

FIRST AMENDMENT LAW REVIEW

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FIRST AMENDMENT LAW REVIEW

VOLUME 15

SYMPOSIUM 2017

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JUSTICE SCALIA AND THE FIRST AMENDMENT SYMPOSIUM INTRODUCTION

Mary-Rose Papandrea*

In October 2016, an extraordinary group of First Amendment scholars gathered in Chapel Hill, North Carolina to discuss the late Justice Antonin Scalia's First Amendment jurisprudence. Just eight months earlier, Justice Scalia had died suddenly after serving on the nation's highest court for almost thirty years. With an election looming, Senate Republicans refusing to take up the nomination of Merrick Garland to fill Scalia's vacant seat, and the ideological future of the Court hanging in the balance, this year's Symposium offered an opportune time to assess Scalia's impact on the Court's First Amendment jurisprudence.

Symposium contributors focused on his approach to the speech and religion clauses as well as his views on (and relationship with) the press. What emerges from this collection of insightful essays is that Justice Scalia's First Amendment legacy is multi-faceted but in many ways uncertain. While at times his First Amendment jurisprudence reflects his approach to other constitutional issues—with a focus on originalism, tradition, and the limited role of the judiciary—he sometimes clouded the clarity of the doctrinal rules he espoused with confusing exceptions and inconsistent applications of those rules from case to case. More fundamentally, some of our scholars suggest that a close examination of Scalia's jurisprudence reveals his failure to offer a more complete theoretical understanding of the true purposes of the First Amendment.

In his famous article *The Rule of Law as a Law of Rules*,¹ Justice Scalia explained that clear rules—rather than mushy balancing tests and “totality of the circumstances” tests—help to prevent judges from making decisions based on their own personal predilections, promote uniformity and predictability, and make it easier for judges to make “unpopular” results.² As Professor Ashutosh Bhagwat argues in *Free Speech and the “Law*

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¹ 56 U. CHI. L. REV. 1175 (1989).

² *Id.* at 1178–90.

of Rules,”³ Scalia attempted to put this approach into practice in some of his most notable freedom of expression opinions, including *Brown v. Entertainment Merchants*,⁴ *R.A.V. v. City of St. Paul, Minn.*,⁵ and government funding cases like *N.E.A. v. Finley*⁶ and *Legal Services Corp. v. Velazquez*.⁷

Bhagwat argues, however, that upon closer examination, the very foundation upon which the clear doctrine rules are based is suspect, and they do not lead to the sort of clear and predictable outcomes Scalia desired. In *Brown*, for example, Scalia contends that the Court cannot announce new categories of unprotected speech unless there is a historical tradition to support that conclusion.⁸ Given Scalia’s professed adherence to originalism, it is not entirely surprising he would embrace this sort of historical approach. As Bhagwat points out, however, Scalia runs into the very inconvenient problem that the historical support for the creation of a new category of graphic violent speech is rather similar to the (rather weak) historical support for the continuing recognition of obscenity as a category of unprotected speech. In *R.A.V.*, Scalia wrote for the Court that content-based distinctions within categories of unprotected speech are unconstitutional, but he went on to complicate this clear (if not doctrinally suspect) rule with various exceptions, which Bhagwat claims “added massive additional intricacy to free speech doctrine.”⁹ In the government funding cases, Scalia frequently argued that the First Amendment simply does not restrict the ability of the government to subsidize speech based on viewpoint, but in *Rosenberger v. Rectors and Visitors of University of Virginia*, joined Justice Kennedy’s opinion recognizing a First Amendment challenge to the administrative of a student activity fund.¹⁰ Rules are rules, except when they are not, Bhagwat argues.

³ 15 FIRST AMEND. L. REV. 159 (2017).

⁴ 564 U.S. 786 (2011).

⁵ 505 U.S. 377 (1992).

⁶ 524 U.S. 569, 590 (1998) (Scalia, J., concurring in the judgment).

⁷ 531 U.S. 533, 549 (Scalia, J., dissenting).

⁸ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

⁹ Ashutosh Bhagwat, *Free Speech and the Law of Rules*, 15 FIRST AMEND. L. REV. 159 (2017).

¹⁰ 515 U.S. 819 (1995).

Ultimately, Professor Bhagwat concludes that the reason Justice Scalia's attempts to create clear doctrinal rules in speech cases is ultimately unsuccessful is that he lacks a coherent theoretical "scaffolding" for these rules. This is in notable contrast to Scalia's approach to separation of powers and legislative intent questions. One possible reason for this failure, Bhagwat suggests, might be because Scalia's preferred approach to constitutional questions—originalism—does not offer meaningful guidance on many speech questions. In Scalia's defense, however, his failure to develop a theoretical basis for approaching speech questions is a problem that plagues the Court's modern First Amendment jurisprudence more generally.

In his article, *Justice Scalia and Abortion Speech*, Professor Timothy Zick offers fascinating insights into the relationship between free speech rights and other fundamental liberties.¹¹ Using Justice Scalia's abortion speech jurisprudence for a lens to view this potentially "dynamic" and multi-directional relationship, Zick commends Justice Scalia's criticisms that the Court's concern about the need to protect abortion rights sometimes clouded its analysis of free speech rights. At the same time, Zick points out that Justice Scalia's analysis of the dynamic between free speech rights and abortion rights was incomplete and one-directional. Scalia did not recognize that protecting free speech rights could also run the other way and impact the exercise of other fundamental liberties; for example, Zick points out, Scalia did not appear to appreciate that some harassing speech outside an abortion clinic can adversely impact the rights of women to obtain abortions. Furthermore, Zick points out that Scalia did not always stand up for the First Amendment in the abortion context, and he offers up *Rust v. Sullivan*¹² as a prime example. Zick concludes that Scalia's understanding of the dynamic between speech rights and other liberty interests was limited and failed to reflect the multi-faceted nature of that relationship.

In *Justice Scalia and Fourth Estate Skepticism*, Professor RonNell Andersen Jones focuses on Justice Scalia's attitude

¹¹ Timothy Zick, *Justice Scalia and Abortion Speech*, 15 *FIRST AMEND. L. REV.* 288 (2017).

¹² 500 U.S. 173 (1991).

toward the media.¹³ She argues that Scalia's increasingly negative view of the press reflected broader societal trends in the last thirty years. Rather than view the media as playing an important and perhaps "special" role in our democracy, Scalia instead expressed personal misgivings about the press. Although he loved to make speeches, he was not too happy to have media coverage and made *ad hominem* remarks about reporters covering the Supreme Court. He opposed cameras in the courtroom because he thought the press would try to present the Court's work as "entertainment." On a doctrinal level, Scalia said publicly that he thought *New York Times v. Sullivan*¹⁴ was incorrectly decided and should be overturned. Although it is unclear at this point what impact Scalia's negative views of the press will have in the future, Jones argues that they may have paved the way for future Court decisions rejecting claims for the right of access to government proceedings and documents, for newsgathering protections, for freedom from prior restraints, and even for the fundamental right to report on matters of public concern.

While Professors Bhagwat, Zick, and Jones focused on the First Amendment's speech or press clauses, Professors John Inazu and Caroline Mala Corbin focused their attention on Justice Scalia's religion clause jurisprudence.

In his article, *Peyote and Ghouls in the Night: Justice Scalia's Religion Clause Minimalism*, Professor John Inazu concludes that Justice Scalia's majority opinion in *Employment Division v. Smith*¹⁵ is—to borrow Scalia's famous line about the *Lemon* test—is "like some ghoul in a late night horror movie"¹⁶ that continues to stalk free exercise jurisprudence. Inazu argues that *Smith*'s minimalist holding that neutral laws of general applicability do not violate the Free Exercise Clause, while solidly entrenched in the Court's jurisprudence, raises both theoretical and doctrinal difficulties. On the theoretical side, *Smith* is consistent with Scalia's interest

¹³ RonNell Andersen Jones, *Justice Scalia and Fourth Estate Skepticism*, 15 FIRST AMEND. L. REV. 258 (2017).

¹⁴ 376 U.S. 254 (1964).

¹⁵ 494 U.S. 872 (1990).

¹⁶ John Inazu, *Peyote and Ghouls in the Night: Justice Scalia's Religion Clause Minimalism*, 15 FIRST AMEND. L. REV. 239 (2017) (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring)).

in deferring to legislative decision-making, but it is in tension with Scalia's concern for minority faiths.¹⁷ It is perhaps this theoretical tension that led Scalia down the path of doctrinal inconsistencies, Inazu speculates, pointing to Scalia's vote with the majority in *Hosanna-Tabor v. EEOC*.¹⁸ That case's recognition of a ministerial exception for religious organizations is hard to square with *Smith*'s holding that generally applicable rules do not violate the Free Exercise Clause. Inazu argues that Justice Scalia's minimalist approach to the Establishment Clause also suffers from similar theoretical and doctrinal difficulties.

Inazu points out that Justice Scalia's Establishment Clause legacy is much less certain. Despite his frequent pleas that the Court clarify its approach to Establishment Clause questions, the Court remains hopelessly muddled. In his dissents in *Edwards v. Aguillard*¹⁹ and *Board of Education of Village of Kiryas Joel v. Grumet*,²⁰ Justice Scalia argued that laws that have a secular basis do not violate the Establishment Clause. In other cases he colorfully attacked the *Lemon* test²¹ and the "coercion" test²² as endlessly manipulable tests that allow the Court to reach desired outcomes. Although Scalia had many thoughts on why the Court's various approaches were misguided, he failed to offer a new approach that had traction with the majority of the Court.

Professor Caroline Mala Corbin pulls no punches in her article, *Justice Scalia, the Establishment Clause, and Christian Privilege*.²³ Drawing on the analysis of "white privilege" in critical race studies, she creatively contends that Justice Scalia's approach to the religion clauses exemplifies "Christian privilege." Like those who exhibit white privilege, she argues,

¹⁷ 540 U.S. 712, 733 (2004) (Scalia, J., dissenting) (expressing concern for discrimination against a religious minority).

¹⁸ 565 U.S. 171 (2012).

¹⁹ 482 U.S. 578, 621 (1987) (Scalia, J., dissenting).

²⁰ 512 U.S. 687, 738, 752 (1994) (Scalia, J., dissenting).

²¹ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., dissenting) (criticizing the Court's selective invocation of the *Lemon* test by colorfully comparing the test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.").

²² *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (criticizing the majority's coercion test as "a boundless, and boundlessly manipulable, test").

²³ Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 *FIRST AMEND. L. REV.* 185 (2017).

Justice Scalia views Christianity as the default “norm;” he assumes his perspective is the universal perspective and rejects other conflicting views and demonstrates hostility when his Christian perspective is questioned. Corbin also contends that Justice Scalia’s form of originalism is “privilege in action” because it rests on a “false claim of objectivity” and tends to “reinforce a status quo that favors the privileged.”

Professor Michael Gerhardt offers a wide lens on the potential constitutional legacy of Justice Scalia.²⁴ Although the sheer volume of the number of opinions Scalia wrote for the Court is impressive, Gerhardt points out, even more noteworthy is the quality of those writings. Some of Scalia’s colleagues have said he is one of the best writers the Court has ever seen. His memorable writing style seems intended for a larger audience; his rhetoric is more vivid, passionate, and colorful than most judicial writing. This writing style is consistent with the aggressive and combative temperament Scalia demonstrated when he sat on the bench. Scalia’s writing and temperament are important parts of his legacy, but in the long run, Gerhardt argues, what truly matters is whether his ideas can stand the test of time. That in large part will depend upon whether the President appoints future Supreme Court Justices who are sympathetic to the methodologies and doctrines Scalia embraced while he served on the Court.

These articles make a substantial contribution to the scholarly literature. Not only do they offer insights on Justice Scalia’s approach to the First Amendment, but they also reflect the broader struggle of the Court to deal with fundamental questions about the purposes and theoretical foundation of the amendment’s various clauses. How Justice Scalia’s legacy will factor into the resolution of these difficult questions in the future remains to be seen, but at least after reading the articles in this Symposium, we have a better appreciation for exactly what his legacy is.

