16-22. The Chief Justice picked up on this theme in his conclusion and also ensured that the affirmative answer to the following question would not be used in the future to provoke more litigation about this part of the ACA. Directing this to the Solicitor General following Justice Kennedy’s exchange with the Solicitor General on *Chevron* deference, the Chief Justice asked: “If you’re right -- if you’re right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?” Oral Arg. Tr. 76:12-15.

⁴⁸ The Chief Justice looked at the definitions of “State,” “qualified individual,” and “Exchange” and the requirement of 42 U.S.C. § 18031(d)(2)(A) that all Exchanges (State and Federal) “shall make available qualified health plans to qualified individuals.” When applying these definitions, if petitioners’ argument were correct, there would be no qualified individuals on a Federal Exchange where the Act “clearly contemplates that there will be qualified individuals on every Exchange” (Emphasis in original.) There would also not be a “Federal Exchange” unless the word “Exchange” in Section 18031 included the Federal Exchange because Section 18041 requires the Secretary of Health and Human Services to establish the Federal Exchange by reference to Section 18031. “The upshot of all this is that the phrase ‘an Exchange established by the State under [42 U.S.C. §18031]’ is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to all Exchanges—both State and Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish ‘such Exchange.’ §18041. And by using the words ‘such Exchange,’ the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States’ citizens; the other type of Exchange would not.” (Emphasis in original. Footnote omitted.) The Chief Justice also looked at the ACA’s provisions for tax credits and concluded that they would not make much sense if the tax credits were not available on Federal Exchanges.

coverage would be ineffectual in States with a Federal Exchange, and that could result in pushing the individual insurance market into a “death spiral.”⁴⁹

It is implausible that Congress meant the Act to operate in this manner. See National Federation of Independent Business v. Sebelius, 567 U.S. ___, ___ (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) (slip op., at 60) (“Without the federal subsidies . . . the exchanges would not operate as Congress intended and may not operate at all.”). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well. (Footnote omitted.)

The Chief Justice bolstered his conclusion by focusing on the definition of “applicable taxpayer.” Suffice it to say here that this definition is not tied to whether a State had its own Exchange. But petitioners then argued that because there was no such nexus, Congress must have intended that an “applicable taxpayer” in a State with a Federal Exchange would be eligible for a tax credit. How much of one? After a tortuous journey through the minutiae of the ACA, petitioners concluded that the amount of the credit would be zero! The Chief Justice flatly rejected the argument:

We have held that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001). But in petitioners’ view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do. Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of “applicable taxpayer” or in some other prominent manner. It would not have used such a winding path of connect-the-dots provisions about the amount of the credit. (Footnote omitted.)

While nodding to the strength of a “plain-meaning” argument, Chief Justice Roberts explained that following the plain meaning here is untenable:

[T]he context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase. . . .

. . . Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid. . . .

⁴⁹ “One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U.S.C. §18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange.” (Citations omitted.) It is somewhat ironic that “death spiral” was the metaphor used to support the ACA’s goals, when “death panel” was a phrase coined to try to defeat passage of the law. See https://en.wikipedia.org/wiki/Death_panel.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

Justice Scalia's dissent was unforgiving: "The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.' That is of course quite absurd, and the Court's 21 pages of explanation make it no less so." Or as he put it later:

Words no longer have meaning if an Exchange that is not established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

(Citation omitted. Emphasis in original.) And Justice Scalia concluded with his view on the separation of powers:

The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give Congress "[a]ll legislative Powers" enumerated in the Constitution. Art. I, §1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that "[o]ur task is to apply the text, not to improve upon it."

(Citation omitted. Emphasis in original.)