First Amendment Law Review Symposium Editors Hannah Combs and Ryan Arnold must be commended for their exceptional and tireless work putting together this Symposium

²⁴ Michael J. Gerhardt, *Justice Scalia’s Legacies*, 15 FIRST AMEND. L. REV. 221 (2017).

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FREE SPEECH AND “A LAW OF RULES”

Ashutosh Bhagwat*

INTRODUCTION

In 1989, Justice Antonin Scalia published an essay in the University of Chicago Law Review titled *The Rule of Law as a Law of Rules*, based on the Oliver Wendell Holmes, Jr. lecture that Justice Scalia delivered at Harvard in February of that year.¹ The basic thesis of the essay is that judge-made law, especially law declared by the Supreme Court, should to the extent possible consist of clear rules rather than discretionary standards.² Moreover, Justice Scalia’s commitment to clear rules was not a merely academic argument, it was also a hallmark of his work during his three decades as a Supreme Court justice. Nowhere was this truer than in Justice Scalia’s First Amendment jurisprudence.

In this essay, I will explore how Justice Scalia’s commitment to rules over standards influenced—indeed, arguably dominated—his free-speech decisions. I will show that almost every influential free speech opinion authored by Justice Scalia, both for the majority and when writing separately, was deeply shaped by his need to articulate a clear, doctrinal rule to justify the result he supported. Moreover, I will argue that the reasons Justice Scalia articulated for generally preferring rules over standards apply especially strongly in the free speech arena—as Justice Scalia appears to have recognized.

Ultimately, however, Justice Scalia was confronted by a problem. In area after area of free speech law, Justice Scalia’s quest to find clear, simple, and objective rules ran into difficulties, because of the messiness of many free speech conflicts. The result was a jurisprudence notable more for its convoluted nature and for its undefended and artificial distinctions than for clarity.

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¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

² *Id.* at 1777-80.

I begin by examining the reasoning behind Justice Scalia's general preference for rules over standards. I then explore three areas where Justice Scalia wrote important or noteworthy free speech opinions: sex and violence, hate speech, and government funding of speech. In each of these areas, I will argue, Justice Scalia tried valiantly to articulate clear and objectively defensible doctrinal rules—and in each of these areas he ultimately failed. I conclude by considering why it is that Justice Scalia's quest for clear rules failed in the free speech arena. The ultimate lesson from all of this, I will argue, is that while there is certainly much to be said in favor of simple, clear rules, such rules cannot emerge out of nowhere. Instead, creating such a system requires an underlying theoretical framework, which in turn shapes the rules. However, free speech law currently lacks such a framework, and therefore a coherent set of rules. This may well be why in a notably influential career, Justice Scalia's contributions to free speech law were so limited.

I. A LAW OF RULES

The basic question that Justice Scalia addressed in his University of Chicago essay was, in his own words, the “dichotomy between ‘general rule of law’ and ‘personal discretion to do justice.’”³ Ultimately, as his title of course implies, Justice Scalia came out strongly in favor of the “general rule of law” and against flexible standards that permit judges to exercise discretion based on the specific facts of a case. In the course of the essay, he articulated several reasons for preferring rules over standards. First, he noted that rules enhance the uniformity and predictability of the law, especially in a system where the highest court (his court) can only hear a tiny fraction of the cases litigated in the legal system.⁴ Second, he argued that clear rules constrain judges in future cases, and so make it harder for judges to decide later cases based on the judge's own “political or policy preferences.”⁵ Finally, he suggested that, perhaps counterintuitively, clear rules make it easier for judges

³ *Id.* at 1176.

⁴ *Id.* at 1178–79.

⁵ *Id.* at 1179–80.

to announce unpopular results, because they provide a “solid shield of a firm, clear principle enunciated in earlier cases.”⁶

Each of these rationales appears in Justice Scalia’s jurisprudence, but there is no doubt that the second—the value of rules as a bulwark against political or biased judicial decision-making—was ultimately the dominant driving force behind his disdain for standards. His most famous articulation of this principle appeared in what is arguably his most influential opinion: his solo dissent in *Morrison v. Olson*⁷ (which not coincidentally was decided in 1988, just a year before the Chicago essay was published).⁸ Objecting vehemently (how else?) to the majority’s decision to uphold the independent counsel provisions of the Ethics in Government Act of 1978, Justice Scalia began his dissent with the comment “[i]t is the proud boast of our democracy that we have ‘a government of laws and not of men.’”⁹ He then accused the majority of “replac[ing] the clear constitutional prescription that the executive power belongs to the President with a ‘balancing test’”¹⁰—which, needless to say, was not a compliment. Finally, he closed his dissent with this statement:

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. . . . 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,

⁶ *Id.* at 1180. One wonders if Justice Scalia had in mind *Texas v. Johnson*, 491 U.S. 397 (1989), which was argued and decided in the spring of 1989, and in which Justice Scalia provided the fifth vote to strike down Texas’s flag desecration statute, a notably controversial and unpopular result.

⁷ 487 U.S. 654 (1988).

⁸ *Id.* at 697 (1988) (Scalia, J., dissenting).

⁹ *Id.*

¹⁰ *Id.* at 711.

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.¹¹

This passage is probably the most eloquent statement of the importance of clear and well-defined rules in the history of the Supreme Court. And, it is worth remembering that essentially all of Justice Scalia's lonely warnings in *Morrison* came to fruition, ironically, during the Starr investigation of President Bill Clinton, resulting in the independent counsel law falling into such utter disrepute that Congress permitted it to expire in 1999.¹²

Justice Scalia's disdain for balancing tests certainly did not end, or even reach its peak in the 1980s. His later pronouncements in this regard are perhaps more caustic, and less poetic, but equally on point. For example, in 2001 in *United States v. Mead Corporation*,¹³ an administrative law case, Justice Scalia, again alone, dissented from the majority's decision to limit the scope of so-called *Chevron* deference that administrative agencies receive when interpreting regulatory statutes.¹⁴ In particular, he accused the majority of replacing a clear rule "with the test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test."¹⁵ He went on to predict that the consequences of the majority's approach would be "protracted confusion"¹⁶ (he was right¹⁷), and would be "enormous, and almost uniformly bad"¹⁸ (the jury is still out on that).

¹¹ *Id.* at 733–34.

¹² Robert Suro, *Power Shifts to Reno Without Special Counsel*, WASH. POST (June 30, 1999), <http://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel063099.htm>.

¹³ 533 U.S. 218 (2001).

¹⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

¹⁵ *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

¹⁶ *Id.* at 245.

¹⁷ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

¹⁸ 533 U.S. at 261 (Scalia, J., dissenting).

In addition to the separation of powers and administrative law, Justice Scalia unsurprisingly expressed disdain for balancing tests in many other areas of law.¹⁹ But now it is time to turn to our topic, the First Amendment, and in particular, free speech. In the remainder of this paper, I will discuss how Justice Scalia applied his rule-of-law approach in free speech cases, and consider whether he was successful. But as a preliminary matter it is worth noting one point: Every one of Justice Scalia’s arguments in favor of “a law of rules” applies fully, and indeed particularly strongly, to free speech.

Consider first the values of uniformity and predictability. Both are of course important values across the legal spectrum—but they are especially important for free speech law. The reason is that private speech, especially noncommercial speech, is particularly susceptible to what the Court has called a “chilling effect.”²⁰ In the face of legal uncertainty regarding the scope of First Amendment protections, potential speakers may choose to remain silent because of fear of prosecution even though after adjudication their speech would most likely have been found to be constitutionally protected. Political and ideological speech is particularly subject to being chilled because it is public and often unremunerated, and the chilling effect on speech is particularly problematic for society because of “the transcendent value to all society of constitutionally protected expression.”²¹ This is the reason why the Court has created an exception to general requirements of standing for free speech plaintiffs under the rubric of the “overbreadth” doctrine;²² and it is why, more broadly, free speech law is most effective when it consists of clear rules rather than discretionary, and unpredictable standards.

¹⁹ See, e.g., *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2517 (2014) (Scalia, J., dissenting) (accusing the majority, in applying the Copyright Act to a new technology, of adopting “nothing but th’ol’ totality-of-the-circumstances test (which is not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation)”; *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 127 (2008) (Scalia, J., dissenting) (rejecting “the Court’s totality-of-the-circumstances (so-called) ‘test’” in an ERISA case).

²⁰ See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

²¹ *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

²² *Id.*

Justice Scalia's second rationale for preferring rules over standards was that clear rules tend to prevent judges from deciding cases based on their own political or ideological predilections. Again, this consideration is particularly relevant to free speech. After all, while ideological factors play a role in many areas of law, especially constitutional law, they are most likely to be relevant in free speech cases, especially cases involving speech on matters of public concern. The danger, of course, is that courts will protect only speech they agree with, while permitting suppression of ideologies they find threatening or subversive. Consider in this regard *Dennis v. United States*.²³ In *Dennis*, the Court affirmed the convictions of the leadership of the Communist Party of the United States under the Smith Act, which criminalized advocating or teaching "the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence."²⁴ There can be little doubt that the Court's decision was deeply influenced by the fact that the justices in the majority found Communist ideology both threatening and subversive. *Dennis* is generally considered an archetypal example of the Court invoking balancing methodology—in particular, watering down the Holmes/Brandeis "Clear and Present Danger" test into a cost/benefit calculation²⁵—to balance away the rights of political speakers.²⁶ More recently, in *Holder v. Humanitarian Law Project*,²⁷ the Court relaxed its traditionally highly-stringent strict scrutiny analysis to balance away the free speech rights of individuals who sought to provide training to designated Foreign Terrorist Organizations on "how to use humanitarian and international law to *peacefully* resolve disputes."²⁸ It seems fairly clear that neither result would have been reached if the Court had adhered to the clear rule, announced after *Dennis* but implicit in the pre-*Dennis* opinions of Justices Holmes and Brandeis that the *Dennis*

²³ 341 U.S. 494 (1951).

²⁴ *Id.* at 496.

²⁵ *Id.* at 510 ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.").

²⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 453-54 (1969) (Douglas, J., concurring) (describing *Dennis* as "distorting" the Clear and Present Danger test).

²⁷ 561 U.S. 1 (2010).

²⁸ *Id.* at 14. (emphasis added).

Court purported to follow,²⁹ that speech advocating illegal action may be prosecuted only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁰ Admittedly, Justice Scalia joined the majority opinion in *Holder* and thereby (in my opinion) deviated from his jurisprudential principles; but the principles remain sound.

Finally, we come to the question of unpopular decisions. There is obvious overlap between this consideration and the last one (since speakers that judges do not like are also likely to be broadly unpopular), but regardless, clear rules undoubtedly play a distinct and important role in fortifying the Court to protect unpopular, even vile, political speakers. An obvious example of this is the *Brandenburg* decision in which the Court announced the current, strict test (quoted above) protecting advocacy of violence.³¹ In that case, the Court reversed the Criminal Syndicalism conviction of a Ku Klux Klan leader—by 1969 a largely reviled organization—after years of failing to protect other harmless but unpopular speakers such as communists and anarchists.³² Concurring, Justice Douglas explicitly tied the Court’s (belated) willingness to protect such unpopular speakers to its abandonment of the “free-wheeling” (*i.e.*, discretionary) test of *Dennis*;³³ and there is much to be said for his argument, though the results in *Brandenburg* and subsequent cases also undoubtedly reflect changing social attitudes and conditions. Another example of the Court relying on a clear rule to reach a wildly unpopular result was *Texas v. Johnson*,³⁴ where the Court reversed the conviction of a protestor who burned the American flag by invoking the almost absolute modern presumption

²⁹ See *Dennis*, 341 U.S. at 505–07.

³⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³¹ *Id.*

³² See, *e.g.*, *Scales v. United States*, 367 U.S. 203 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

³³ See *Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring).

³⁴ 491 U.S. 397 (1989).

against content-based regulations of speech.³⁵ The dissenting opinions in that case, in contrast, advocated a fuzzy standard under which the special status of the flag justified deviation from standard First Amendment rules.³⁶ Finally, in *Snyder v. Phelps*³⁷ the Court invoked the equally strong First Amendment presumption against punishing speech on matters of public concern to reverse a massive damages award against an extremely unpopular, and thoroughly vile, group that regularly protested at military funerals.³⁸ There is little doubt that if flexible standards had been applied under which the law is “what it *ought* to be,”³⁹ all three of these cases would have come out differently.

II. SEX AND VIOLENCE

To this point, I have described Justice Scalia’s longstanding commitment to clear rules over discretionary standards, and I have argued that the reasons underlying his commitment are peculiarly relevant to free speech law. I now turn to Justice Scalia’s own contributions to free speech jurisprudence, to see how his commitment to rules played out in this arena. The answer, in brief, is that it’s complicated.

Let us begin with what is probably one of Justice Scalia’s two most important majority opinions on free speech,⁴⁰ *Brown v. Entertainment Merchants Association*.⁴¹ In *Brown*, the Court struck down a California statute banning the sale or rental of violent video games to minors.⁴² The reasoning is vintage Scalia, eschewing all fuzzy standards and instead moving from one simple principle to another. First, he articulated two clear rules: that the First Amendment protects entertainment as well as political expression because there is no way to easily distinguish

³⁵ *Id.* at 412. I say “almost” because of *Holder v. Humanitarian Law Project*, 56 U.S. 1 (2010), where the Court abandoned its clear rule, and predictably reached a popular but problematic result.

³⁶ *See id.* at 434 (Rehnquist, C.J., dissenting), 438–39 (Stevens, J., dissenting).

³⁷ 562 U.S. 443 (2011).

³⁸ *Id.* at 451–52.

³⁹ *See Morrison v. Olson*, 487 U.S. 654, 733–34 (1988) (Scalia, J., dissenting).

⁴⁰ The other is *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), discussed in the next section.

⁴¹ 564 U.S. 786 (2011).

⁴² *Id.* at 804–05.

the two,⁴³ and that it protects all communications technologies equally.⁴⁴ As a result, video games are fully protected speech.⁴⁵ He then turned to the question of whether the fact that the speech regulated here is *violent* speech directed at minors exempts it from constitutional protection.⁴⁶ He said it does not, and again, his reasoning was entirely rule-based.⁴⁷ Reaffirming the previous Term’s decision in *United States v. Stevens*,⁴⁸ Justice Scalia firmly rejected the view that categories of unprotected speech can be created using “a ‘simple balancing test,’”⁴⁹ holding instead that such categories must be based on historical tradition—a (seemingly) objective rule.⁵⁰ He also rejected California’s attempted analogy to the law of obscenity, noting that historically obscenity was limited to sex.⁵¹ He concluded therefore that since there is no historical tradition of restricting children’s access to violence, there can be no category of unprotected speech justifying California’s statute.⁵² Finally, Justice Scalia invoked the long-standing presumption against content-based regulations of speech to strike down the California law.⁵³ Thus, moving from clear, simple rule to clear, simple rule, he reached the (perhaps surprising) conclusion that minors have a broad, constitutional right to access even highly violent speech.

The decision in *Brown* on its face appears to be a perfect example of applying clear First Amendment rules to protect unpopular speech—a poster child for a law of rules. Appearances, however, can be deceiving. And underneath Justice Scalia’s simple rules lie many unanswered questions. California had written its statute to consciously mimic a New York statute that the Court had previously upheld, prohibiting the sale to minors of materials obscene as to minors.⁵⁴ It was therefore critical for Justice Scalia’s reasoning to distinguish

⁴³ *Id.* at 790.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 795-96.

⁴⁷ *Id.* at 796.

⁴⁸ 559 U.S. 460 (2010).

⁴⁹ *Brown*, 564 U.S. at 792 (quoting *Stevens*, 559 U.S. at 470).

⁵⁰ *Id.*

⁵¹ *Id.* at 792-93.

⁵² *Id.* at 794-96.

⁵³ *Id.* at 799-804.

⁵⁴ *Id.* at 793 (citing *Ginsburg v. New York*, 390 U.S. 629 (1968)).

unprotected obscenity from protected violent speech, based on an appeal to history. The problem, as Geoffrey Stone has recently and convincingly demonstrated, is that the historical evidence that obscenity was considered unprotected speech at the time of the ratification of the First Amendment is in fact extremely weak.⁵⁵ Widespread regulation of obscenity was rather a product of grocer Anthony Comstock's political campaigns in the 1860s, not the Framing era.⁵⁶ It is true that from the 1860s to the modern era (at least until the growth of the Internet), obscenity was vigorously suppressed. But as Justice Scalia's opinion implicitly admits by citing examples, during this period there were also recurring and widespread attempts to shield minors from violent speech.⁵⁷ So, the clear history-based "rule" underlying *Brown* turns out to have shaky foundations.

Nor do the problems end there. One of the striking aspects of *Brown* is its extension of almost complete First Amendment rights to children. But the only case Justice Scalia cited to support this proposition⁵⁸ was primarily about a city's power protect all citizens from offense, by banning nudity in drive-in movies visible from a public place,⁵⁹ not about the rights of children; and even the discussion of children's First Amendment rights in *Erznoznik* did not purport to equate adults' and children's free speech rights.⁶⁰ Moreover, in other areas of constitutional litigation, such as abortion, the Court has been more willing to uphold parental consent requirements⁶¹ (which the California statute effectively was, since it permitted parents and close relatives to buy violent video games for minors). We are thus left unclear as to why the "rule" in this context is that children are full rights-bearers, but not in others—a particularly notable omission given that Justice Thomas dissented in *Brown* precisely

⁵⁵ Geoffrey R. Stone, *Sex, Violence and the First Amendment*, 74 U. CHI. L. REV. 1857, 1861–63 (2007).

⁵⁶ *Id.* at 1865.

⁵⁷ *Brown*, 564 U.S. at 797–98 (discussing 19th century efforts to condemn time novels and "penny dreadfuls," as well as later campaigns against violence in movies and comic books).

⁵⁸ *Id.* at 794 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975)).

⁵⁹ *Erznoznik*, 422 U.S. at 208.

⁶⁰ *See id.* at 208, 213.

⁶¹ *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992).

on the grounds that historically children had no rights to bypass parental authority.⁶²

Indeed, the uncertain sources of the clear rules Justice Scalia invoked in the free-speech arena are not limited to *Brown*; they also pervaded his jurisprudence regarding sexually oriented expression. One striking example emerged in a series of cases spanning his long career, involving challenges to regulations of businesses distributing non-obscene, and so presumably constitutionally protected, but sexually-oriented materials. In each case, Justice Scalia wrote separately, arguing that even though the regulations at issue clearly discriminated against speech based on its content, the laws should still not receive close judicial scrutiny (so much for the “clear rule” of *Brown*) because the Constitution does not protect “commercial entities which engage in ‘the sordid business of pandering.’”⁶³ Indeed, in several more recent opinions Justice Scalia asserted that “[w]e have recognized” this rule, “we” referring presumably to the Court.⁶⁴ In truth, however, the Court as a whole has *never* recognized such a rule, and no other justice has expressed agreement with it. Justice Scalia’s citations in these cases are to his own separate opinions, to one majority opinion from the 1960s—*Ginzburg v. United States*⁶⁵—as well as a handful of cases that applied the *Ginzburg* decision.⁶⁶ The problem is that neither *Ginzburg* nor its progeny ever held that the business of “pandering” was automatically outside the First Amendment. They only held that evidence that the defendant “pandered” the materials at issue—i.e., emphasized their salacious nature—could be considered by

⁶² *Brown*, 564 U.S. at 821–39 (Thomas, J., dissenting).

⁶³ *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting) (quoting *United States v. Playboy Entm’t. Grp.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting)); *see also* *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 443 (2002) (Scalia, J., concurring in part and dissenting in part); *United States v. Playboy Entm’t. Grp.*, 529 U.S. 803, 831–32 (2000) (Scalia, J., dissenting); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part).

⁶⁴ *Ashcroft*, 542 U.S. at 676 (Scalia, J., dissenting) (quoting *Playboy Entm’t Grp.*, 529 U.S. at 831 (Scalia, J., dissenting)).

⁶⁵ 383 U.S. 463 (1966).

⁶⁶ *See, e.g., FW/PBS, Inc.*, 493 U.S. at 256 (Scalia, J., concurring in part and dissenting in part); *Pinkus v. United States*, 436 U.S. 293, 303–04 (1978); *Splawn v. California*, 431 U.S. 595, 598–601 (1977); *Hamling v. United States*, 418 U.S. 87, 130 (1974); *Playboy Entm’t Grp.*, 529 U.S. at 831–32 (Scalia, J., dissenting) (citing *Ginzburg*, 383 U.S. 463, 467 (1966)).

the jury in making the ultimate determination of whether the materials at issue were obscene under the prevailing legal standard.⁶⁷ But the convictions in all of those cases were for distributing obscene materials, *not* pandering non-obscene speech, and the *Ginzburg* Court emphasized that its “analysis simply elaborates the test by which the obscenity vel non of the material must be judged.”⁶⁸ Furthermore, in no other area of First Amendment law has the Court even hinted that the commercial distribution of protected materials may be punished, even if the underlying material may not be suppressed. Indeed, such a rule is inconceivable given the importance of the commercial press and commercial publishers to our national dialogue. So, Justice Scalia’s clear “rule” emerged out of nowhere, based on an underlying assumption—sex is different—that also has little historical basis.

Why then did Justice Scalia walk this path? The answer, I think, must lie in the essentially intractable nature of obscenity doctrine. The modern definition of obscenity, adopted in 1973 in *Miller v. California*, is a three-part “test” that requires judgments regarding the challenged materials’ “prurient interest,” “patently offensive” nature, and “serious . . . value.”⁶⁹ This is not so much a rule as an open-ended judgment, highly discretionary in nature, and so inevitably driven by the eyes of the beholder—a point that Justice Scalia himself once made with respect to the “value” prong of *Miller*.⁷⁰ It is the antithesis of a law of rules. But it is well-settled doctrine, and in any event, decades of struggle by the Court prior to *Miller* suggest that no clearer definition, no “rule,” is possible here.⁷¹ The *Miller* test also defines obscenity narrowly, to ensure that valuable speech is not suppressed in the name of obscenity regulation (as happened often prior to the modern era⁷²). The result, however, is to hamstring the ability of local

⁶⁷ See, e.g., *Ginzburg*, 383 U.S. at 470–71; *Splawn*, 431 U.S. at 598–99.

⁶⁸ *Ginzburg*, 383 U.S. at 475.

⁶⁹ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁷⁰ *Pope v. Illinois*, 481 U.S. 497, 504–05 (1987) (Scalia, J., concurring).

⁷¹ See, e.g., *Memoirs v. Massachusetts*, 381 U.S. 413 (1966) (reversing an obscenity conviction in a case producing 7 different opinions, and no majority).

⁷² See, e.g., *Commonwealth v. Friede*, 171 N.E. 472 (1930) (suppressing as obscene Theodore Dreiser’s “An American Tragedy”); KEVIN BIRMINGHAM, *THE MOST DANGEROUS BOOK: THE BATTLE FOR JAMES JOYCE’S ULYSSES* (2015) (describing obscenity prosecutions of *Ulysses*).

communities to restrict businesses which specialized in highly sexual but non-obscene materials—a situation that Justice Scalia bemoaned in his first opinion in this line of cases.⁷³ Basically, faced with fairly clear rules that created what Justice Scalia considered (reasonably enough) a socially problematic result, he crafted a new, narrow, but essentially made-up rule (that the Constitution does not protect “the sordid business of pandering”) to avoid the result.