And with respect to both *Sebelius* and *Burwell*, he offered this warning:

Perhaps the Patient Protection and Affordable Care Act will attain the enduring status of the Social Security Act or the Taft-Hartley Act; perhaps not. But this Court's two decisions on the Act will surely be remembered through the years. The somersaults of statutory interpretation they have performed ("penalty" means tax, "further [Medicaid] payments to the State" means only incremental Medicaid payments to the State, "established by the State" means not established by the State) will be cited by litigants endlessly, to the confusion of honest jurisprudence. And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.

Stare Decisis

Justice Scalia's numerous dissents may yet have impacts on the Court in the future. He wrote *Johnson v. United States* which demonstrates that dissents sometimes will eventually carry the day.

Johnson v. United States (2015)

Justice Scalia wrote this 8-1 decision (Justices Kennedy and Thomas concurred in the judgment and Justice Alito dissented) holding that the Armed Career Criminal Act of 1984 violates the Constitution's prohibition on vague criminal laws when it defines a "violent felony" as including, in a residual clause, "conduct that presents a serious potential risk of physical injury to another."

The Court had addressed this phrase in earlier cases but sustained the statute over Justice Scalia's dissents, as he himself explained:

We have held that the residual clause (1) covers Florida's offense of attempted burglary, James v. United States, 550 U.S. 192 (2007); (2) does not cover New Mexico's offense of driving under the influence, Begay v. United States, 553 U.S. 137 (2008); (3) does not cover Illinois' offense of failure to report to a penal institution, Chambers v. United States, 555 U.S. 122 (2009); and (4) does cover Indiana's offense of vehicular flight from a law-enforcement officer, Sykes v. United States, 564 U.S. 1 (2011). In both James and Sykes, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws. Compare James, 550 U.S., at 210, n. 6, with id., at 230 (SCALIA, J., dissenting); compare Sykes, 564 U.S., at ___ (slip op., at 13–14), with id., at ___ (SCALIA, J., dissenting) (slip op., at 6–8). (Emphasis in original.)

This time, Justice Scalia's view prevailed:

In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"...

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "otherwise involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

(Emphasis in original. Citations omitted.)

But in overruling *James* and *Sykes*, what about *stare decisis*? It must give way when the original precedents have done nothing but cause confusion:

The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable. Payne v. Tennessee, 501 U.S. 808, 827 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after Sykes tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction."

Although it is a vital rule of judicial self-government, stare decisis does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." Payne, supra, at 827. Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by James and Sykes would undermine, rather than promote, the goals that stare decisis is meant to serve.

(Citation omitted.)

CONCLUSION

This is a limited review of a seemingly unlimited number of decisions, but I hope it gives readers a sense of Justice Scalia's jurisprudence.

Supreme Court Justices do not live forever. But the legacy of some Supreme Court Justices will permeate the life of the institution. That is clearly the case with Justice Scalia.

/jmb

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude*) and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. He is also the recipient of one of the 2011 Burton Awards for Legal Achievement which honors lawyers for distinguished legal writing. Mr. Barkett has been a member of the Advisory Committee for Civil Rules of the Federal Judicial Conference since 2012. He served as a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility for the 2014-15 ABA year. He is also a member of the American Law Institute.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental, commercial, and reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, and the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals." He has served or is serving as a neutral in scores of matters involving in the aggregate more than \$4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He is a Fellow of the American College of Civil Trial Mediators.

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- *The First 100 Days (or so) of the 2015 Civil Rules Amendments* (forthcoming)
- *Cheap Talk? Witness Payments and Conferring with Testifying Witnesses* (ABA Webinar, October 2015)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar, September 30, 2015)
- *The Roberts Court 2014-15: Individual Rights, Voting Rights, Fair Housing, and the Importance of (Con)Text* (ABA Annual Meeting, Chicago, July 31, 2015)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (ABA National Institute on E-Discovery, May 15, 2015, New York)

- *Arbitration: Hot Questions, Cool Answers* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *The Roberts Court 2013-14: First Amendment, Equal Protection, Privacy, and More (or Less) Unanimity* (ABA Annual Meeting, Boston, August 7, 2014)
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