Consider finally Justice Scalia’s separate opinions in the Court’s two “nude dancing cases.”⁷⁴ In each case, Justice Scalia argued that (a) laws regulating conduct in order to prevent noncommunicative harms, with only an incidental impact on expression, should not receive any heightened scrutiny; and (b) laws banning nudity do not target expression.⁷⁵ As such, applying nudity laws to prohibit nude dancing raised no First Amendment issues. While it has never garnered majority support, rule (a) above is surely a clear rule, and so concededly consistent with “a law of rules” philosophy. But rule (b) is problematic at best. In *City of Erie*, Justice Scalia conceded that the ordinance at issue might have been specifically targeted at nude dancing, not nudity generally⁷⁶ (it surely was⁷⁷), and that the city’s stated reason for adopting the law—to control the blight associated with nude dancing—was disingenuous at best.⁷⁸ Yet he remained convinced that the goal of the statute was not based on hostility to the message communicated by nude dancing, but rather it was “to foster good morals.”⁷⁹ But isn’t it possible, indeed likely, that the “morals” being fostered here are opposition to eroticism, precisely the “message” communicated

⁷³ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 251–52 (1990) (Scalia, J., concurring in part and dissenting in part).

⁷⁴ *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 302 (2000) (Scalia, J., concurring); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring).

⁷⁵ *City of Erie*, 529 U.S. at 307–10 (Scalia, J., concurring); *Barnes*, 501 U.S. at 573–74, 576 (Scalia, J., concurring).

⁷⁶ *City of Erie*, 529 U.S. at 310 (Scalia, J., concurring).

⁷⁷ *Id.* at 318 (Stevens, J., dissenting) (“[T]he council of the city of Erie enacted the restriction at issue ‘for the purpose of limiting a recent increase in nude live entertainment within the City.’”).

⁷⁸ *Id.* at 310 (Scalia, J., concurring) (“I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.”).

⁷⁹ *Id.*

by the dancing? Ultimately, as in the cases involving regulation of sexually oriented businesses, Justice Scalia resolved the issues based on a “rule” whose basis and scope remain far from clear.

A critic might argue that I am being unfair to Justice Scalia. After all, even if the roots of the rules he applied in the above-discussed cases are not clear, they are still *rules* and so perform the functions of a law of rules. But that is not so. Remember the underlying arguments for rules: They enhance uniformity and predictability, they constrain judges, and they make it easier to announce unpopular results, with the second argument being the most significant.⁸⁰ The difficulty is that if judges can announce narrow, tailor-made rules created out of whole cloth, and worse, if those rules can be used to justify suppression of specific speech content, then the constraint argument has evaporated. Justice Scalia’s narrow rules disfavor sexual speech. But the same approach might be invoked to justify special rules for subversive speech (as was true before *Brandenburg*⁸¹). It also could be used to create a special rule for racist speech, a position advocated by many academics⁸² but not, as we shall next see, Justice Scalia. The problem, in short, is that clear rules without any methodology backing them up are as susceptible to political and ideological manipulation as the mushy standards that Justice Scalia quite rightly excoriated.⁸³ And the problem is exaggerated when those clear rules become extraordinarily narrow and convoluted, because then rules can be created which, in practice, affect only a very few cases, thus substantially reducing their constraining effect. Which takes us to our next topic.

III. HATE SPEECH AND EPICYCLES

⁸⁰ Scalia, *supra* note 1, at 1179–80.

⁸¹ See *Brandenburg*, 395 U.S. at 447.

⁸² See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010).

⁸³ See *Morrison v. Olson*, 487 U.S. 654, 733–34 (1988) (Scalia, J., dissenting) (describing a standards-based approach to the separation of powers as “ungoverned by law”).

Aside perhaps from *Brown v. Entertainment Merch. Ass’n*,⁸⁴ Justice Scalia’s most important contribution to the law of free speech was undoubtedly his 1992 opinion for the Court in *R.A.V. v. City of St. Paul*.⁸⁵ The facts of *R.A.V.* are simple and stark. R.A.V., a minor, burned a cross on the lawn of a black family that lived across the street from him.⁸⁶ That this act of terrorism was punishable no one doubted, including Justice Scalia.⁸⁷ However, the Court found that the *law* St. Paul prosecuted R.A.V. under was unconstitutional.⁸⁸ The statute at issue, titled “Bias-Motivated Crime Ordinance,” read as follows:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.⁸⁹

The Court concluded that because the ordinance only prohibited words that insult or provoke “on the basis of race, color, creed, religion or gender,” it in effect discriminated against speech based on content and viewpoint (since only bigoted speech was prohibited).⁹⁰ Thus far, the case looks like a simple application of the Court’s long-standing presumption against content-based regulation of speech, as well as the near-absolute prohibition of viewpoint-based regulation, and so it should have been a simple and unanimous decision. It was anything but.

The difficulty the Court (and Justice Scalia) faced was that the Minnesota Supreme Court had adopted a binding construction of the St. Paul ordinance, limiting its reach to “fighting words,” a category of speech that the Court has long

⁸⁴ 564 U.S. 786 (2011).

⁸⁵ 505 U.S. 377 (1992).

⁸⁶ *Id.* at 379.

⁸⁷ *Id.* at 379–80, 380 n.1 (stating “this conduct could have been punished under any of a number of laws” and listing clearly constitutional laws R.A.V. violated).

⁸⁸ *Id.* at 391.

⁸⁹ *Id.* at 380 (quoting ST. PAUL, MINN. CODE OF ORDINANCES § 292.02 (1990)).

⁹⁰ *Id.* at 391.

held to be unprotected by the First Amendment.⁹¹ Until *R.A.V.*, the general understanding (which the Minnesota court followed) had been that the prohibitions on content and viewpoint discrimination applied only to regulations of *protected* speech, not unprotected speech such as fighting words.⁹² In *R.A.V.*, Justice Scalia rejected this longstanding (albeit unarticulated) assumption. Instead, the Court held that calling categories of expression unprotected means that they “can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”⁹³ This holding in itself added a major complication to free speech law. But the complexity did not end there. Justice Scalia went on to state that not all content discrimination within unprotected categories is suspicious.⁹⁴ Instead, he identified three exceptions to his new rule.⁹⁵ First, he explained that

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.⁹⁶

Second, a law may discriminate against “even a content-defined subclass of proscribable speech [if] that . . . subclass happens to

⁹¹ *Id.* at 380–81 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Fighting words are defined as those “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky*, 315 U.S. at 572.

⁹² *R.A.V.*, 505 U.S. at 380–381.

⁹³ *Id.* at 383–84 (emphasis in original).

⁹⁴ *See id.* at 387 (“Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech.”).

⁹⁵ *Id.* at 388–89.

⁹⁶ *Id.* at 388.

be associated with particular ‘secondary effects’ of the speech.”⁹⁷ Third, “a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.”⁹⁸ Finally, the Court prevaricated further by suggesting that these exceptions may not be unique.⁹⁹ Rather, “so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot,” it may be permissible.¹⁰⁰

Justice Scalia’s recognition of these exceptions, as should be obvious, added massive additional intricacy to free speech doctrine. Moreover, the last potential, open-ended exception largely converted what had been at least a rule (albeit a very complicated one) into more of a standard. Nonetheless, given his first doctrinal move, the later complications were inevitable. The reason is that content-based distinctions are ubiquitous in regulating unprotected or low-value speech. Many laws, for example, regulate fraud in the sale of one particular service or product, not fraud generally—but that is a content-based distinction.¹⁰¹ Similarly, few would argue that laws that impose restrictions only on commercial advertising of, for example, alcohol trigger strict scrutiny.¹⁰² Indeed, the language of *R.A.V.* and subsequent developments make clear that the exceptions recognized by Justice Scalia in *R.A.V.* are very real. Most notably, in *Virginia v. Black* the Court invoked the first *R.A.V.* exception to (mostly) uphold a Virginia statute banning cross burning, on the theory that cross burning, because of its historical association with KKK violence, was an especially virulent form of “true threats” (another unprotected category).¹⁰³ In *R.A.V.* Justice Scalia also suggested that the application of Title VII’s prohibition on sex discrimination to ban “sexually derogatory ‘fighting words’” from the workplace was permissible under the

⁹⁷ *Id.* at 389.

⁹⁸ *Id.*

⁹⁹ *See id.* at 390.

¹⁰⁰ *Id.* at 390.

¹⁰¹ *See, e.g.*, Securities Exchange Act of 1934, §10(b), *codified at* 15 U.S.C.A. §78j(b) (West 2016) (prohibiting use of manipulative or deceptive devices in sale of securities).

¹⁰² *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1994) (applying intermediate scrutiny to law prohibiting beer labels from displaying alcohol content).

¹⁰³ 538 U.S. 343, 359–60 (2003).

third exception.¹⁰⁴ The key point here is that the exceptions recognized by the *R.A.V.* Court were as essential an aspect of the holding as the broader rule that content discrimination within unprotected categories triggers strict judicial scrutiny.

R.A.V. and its progeny arguably represent the most prominent example in free speech law of what one might call the “epicycles” approach to doctrine:¹⁰⁵ a body of rules which are clear enough on their own terms, but are necessarily extraordinarily complex in order to either match physical reality or (in this case) produce acceptable results. The problem with an epicycle-based approach to rules is much the same as an approach to rules lacking a methodological basis—it fails to protect the values that rules should advance. As *Virginia v. Black* illustrates, numerous and complicated exceptions permit judges to avoid the ideologically unpleasant consequences of supposedly clear rules, and also substantially undermine predictability. *R.A.V.* seemed to suggest that hate speech, including cross burning, could not be constitutionally singled out by the state.¹⁰⁶ *Black* shows that is not so, leaving unclear the question of which hate speech regulations are or are not permissible.¹⁰⁷ And more generally, *R.A.V.*’s final, catchall exception (for content discrimination “[where] there is no realistic possibility that official suppression of ideas is afoot”¹⁰⁸) seems to leave judges with almost limitless discretion to depart from the *R.A.V.* “rule” when so inclined. The ultimate result, in short, is a body of doctrine with the outward appearance of “a law of rules,” but little of the substance.

IV. GOVERNMENT FUNDING AND “FORUMS”

¹⁰⁴ *R.A.V.*, 505 U.S. at 389.

¹⁰⁵ Epicycles are of course the extraordinarily complex model of circles-within-circles developed by early astronomers to reconcile actual observations of planetary movement with the assumption of a Ptolemaic (earth-centered) universe. They could be abandoned once the Copernican (sun-centered) model of the solar system was accepted. See *The Universe of Aristotle and Ptolemy and the Role of Eratosthenes*, UNIV. OF ROCHESTER DEP’T OF PHYSICS & ASTRONOMY, <http://www.pas.rochester.edu/~blackman/ast104/aristotle8.html>.

¹⁰⁶ See *R.A.V.*, 505 U.S. at 402 (White, J., concurring) (“[T]he majority legitimizes hate speech as a form of public discussion.”).

¹⁰⁷ See *Black*, 538 U.S. at 383 (distinguishing the instant case from *R.A.V.*).

¹⁰⁸ *R.A.V.*, 505 U.S. at 390.

A final area we will briefly discuss, where Justice Scalia promoted a distinct doctrinal approach—albeit primarily in separate opinions—is government funding of speech. He expounded his views most famously in a concurring opinion in *National Endowment for the Arts v. Finley*.¹⁰⁹ At issue in *Finley* was a 1990 amendment to the National Foundation on the Arts and Humanities Act, which required the National Endowment for the Arts (“NEA”), in approving grants to support the arts, to “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”¹¹⁰ The majority upheld the amendment on the (improbable) grounds that the provision was “merely hortatory” and did not require viewpoint discrimination by the NEA.¹¹¹

Justice Scalia agreed with the result but firmly rejected the majority’s reasoning with the memorable opening line “[t]he operation was a success, but the patient died.”¹¹² Justice Scalia began by conceding, indeed emphatically arguing, that the amendment “establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated.”¹¹³ But, he insisted, it was still “perfectly constitutional.”¹¹⁴ The reason, quite simply, was that when Congress denies funding to speech, it does not *abridge* the freedom of speech, which is the only thing the First Amendment prohibits.¹¹⁵ Given this broad principle, Justice Scalia’s conclusion was not dependent on the nature of NEA funding program or any other specific facts of the case. Instead, he emphasized, his view was that the government “may allocate both competitive and noncompetitive funding *ad libitum*, insofar as the First Amendment is concerned.”¹¹⁶

Three years later, Justice Scalia forcefully reiterated his position on subsidies and funding. In *Legal Services Corp. v.*

¹⁰⁹ 524 U.S. 569, 590–600 (1998) (Scalia, J., concurring).

¹¹⁰ *Id.* at 572-74 (The amendment was adopted in response to controversy over NEA funding for an exhibit of Robert Maplethorpe’s photography which included homoerotic images, as well as for Andres Serrano’s photograph “Piss Christ.”).

¹¹¹ *Id.* at 580–82.

¹¹² *Id.* at 590 (Scalia, J., concurring).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 595–96.

¹¹⁶ *Id.* at 599.

Velazquez,¹¹⁷ the Court struck down a congressional statute that forbade lawyers employed by entities receiving grants issued by the Legal Services Corporation¹¹⁸ from participating in legal representation with the aim of amending or otherwise challenging existing welfare laws.¹¹⁹ Justice Scalia dissented.¹²⁰ The Legal Services Corporation Act is, he pointed out, “a federal subsidy program, not a federal regulatory program, and . . . [while r]egulations directly restrict speech; subsidies do not.”¹²¹ He did concede that in narrow circumstances, a subsidy might indirectly abridge speech because of its coercive effect, but thought those situations exceedingly rare.¹²² Given the selective nature of the funding program in *Velazquez* there was no serious argument for coercion, and so the constitutionality of the congressional restriction followed naturally.¹²³

Finally, Justice Scalia reiterated and indeed strengthened his position on government funding just four years ago, in *Agency for Int’l Dev. v. Alliance for Open Society Int’l*.¹²⁴ The issue in that case was the constitutionality of a federal provision that restricted funding from a multibillion dollar program to combat the spread of HIV/AIDS to organizations that had an explicit policy opposing prostitution and sex trafficking.¹²⁵ The majority struck down this restriction on the grounds that while the government may set funding conditions within a program restricting how federal money is to be spent, here the restriction was “outside” the program, and so was an unconstitutional condition in violation of the First Amendment.¹²⁶ Justice Scalia of course dissented. His view was that the government was generally welcome to impose ideological conditions on funding recipients, and that this was all that was going on here.¹²⁷ In so arguing, Justice Scalia was adopting an extremely narrow

¹¹⁷ 531 U.S. 533 (2001).

¹¹⁸ The Legal Services Corporation is an entity created by Congress to distribute federal funds to organizations that provide noncriminal legal services to the poor.

¹¹⁹ See *Velazquez*, 531 U.S. at 536–37.

¹²⁰ *Id.* at 549 (Scalia, J., dissenting).

¹²¹ *Id.* at 552.

¹²² *Id.*

¹²³ *Id.* at 553.

¹²⁴ See 133 S. Ct. 2321 (2013).

¹²⁵ *Id.* at 2325.

¹²⁶ *Id.* at 2330.

¹²⁷ *Id.* at 2332–33 (Scalia, J., dissenting).

reading of the unconstitutional conditions doctrine,¹²⁸ and so granting the government virtually unlimited discretion to limit what speech it subsidizes as well as to select recipients on ideological grounds.

Government funding/subsidies thus appears to be an area where Justice Scalia has adopted a clear, consistent position without epicycles or inconsistencies, and based on a simple, underlying principle, that denying subsidies is not abridgement and so cannot violate the First Amendment.¹²⁹ But there is a fly in the ointment, and that fly’s name is *Rosenberger*. In 1995, Justice Scalia joined a majority opinion authored by Justice Kennedy in *Rosenberger v. Rector and Visitors of University of Virginia*.¹³⁰ The University of Virginia had established a Student Activities Fund which, *inter alia*, paid the printing costs of student publications, but excluded from participation any student paper or publication that “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”¹³¹ The Court held that this exclusion constituted forbidden viewpoint discrimination, because the University funded publications expounding secular but not religious viewpoints on issues relevant to the community.¹³² The fact that the discrimination was part of a funding program did not save it because in creating the Student Activities Fund, the University had created a “limited public forum,” within which content- but not viewpoint-discrimination is permitted.¹³³ Further, the Court emphasized that while previous decisions had permitted the state, when speaking on its own behalf, to prefer its “own favored message,” this case involved “private speech of students,” not the speech of the University, and so was different.¹³⁴ Finally, the

¹²⁸ The unconstitutional conditions doctrine is an extremely complex set of doctrinal rules governing when the government may, or may not, condition receipt of a benefit on surrender of a constitutional right. See Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

¹²⁹ See also *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 236 (1988) (Scalia, J., dissenting) (arguing that a selective tax exemption constituted a subsidy, and so did not implicate the First Amendment).

¹³⁰ 515 U.S. 819 (1995).

¹³¹ *Id.* at 822–23.

¹³² See *id.* at 831.

¹³³ *Id.* at 829–30.

¹³⁴ *Id.* at 834–35.

Court held that the scarcity of money also did not justify viewpoint discrimination, though the state could of course ration or allocate limited funds using “some acceptable neutral principle.”¹³⁵ Justice Scalia joined the majority opinion in full, and never repudiated or questioned his vote.

The tension between *Rosenberger* and Justice Scalia’s other funding opinions—notably *Finley*—is obvious. In all the other opinions Justice Scalia vehemently insisted that discriminatory funding choices raised no First Amendment issues absent coercion (of which there was none in *Rosenberger*); but in *Rosenberger* he voted—indeed, provided the crucial fifth vote—to strike down just such a program. Moreover, it is clear that the government versus private speech distinction invoked in *Rosenberger* cuts against the government in *Finley*, unless the NEA wanted to take the remarkable position that “Piss Christ” conveys the government’s own message. In *Finley*, Justice Scalia distinguished *Rosenberger* with the brief comment that *Rosenberger* “found the viewpoint discrimination unconstitutional, not because funding of ‘private’ speech was involved, but because the government had established a limited public forum—to which the NEA’s granting of highly selective (if not highly discriminating) awards bears no resemblance.”¹³⁶ Similarly, in *Velazquez*, Justice Scalia off-handedly commented that *Rosenberger* was distinguishable because “the government created a public forum with the spending program”¹³⁷ without explaining why the Student Activities Fund, but apparently no other spending program, was a “forum.” In particular, the *Rosenberger* Court’s insistence that scarcity was not determinative, and its explicit endorsement of allocating scarce funds using “some acceptable neutral principle” even within a forum make it very difficult to distinguish the Student Activities Fund from NEA grants based on the competitive nature of the latter. After all, NEA grants could be awarded based on the presumptively viewpoint neutral principle of artistic originality and excellence.

¹³⁵ *Id.* at 835.

¹³⁶ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. at 598–99 (1998) (Scalia, J., concurring).

¹³⁷ *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 552 (2001) (Scalia, J., dissenting).

So, once again, we are left with a “rule” which permits some, but not other, government funding programs to engage in viewpoint discrimination based on a complex, ambiguous, and not fully articulated set of distinctions—the very antithesis of a law of rules.

V. RULES AND THEORIES

Why is it that Justice Scalia was never able to articulate a clear set of rules to resolve First Amendment disputes? Part of the reason is no doubt that free speech disputes, pitting as they often do crucial liberty values against serious social harms, are not easily susceptible to simple rules. But that is not, I think, the whole story. After all, free speech is hardly the only area of constitutional law where constitutional principles find themselves in tension with perceived societal demands. To ferret out the deeper problem here, it is worth contrasting Justice Scalia’s free speech jurisprudence with parts of constitutional law where Justice Scalia *was* able to develop a clear philosophy and set of principles.

Separation of powers is almost certainly the area of constitutional law where Justice Scalia’s ideas have had, and will continue to have, the most profound, and lasting impact. The reason, I think, is quite simple: underlying all of Justice Scalia’s myriad specific views on the separation of powers is a simple, fully articulated and instinctively appealing theoretical construct. Throughout his tenure on the Court, he clung to a vision of a formalistic separation of powers in which each of the three branches of government (no “veritable fourth branches”¹³⁸ for him) possesses a specific species of authority, which is not shared with the other branches except in narrow circumstances delineated in the Constitution (such as the presidential veto), and which may not be interfered with by the other branches. From this basic vision many specific implications follow, such as that Article II’s vesting clause means that the President must control “not . . . *some* of the executive power, but *all* of the executive

¹³⁸ Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (describing administrative agencies as “a veritable fourth branch of Government, which has deranged our three-branch legal theories”).

power”;¹³⁹ that *all* private rights cases must be litigated before an Article III tribunal;¹⁴⁰ and that “the term ‘inferior officer’ [in the Appointments Clause] connotes a relationship with some higher ranking officer or officers below the President[.]”¹⁴¹ These specific results, each of which rests on simple and clear rules, follow because they derive from the same underlying, consistent theory.

A similar phenomenon can be observed in Justice Scalia’s approach towards legislative intent. Justice Scalia was famously opposed to even consulting legislative history.¹⁴² In isolation, this insistence seems a bit odd—after all, what is the point of completely ignoring potentially relevant, albeit often unreliable evidence? But it turns out that Justice Scalia’s insistence was not based in stubbornness, it was founded on an underlying theory of legislative meaning. As he put it in *Conroy v. Aniskoff*,¹⁴³ in the course of criticizing the majority’s reliance on legislative history, “[w]e are governed by laws, not by the intentions of legislatures.”¹⁴⁴ Therefore, even if legislators’ subjective intent could be gleaned from legislative history (a dubious proposition), it *still* wouldn’t matter. The same philosophy led him, in *Church of The Lukumi Babalu Aye v. City of Hialeah*,¹⁴⁵ to refuse to rely on the subjective intent of legislators in finding a Free Exercise Clause violation (though he did agree that given the law’s actual effect, it was unconstitutional).¹⁴⁶ And in *Edwards v. Aguillard*¹⁴⁷ he carried this argument even further, arguing that subjective legislative intent is not only not discernable with a collective body such as a legislature, it often does not even exist.¹⁴⁸ For this reason, Justice Scalia would have rejected entirely the “purpose”

¹³⁹ *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

¹⁴⁰ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65–66 (1989) (Scalia, J., concurring in part).

¹⁴¹ *Edmond v. United States*, 520 U.S. 651, 662 (1997).

¹⁴² See Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 182–93 (1996).

¹⁴³ 507 U.S. 511 (1993).

¹⁴⁴ *Id.* at 519 (Scalia, J., concurring).

¹⁴⁵ 508 U.S. 520 (1993).

¹⁴⁶ *Id.* at 557–59 (Scalia, J., concurring in part).

¹⁴⁷ 482 U.S. 578 (1987).

¹⁴⁸ *Id.* at 636–40 (Scalia, J., dissenting).

prong of the *Lemon* test for Establishment Clause violations.¹⁴⁹ As with Justice Scalia’s separation of powers jurisprudence, he was not necessarily correct in his approach to legislative intent, nor did the rest of the Court agree with him; but his approach was simple, predictable, and based on a clear, underlying theory.

The contrast between these areas and the Free Speech Clause is stark. Justice Scalia never articulated or endorsed a clear theory of what speech is, and why the Constitution singles it out for protection. As a consequence, his opinions and his votes in free speech cases seem inconsistent and sometimes result-driven, the very antithesis of a law of rules. Why this was so is, of course, harder to say, but I suspect one reason is that Justice Scalia’s preferred theoretical construct for constitutional interpretation—Original Public Meaning Originalism¹⁵⁰—has very little to say regarding free speech law. The only serious contender for an Originalist reading of the First Amendment is that the Speech and Press Clauses prohibit only prior restraints on speech.¹⁵¹ Not only is this reading absurdly narrow, it is also almost certainly wrong as a historical matter.¹⁵² Narrow Originalism thus fails in this area, and Justice Scalia does not appear to have adopted any alternative, overarching understanding of the First Amendment, even though he often (though certainly not always) voted to enforce First Amendment rights. The result was a jurisprudence that appears somewhat ad hoc and, to some extent, driven by the types of speech he approved of (religious speech) and the types that he did not (sexual speech).

To be fair, the lack of an overarching theory of the First Amendment is hardly unique to Justice Scalia—it is a general aspect of the modern Supreme Court’s approach to free speech.

¹⁴⁹ *Id.*

¹⁵⁰ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997).

¹⁵¹ *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“[T]he main purpose of such constitutional provisions is ‘to prevent all such *previous restraints* upon publications as had been practised by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”); *ACLU v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting).

¹⁵² *See generally* Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. REV. 1151 (demonstrating extensive historical problems with the “no prior restraints” reading of the speech and press clauses).

And the contradictions in Justice Scalia's free speech decisions reflect a broader incoherency in the Court's jurisprudence as a whole.¹⁵³ But for Justice Scalia, a man deeply committed to consistency and clarity in legal doctrine this incoherence must have been particularly painful—which is, perhaps, why Justice Scalia wrote so few important free speech opinions in comparison to his many contributions to other areas of constitutional law.

CONCLUSION

This essay began as a meditation on Justice Scalia's contributions to free speech jurisprudence, and ended up a lamentation regarding the general incoherency of modern free speech law. That is not a coincidence—the exact same forces that prevented Justice Scalia from developing a clear body of free-speech rules here have also hamstrung the Court as a whole. The problem, in short, is the lack of any overarching theory of why speech is special for *constitutional* purposes. The lack of an agreed upon theory of free speech admittedly is not a new development, and yet the Court has muddled on. However, as free speech disputes arise in ever more areas, including economic regulation, telecommunications law, and privacy law, and as the stakes in free speech disputes rise astronomically as a consequence of the spread of the Internet, the time for theoretical agnosticism has come to an end. We need a way to think about free speech that is grounded, clear, and does not yield absurd results. What that approach might be, however, is a task for another day. (Hint: it involves democracy).

¹⁵³ See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995).

JUSTICE SCALIA, THE ESTABLISHMENT CLAUSE, AND CHRISTIAN PRIVILEGE

Caroline Mala Corbin*

INTRODUCTION

Justice Scalia had an unusual take on the Establishment Clause. From its earliest Establishment Clause cases, the Supreme Court has held that the Clause forbids the government from first, favoring one or some religions over others, and second, favoring religion over secular counterparts.¹ Although Justice Scalia was not alone in questioning the second principle, he was uniquely vehement in challenging the first. In particular, he maintained that given the history and traditions of this country, the government could, consistent with the Constitution, express a preference for Christianity. Moreover, he tended to dismiss the idea that favoring one religion would undermine a main goal of the Establishment Clause, which is to protect religious minorities. Instead, he thought that the government's failure to favor Christianity expressed hostility to religion.

I want to suggest that Justice Scalia's view of the Establishment Clause exemplifies Christian privilege. In this analysis, I borrow from critical race studies and its analysis of white privilege. I do not mean to equate race and religion, which are obviously different and have very different histories in the United States. (Of course, they are not completely distinct either, as race and religion often overlap and intersect.)² Rather, I argue that insights from critical race studies can help illuminate Justice Scalia's relationship with the Establishment Clause.

*Professor of Law, University of Miami School of Law. I would like to thank Jean Phillip Shami for research assistance as well as the staff of the *First Amendment Law Review* for the invitation to their wonderful symposium.

¹ See, e.g., Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U.L. REV. 1097, 1113 (2006) ("The principle of governmental neutrality among religions and between religion and nonreligion has been a central tenet of the Court's Establishment Clause jurisprudence for more than half a century [] in essence, from the very beginning.").

² For example, because most Muslims in the United States are not white, hostility towards Muslims may have a racial component. See, e.g., *Section 1: A Demographic Portrait of Muslim Americans*, PEW RESEARCH CTR. (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/section-1-a-demographic-portrait-of-muslim-americans/> (finding that only 30% of U.S. Muslims identify as white).

Part I presents Justice Scalia's view of the Establishment Clause. Part II explores white privilege and white fragility and identifies three key insights. First, whites enjoy certain unearned privileges, including the fact that whiteness is the unstated racial norm. Second, these privileges are often invisible to those who possess them. Third, the loss of this privileged position is often experienced as hostility. Part III maps these insights onto Justice Scalia's Establishment Clause jurisprudence as well as his originalist theory of constitutional interpretation more generally.

I. JUSTICE SCALIA'S ESTABLISHMENT CLAUSE JURISPRUDENCE

In one of its early Establishment Clause cases, the Supreme Court explained that the Establishment Clause bars the government from favoring one religion over another, and from favoring religion over its secular counterpart: "[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."³ These principles have been regularly reinforced in Establishment Clause decisions over the years.⁴

Justice Scalia disagreed with both. He repeatedly argued that the Establishment Clause does not bar the state from preferring religion over nonreligion. Thus, he proclaimed that "there is nothing unconstitutional in a State's favoring religion

³ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); see also *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'").

⁴ See, e.g., *McCreary Cty.*, 545 U.S. at 860 ("[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion."); *Lee v. Weisman*, 505 U.S. 577, 609–10 (1992) (Souter, J., concurring) ("Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'"); *id.* at 627 ("While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others.").

generally”⁵ and that “the Court’s oft repeated assertion that the government cannot favor religious practice is false.”⁶

On this question, Justice Scalia was not alone.⁷ Chief Justice Rehnquist, for example, argued that the Founders never expressed concern about whether the federal government might aid all religions evenhandedly.⁸ In fact, in religion clause scholarship, whether religion is special and merits special treatment is a perennial debate.⁹

However, the disagreement about whether it is unconstitutional to favor all religions does not extend to the question of whether the Establishment Clause permits favoring one or some religions over others. On that score, there is much less dispute. The same Supreme Court case that incorporated the Establishment Clause also held that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . prefer one religion over another.”¹⁰ This proposition has been acknowledged in most Establishment Clause decisions

⁵ Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

⁶ *McCreary Cty.*, 545 U.S. at 885 (Scalia, J., dissenting). Justice Scalia then lists numerous examples of historical religious practices and concludes: “With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that the ‘First Amendment mandates governmental neutrality between . . . religion and nonreligion,’ and that ‘[m]anifesting a purpose to favor . . . adherence to religion generally,’ is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words.” *Id.* at 889 (internal citations omitted).

⁷ Justice Thomas has his own idiosyncratic views. He maintains that the Establishment Clause does not apply to the states and therefore cannot serve as a limit on their religious activities. *See, e.g.*, *Town of Greece v. Gallaway*, 134 S. Ct. 1811, 1835 (2014) (Thomas, J., concurring in judgment) (“As I have explained before, the text and history of the [Establishment] Clause ‘resis[t] incorporation’ against the States If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.”).

⁸ *Wallace v. Jaffree*, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

⁹ Compare Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571 (2006), and Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000), with Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994), and Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1365 (2012).

¹⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

since then.¹¹ Typical is *Larson v. Valente*,¹² which states unequivocally: “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”¹³

Even when upholding programs and practices that have the effect of favoring some religions over others, the Supreme Court justifies that benefit as indirect or unintentional. Thus, a voucher program in which over 96% of government funds ended up at (mostly Catholic) religious schools¹⁴ did not violate the Establishment Clause because it was the parents, not the government, that chose where to direct the money.¹⁵ A legislative prayer program where the vast majority of invited chaplains gave Christian prayers did not violate the Establishment Clause because almost all the town’s congregations were Christian and no one was intentionally excluded.¹⁶ Meanwhile, the Court permitted Texas to display a Ten Commandments monolith on the State Capitol grounds despite its undeniably religious content¹⁷ because the Court maintained that the government’s aims were historical, not religious.¹⁸ In other words, despite some questionable holdings, the Court has generally insisted that the

¹¹ See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9 (1989) (“It is part of our settled jurisprudence that ‘the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.’”); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 605 (1989) (“Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed . . .”).

¹² 456 U.S. 228 (1982).

¹³ *Id.* at 244.

¹⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (“96 percent of students in the program attend religious schools.”).

¹⁵ See *id.* at 646.

¹⁶ *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817 (2014) (“Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town’s congregations, rather than an official policy or practice of discriminating against minority faiths.”); *id.* at 1831 (2014) (Alito, J., concurring) (conceding that that intentionally discriminating against minority religions would violate the Establishment Clause).

¹⁷ *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (“Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain.”).

¹⁸ *Id.* at 689 (finding that display of Ten Commandments meant to acknowledge “the role the Decalogue plays in America’s heritage . . .”).

government cannot intentionally favor or advance particular faiths.¹⁹

Justice Scalia, however, disagreed. As far as Justice Scalia was concerned, the principle that the government can never favor one religion over another is “demonstrably false.”²⁰ Granted, sometimes the government may not single out a religion for special favor, such as cases involving government funding.²¹ Indeed, in one dissent Justice Scalia even wrote that “I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others.”²² But when it comes to the state revering God or the Ten Commandments, the Establishment Clause is no bar. “[T]here is nothing unconstitutional in a State[] . . . honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”²³ On the contrary, preferring Christianity (or perhaps Judeo-Christianity) is inevitable:

If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word “God,” or “the Almighty,” one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of

¹⁹ *Town of Greece*, 134 S. Ct. at 1824 (noting that a pattern of prayers that proselytized Christianity or denigrated other religions would be unconstitutional).

²⁰ *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (“Besides appealing to the demonstrably false principle that the government cannot favor religion over irreligion, today’s opinion suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another.”).

²¹ *See id.* at 893 (“[The Establishment Clause bars preferring one religion over others] is indeed a valid principle where public aid or assistance to religion is concerned . . . or where the free exercise of religion is at issue . . . but it necessarily applies in a more limited sense to public acknowledgment of the Creator.”) (citations omitted).

²² *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).

²³ *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring).

polytheists and believers in unconcerned deities,
just as it permits the disregard of devout atheists.²⁴

In short, the government cannot thank God without favoring some religions, and therefore it cannot avoid disregarding “polytheists,” “believers in unconcerned deities,” “devout atheists,” and anyone else who does not share a belief in the Judeo-Christian God.²⁵

As to whether the Establishment Clause allows the state to honor God in the first place, Justice Scalia’s answer is clear: of course it does, because these acknowledgements, and this type of favoritism, dates to the founding of our country. According to Justice Scalia, “the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings.”²⁶ Thus, the touchstone for the Establishment Clause is the country’s history—“our interpretation of the Establishment Clause should compor[t] with what history reveals was the contemporaneous understanding of its guarantees”²⁷—and traditions—“[t]he foremost principle I would apply is fidelity to the longstanding traditions of our people.”²⁸

This approach reflects the originalist theory of constitutional interpretation Justice Scalia espoused. In a nutshell, originalists believe we should understand the Constitution in the same way as the founding generation, and if they thought a government action was constitutional, then so

²⁴ *McCreary Cty.*, 545 U.S. at 893 (Scalia, J., dissenting).

²⁵ See *infra* notes 91-96, 116-121 and accompanying text (describing how “Judeo-Christian” is often really just Christian).

²⁶ *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (“[T]he Establishment Clause must be construed in light of the ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.’ . . . [T]he meaning of the Clause is to be determined by reference to historical practices and understandings.”).

²⁷ *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (quoting *Lynch v. Donnelly*, 465 U.S. 688, 673 (1984)); *id.* at 631 (“[A] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”) (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989)).

²⁸ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 751 (Scalia, J., dissenting); see also *Van Orden*, 545 U.S. at 692 (“I would prefer to reach the same result by adoptin Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices . . .”).

should we.²⁹ In other words, as Justice Scalia has written, “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”³⁰

Proponents argue that originalism is more democratic because it ensures that the meaning of the Constitution is determined by the supermajority that approved the Constitution rather than nine unelected judges.³¹ They also claim that by forcing judges to uncover the objective, fixed meaning of the Constitution, originalism prevents judges from infusing it with their own personal views.³² As Scalia argued: “[O]ur Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.”³³

Justice Scalia’s view of the Establishment Clause, which is itself a reflection of his originalist theory of constitutional interpretation, reflects a certain privileged viewpoint. More particularly, both at a general (originalism) and a specific (the Establishment Clause allows state preference for Judeo-

²⁹ Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000) (“Justice Scalia’s unique contribution to constitutional theory has been his jurisprudence of ‘original meaning.’ His central idea is that the meaning of the Constitution is fixed and that it is discoverable by looking at the text and the practices at the time the Constitution was written.”).

³⁰ *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (quoting Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 294 (1963)). Justice Scalia later clarified that original or public meaning equates to the founding generation’s understanding and not the founding framers’ intent. See, e.g., Chemerinsky, *supra* note 29, at 390 (quoting ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Gutmann ed., 1997)) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”); see also Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 609–11 (2008) (comparing “old originalism” and “new originalism”). Either way, the understanding dates to the founding era.

³¹ See, e.g., Ilya Somin, *Active Liberty and Judicial Power: What Should Courts Do to Promote Democracy? Active Liberty: Interpreting Our Democratic Constitution* by Stephen Breyer, 100 NW. U.L. REV. 1827, 1859 (2006) (“[T]he original meaning version of originalism ha[s] the virtue of supermajority endorsement, which makes it more likely that [it is] the product of broad democratic participation.”).

³² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.”).

³³ *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

Christianity) level, it is one made possible by white/Christian privilege.

II. PRIVILEGE DEFINED

Among the first to explore white privilege was Peggy McIntosh in her essay, *White Privilege: Unpacking the Invisible Knapsack*.³⁴ She describes white privilege as “an invisible package of unearned assets that I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious.”³⁵ Others have observed that white privilege “is best described as myriad advantages that White people enjoy on a daily basis that racial minorities do not.”³⁶

This Part highlights three key characteristics of white privilege. First, among the many unearned advantages that whites enjoy is that whiteness and white experience is the unstated norm. Second, these privileges are often invisible to those who benefit from them. Third, white privilege tends to breed white fragility. Consequently, attempts to change the status quo to a more equitable system is often experienced at hostility by those used to a system of privilege.

A. Unearned Benefits

In her groundbreaking essay, Peggy McIntosh lists dozens of concrete examples of white privilege.³⁷ Some of these benefits are generally positive and should be available to everyone,³⁸ while

³⁴ Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in BEYOND HEROES AND HOLIDAYS 79 (Enid Lee et al. eds., 1998).

³⁵ *Id.* (“White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.”). Cf. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1713 (1993) (“In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain.”).

³⁶ Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407, 418 (2007).

³⁷ McIntosh, *supra* note 34, at 79–80.

³⁸ *Id.* at 81 (“Some, like the expectation that neighbors will be decent to you, or that your race will not count against you in court, should be the norm in a just society.”).

others are negative and “give license to be ignorant, oblivious, arrogant and destructive.”³⁹ They include:

- “If a traffic cop pulls me over . . . I can be sure I haven’t been singled out because of my race.”⁴⁰
- “Whether I use checks, credit cards or cash, I can count on my skin color not to work against the appearance of my financial reliability.”⁴¹
- “I can choose blemish cover or bandages in ‘flesh’ color and have them more or less match my skin.”⁴²
- “I can turn on the television or open to the front page of the paper and see people of my race widely represented.”⁴³
- “When I am told about our national heritage or about ‘civilization,’ I am shown that people of my color made it what it is.”⁴⁴
- “I can remain oblivious of the language and customs of persons of color . . . without . . . any penalty for such oblivion.”⁴⁵

All of these are advantages that white people enjoy for no other reason than their whiteness.⁴⁶ They are unearned. White people are treated differently than people of color for the exact same behavior. The first example alludes to the well-documented fact that the police stop non-whites for conduct they ignore in whites.⁴⁷ At the same time, study after study has shown that

³⁹ *Id.* (“Others, like the privilege to ignore less powerful people, distort the humanity of the holders as well as the ignored group.”).

⁴⁰ *Id.* at 80.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* (“I can easily buy posters, postcards, picture books, greeting cards, dolls, toys, and children’s magazines featuring people of my race.”).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245, 246 (2005) (“Peggy McIntosh’s widely acknowledged definition of white privilege emphasizes the benefit that privilege bestows upon the individual holder.”).

⁴⁷ Although African-Americans are obviously not the only minority group, they are the one most studied. See, e.g., Sharon LeFraniere & Andrew W. Lehrer, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> (documenting that police are more likely to stop and use force against black drivers).

whites are rated as more accomplished for the exact same performance, including evaluations based on identical resumes⁴⁸ and legal writing samples.⁴⁹

In addition, our structures are designed with white people in mind. “Characteristics of the privileged group define the societal norm.”⁵⁰ As a very mundane example, “flesh” colored crayons, “nude” stockings, and “invisible” Band-Aids have, until very recently, only met their vaunted criteria for white people. More generally, the white experience and the white perspective is the default one. This unstated norm informs our history, our culture, our politics, and even our holidays.⁵¹ U.S. history classes, as McIntosh points out, are often the history of white Americans.⁵² If you turn on the TV, open the newspaper, or buy a children’s book, you encounter the stories of white people.⁵³ “Everywhere we look, we see our own racial image reflected back to us—in our heroes and heroines, in standards of beauty, . . . in our textbooks and historical memory, in the media,

⁴⁸ See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98 (2004) (finding that resumes with African-American names are fifty percent less likely to receive callback interviews than identical ones with white names).

⁴⁹ Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn’t White*, ABA J. (Apr. 21, 2014), http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases. These are just the tip of the iceberg. See, e.g., David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 509 (1996) (“As study after study demonstrates, there are still a substantial number of whites who hold (consciously or unconsciously) discriminatory and/or stereotypical views about blacks.”).

⁵⁰ Wildman, *supra* note 46, at 247; see also Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999) (“White privilege is the pervasive, structural, and generally invisible assumption that white people define a norm and Black people are ‘other,’ dangerous, and inferior.”) (footnote omitted).

⁵¹ This is not a complete list, either. For example, people are measured against white standards as well. See, e.g., Wildman, *supra* note 46, at 247 (“[I]ndividual members of society are judged against characteristics held by the privileged.”).

⁵² McIntosh, *supra* note 34, at 80.

⁵³ See, e.g., Dashka Slater, *The Uncomfortable Truth About Children’s Books*, MOTHER JONES (Sept.-Oct. 2016), <http://www.motherjones.com/media/2016/08/diversity-childrens-books-slavery-twitter> (noting that within five years, more than half of U.S. children under five will have a nonwhite parent, yet only 14% of children’s books feature a black, Latino, Asian, or Native American main character); Scott Collins, *More Diversity in Film & TV? New Report Says Women and Minorities Are Actually Falling Behind*, L.A. TIMES (Feb. 25, 2016), <http://www.latimes.com/entertainment/tv/showtracker/la-et-st-diversity-film-tv-ucla-report-minorities-20160224-story.html> (reporting that although 38% of US population, people of color only account for 8.1% of lead actors in scripted broadcast TV shows).

in religious iconography including the image of god himself”⁵⁴ Indeed, how else to explain Columbus Day as a federal holiday and the elevation of Christopher Columbus as the “discoverer” of the United States?

Because white norms and values are society’s norms and values, whites may ignore all others. Although people of color need to understand the dominant white culture, many white people can go their whole lives without learning about nonwhite cultures. “Most white people have no experience of a genuine cultural pluralism, one in which whites’ perspectives, behavioral expectations, and values are not taken to be the standard from which all other cultural norms deviate.”⁵⁵

In sum, white privilege attempts to capture the idea that all kinds of benefits attach to being white, one of which is that whiteness is the unstated norm in American society.

B. Invisibility

A key component of white privilege is that it is often invisible to those who benefit from it. White people do not realize that their whiteness confers benefits,⁵⁶ including the benefit of having whiteness as the societal norm: whites tend “not to think about . . . [how] norms, behaviors, experiences, or perspectives . . . are white-specific.”⁵⁷

One result is that white people fail to understand that their perspective is not the one true objective perspective but one of many, specifically, a white perspective. “Whites are taught to see their perspectives as objective and representative of reality.”⁵⁸ Because whites believe their own point of view is universal, they do not learn other points of view. Instead, “we use ourselves and our experiences as the reference point for everyone. ‘I’m not followed around in the store by a guard. What makes you think

⁵⁴ Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 62 (2011).

⁵⁵ Barbara J. Flagg, *“Was Blind, but Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 979 (1993).

⁵⁶ This description obviously does not apply to every single white person in the United States, but it does apply to many.

⁵⁷ Flagg, *supra* note 55, at 957. Flagg calls this phenomenon “transparency.” *Id.* I will use “invisibility” instead since it captures the way it is invisible to most whites.

⁵⁸ DiAngelo, *supra* note 54, at 59.

you are?”⁵⁹ Or, “I’m not offended by that joke, therefore it is not offensive.”⁶⁰

Another result is that white people are so oblivious to the privileged position that their race confers that most of the time they do not even think of themselves as raced.⁶¹ Other people have race. White people just are.⁶² “The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any.”⁶³ Barbara Flagg goes so far as to say that this obliviousness is a “defining characteristic of whiteness: to be white is not to think about it.”⁶⁴

Perhaps this exercise will demonstrate this phenomenon: Pick five words to describe yourself. Did you include your race? “When people are asked to describe themselves in a few words, Black people invariably note their race and white people almost never do. Surveys tell us that virtually all Black people notice the importance of race several times a day.”⁶⁵ This tendency is widespread. If you are reading a white author’s novel, odds are that descriptions of white people do not include their race, but descriptions of nonwhite people do. “White people rarely contemplate the fact of our whiteness—it is the norm, the given. It is a privilege to not have to think about race.”⁶⁶

In sum, whiteness is such the predominant norm, and the world is so tailored to the needs and values of white people, that white people can go through life unaware that whiteness is the default. Indeed, the world is so normed to whiteness that white people may not even think of themselves in racial terms. Of

⁵⁹ FRANCES E. KENDALL, *UNDERSTANDING WHITE PRIVILEGE* 71 (Lee Anne Bell ed., 2006).

⁶⁰ *Id.*

⁶¹ Flagg, *supra* note 55, at 969 (“[T]he white person has an everyday option not to think of herself in racial terms at all.”).

⁶² *Id.* at 971 (“Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different.”); *see also* DiAngelo, *supra* note 54, at 59 (“White people are just people. . . . [Yet] people of color, who are never just people but always most particularly black people, Asian people, etc., can only represent their own racialized experiences.”).

⁶³ Flagg, *supra* note 55, at 957.

⁶⁴ *Id.* at 969 (“[T]he white person has an everyday option not to think of herself in racial terms at all. In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: to be white is not to think about it.”).

⁶⁵ Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999) (citations omitted).

⁶⁶ *Id.* at 604–05 (citations omitted).

course, whiteness itself does not need to be invisible in order for white privileges to be. That is, even white people aware of their race may not fully understand all the benefits that flow from that fact, including how whiteness is the default norm. “[W]hite privilege remains largely unacknowledged. [Consequently,] [t]he existence of white privilege allows white people of good will—many with antiracist views—to benefit from the privileged white norms.”⁶⁷

C. *White Fragility*

“White fragility” is the term used to describe how whites get very upset when their unearned racial advantages are pointed out, and practically apoplectic when they are taken away.⁶⁸ Robin DiAngelo, the academic who coined the phrase, defines it as “a state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves.”⁶⁹ For example, a challenge to their objectivity, such as “[s]uggesting that a white person’s viewpoint comes from a racialized frame of reference”⁷⁰ can unduly disturb them. Moreover, changes in the status quo designed to move to greater equality is experienced as hostile targeting of whites.⁷¹

There are different causes of the great distress. One of them is simply that these issues are new and uncomfortable. “White people in North America live in a social environment that protects and insulates them from race-based stress. . . . This insulated environment of racial privilege builds white expectations for racial comfort while at the same time lowering the ability to tolerate racial stress.”⁷² Although people of color

⁶⁷ Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 645 (2008).

⁶⁸ Again, this general description does not apply to all white people. See *supra* note 56. Nonetheless, the intensity with which this generalization is denied might itself demonstrate white fragility.

⁶⁹ DiAngelo, *supra* note 54, at 54 (coining the term “White Fragility” in an academic article).

⁷⁰ *Id.* at 57.

⁷¹ Cf. Rhonesha Byng, *Arkansas Town Responds To Controversial “Anti-Racist Is A Code Word for Anti-White” Sign*, HUFF. POST (Nov. 7, 2013), http://www.huffingtonpost.com/2013/11/07/harrison-arkansas-antiracist-code-word-antiwhite_n_4227769.html.

⁷² DiAngelo, *supra* note 54, at 55.

are used to engaging with racial issues, white people are not. Thus, they have a hard time with race as a topic of conversation and are “at a loss for how to respond in constructive ways.”⁷³

Exacerbating this discomfort is the simplistic view of racism often held by whites. White people tend to equate racism with intentional, hostile discrimination.⁷⁴ Under this view, race discrimination always has a bad actor. Whites often simply do not see the other kinds of discrimination that operate. They are unaware of the unconscious racism that gives whites a boost in supposedly objective evaluations. They are unaware of the structural racism that results in “nude” stockings and Columbus Day. Remember, because the world is designed around their norms and needs, whites miss the way the status quo is highly racialized to their benefit.⁷⁵ “The white person's lived experience, the fabric of daily life, emphasizes—and minute to minute recreates—the whiteness of the world. This whiteness is just normal—the way things are.”⁷⁶ Accordingly, when someone tries to explain to a white person how they benefit from their race, they feel accused of racial malice. It is as though someone is equating them with the Ku Klux Klan.⁷⁷ “The good/bad binary is the fundamental misunderstanding driving white defensiveness about being connected to racism.”⁷⁸ Because white people hear an accusation of ill will instead of a deconstruction of unconscious and structural processes, whites

⁷³ *Id.* at 57.

⁷⁴ Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995) (“Generally whites think of racism as voluntary, intentional conduct, done by horrible others.”).

⁷⁵ See, e.g., Kerry A. Dolan, *Why White People Downplay Their Individual Racial Privileges*, STAN. GRADUATE SCH. BUS. (Aug. 27, 2016), <https://www.gsb.stanford.edu/insights/why-whites-downplay-their-individual-racial-privileges> (“Research shows that white Americans, when faced with evidence of racial privilege, deny that they have benefited personally.”).

⁷⁶ Wildman, *supra* note 46, at 255.

⁷⁷ Indeed, I almost used the terms “unconscious discrimination” and “structural discrimination” instead of “unconscious racism” and “structural racism” in case some readers’ reaction to the word “racism” would generate so much resistance that they would no longer be open to the idea that all race discrimination is not intentional and malicious.

⁷⁸ Robin DiAngelo, *White Fragility: Why It's So Hard to Talk to White People About Racism*, THE GOOD MEN PROJECT (Apr. 9, 2015), <https://goodmenproject.com/featured-content/white-fragility-why-its-so-hard-to-talk-to-white-people-about-racism-twlm/>.

fail to grapple with the fact that even if well-meaning, they nonetheless benefit from their whiteness.⁷⁹

One defensive reaction is to position themselves as the real victims: When finally confronted with discussion of race, “whites position themselves as victimized, slammed, blamed, attacked.”⁸⁰ At the same time whites exaggerate the harm to themselves, they minimize the actual harm to others. Consequently, moving the spotlight back onto whites once again erases and minimizing non-white experience.⁸¹ “‘Erasure’ refers to the practice of collective indifference that renders certain people and groups invisible . . . [and] describe[s] how inconvenient people are dismissed, their history, pain and achievements blotted out.”⁸²

Moreover, the combination of elevating white pain and minimizing non-white pain, until conversations about race are equated with actual racism, results in a textbook example of a false equivalency.

The language of violence that many whites use to describe anti-racist endeavors is not without significance, as it is another example of the way that White Fragility distorts and perverts reality The history of brutal, extensive, institutionalized and ongoing violence perpetrated by whites against people of color—slavery, genocide, lynching, whipping, forced sterilization and medical experimentation to mention a few—becomes profoundly trivialized when whites claim they don’t feel safe or are under attack when in the rare situation of merely talking about race with people of color.⁸³

⁷⁹ George Yancy, *Dear White America*, N.Y. TIMES (Dec. 24, 2015), <https://opinionator.blogs.nytimes.com/2015/12/24/dear-white-america/> (“You may have never used the N-word in your life, you may hate the K.K.K., but that does not mean that you don’t harbor racism and benefit from racism.”).

⁸⁰ DiAngelo, *supra* note 54, at 64.

⁸¹ John Halstead, *The Real Reason White People Say “All Lives Matter”*, HUFF. POST (July 25, 2016), http://www.huffingtonpost.com/johnhalstead/dearfellowwhite-people_b_11109842.html (“‘All Lives Matter’ is really code for ‘White Lives Matter,’ because when white people think about ‘all lives,’ we automatically think about ‘all white lives.’”).

⁸² Paul Sehgal, *Fighting ‘Erasure’: First Words*, N.Y. TIMES (Feb. 2, 2016), <http://nyti.ms/1NOC0VQ>.

⁸³ DiAngelo, *supra* note 54, at 65.

It explains how white people can get more upset by a black football player peacefully protesting police shootings than by the police shootings themselves.

This defensiveness reaches even higher levels when whites are faced not merely with discussions of how race shapes the status quo but actual attempts to remedy it. In fact, such efforts can be experienced as undeserved and hostile attacks. And, to be fair, these are attempts to take something from them, namely their unearned (and unfair) advantages. But because whites do not understand them as such, they feel unjustly targeted. Of course, reframing any move towards equality as an attack allows whites to resist it, thereby leaving intact the status quo, along with all their privileges.

III. CHRISTIAN PRIVILEGE

An exchange during the oral argument for *Salazar v. Buono*⁸⁴ reflects Justice Scalia's privileged Christian view of the Establishment Clause. The case involved an eight foot Latin cross on federal lands.⁸⁵ Its defenders argued it was meant to commemorate soldiers who had died during World War I.⁸⁶ The lower courts held that it violated the Establishment Clause for the federal government to display an obviously Christian symbol.⁸⁷ In response, Congress declared that the cross was "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war;"⁸⁸ barred the use of federal funds to remove the cross; and transferred to private parties the plot of land on which the cross stood.⁸⁹ At one point during the oral argument, Justice Scalia

⁸⁴ 559 U.S. 700 (2010).

⁸⁵ *Id.* at 706–07 (describing size and location of the cross in the Mojave National Preserve).

⁸⁶ *Id.*

⁸⁷ *Id.* at 709 (describing how Ninth Circuit Court of Appeals concluded that "a reasonable observer would perceive a cross on federal land as governmental endorsement of religion.").

⁸⁸ *Id.* (quoting Department of Defense Appropriations Act, 2002, Pub.L. 107–117, § 8137(a), 115 Stat. 2278).

⁸⁹ The land deal was actually a land swap where the federal government received a private plot of land in return. *Id.* at 710 (stating in exchange, the Government was to receive land elsewhere in the preserve from Henry Sandoz and his wife). The swap was conditional: "The land-transfer statute provided that the property would revert

reacted to the ACLU attorney's characterization of the cross as a Christian symbol that honors Christian soldiers:

JUSTICE SCALIA: The cross doesn't honor non-Christians who fought in the war? Is that -- is that --

MR. ELIASBERG: I believe that's actually correct.

JUSTICE SCALIA: Where does it say that?

MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans --

JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the -- the cross is the -- is the most common symbol of -- of -- of the resting place of the dead, and it doesn't seem to me -- what would you have them erect? A cross -- some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.

(Laughter.)

MR. ELIASBERG: So it is the most common symbol to honor Christians.

JUSTICE SCALIA: I don't think you can leap from that to the conclusion that the only war dead

to the Government if not maintained 'as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.'" *Id.*

that that cross honors are the Christian war dead.
I think that's an outrageous conclusion.⁹⁰

This exchange illustrates several of the privilege themes described in Part II, but in the context of religion rather than race. As discussed in more detail below, it highlights how Christianity is the unstated norm in the United States and that this Christian privilege is often invisible precisely because the Christian perspective is assumed to be the universal perspective. Furthermore, Christian fragility helps explain the emotional reaction that greets attempts to point out and remedy this state of affairs.

A. Privilege: Christianity as Unstated Norm

Just as whiteness confers unearned benefits, so too does Christianity. One of those benefits is that society is designed around Christian norms and needs.⁹¹ Take the United States calendar. Many might assume that a Monday-Friday workweek with a Saturday-Sunday weekend—a weekend that facilitates Sabbath observance for Christians—is normal, natural, and universal. It is not. In Israel, the workweek is from Sunday to Thursday, or mid-Friday, to allow people to prepare Shabbat dinner on Friday and celebrate the Sabbath on Saturday. Countries with predominantly Muslim populations have Fridays off because Friday is the Muslim day of prayer.⁹² Moreover, only

⁹⁰ See Transcript of Oral Argument at 38–39, *Salazar v. Buono*, 559 U.S. 700 (2010) (No. 08-472) [hereinafter *Salazar* Transcript].

⁹¹ As I have noted elsewhere, “their Sabbath defines the workweek, their sacred days define state and national holidays, their morality defines the family and determines when life begins, belief in their God characterizes patriotism, and invocation of their God solemnizes, dignifies, and authenticates.” Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L. REV.* 1545, 1578–79 (2010). If the cadence sounds familiar, I was riffing on a famous Catharine MacKinnon quotation about male privilege: “Men’s physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies defined workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.” CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 224 (First Harv. Univ. Press paperback ed., 1991).

⁹² See, e.g., *Saudi Arabia Switches Start of Weekend from Thursday to Friday*, BBC NEWS (June 23, 2013), <http://www.bbc.com/news/business-23031706> (“Friday remains a

Christians have their Christmas holiday built into the federal calendar.⁹³ The federal government does not close for the high holy days of other religions. There is no official day off for Yom Kippur or Passover (Judaism), or for Eid Al-Fitr and Eid Al-Adha (Islam), or for Diwali (Hinduism),⁹⁴ Vesak (Buddhism)⁹⁵ or any other religion's most sacred days.⁹⁶ Moreover, to paraphrase Peggy McIntosh, "[w]hen I am told about our national heritage or about 'civilization,' I am shown that people of my [religion] have made it what it is."⁹⁷ Indeed, our expressions of patriotism—our pledge of allegiance⁹⁸ and our national motto⁹⁹—both incorporate the Christian (or maybe the Judeo-Christian) worship of God, and not the beliefs of other faiths.¹⁰⁰

Christianity was certainly the unstated norm for Justice Scalia. This is evident in the exchange about the large Latin cross

holiday in Muslim countries because it is a holy day set aside for communal prayer.").

⁹³ In response to the claim that Christmas is a secular holiday that all Americans celebrate, I paraphrase Mr. Eliasberg: "I have been in Jewish schools. There is never a Christmas tree or Santa Clause or reindeer decorating the classroom of a Jewish school." See *Salazar* Transcript, *supra* note 90 ("I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.").

⁹⁴ Emanuella Grinberg, *Six Things You Should Know About Diwali*, CNN (Oct. 26, 2014), <http://www.cnn.com/2014/10/25/travel/diwali-2014/> ("The five-day celebration of good over evil is as important to Hindus as Christmas is to Christians").

⁹⁵ *Wesak*, BBC (Aug. 21, 2014), www.bbc.co.uk/religion/religions/buddhism/holydays/wesak.shtml ("This most important Buddhist festival is known as either Vesak, Wesak or Buddha Day.").

⁹⁶ I am focusing on Judaism and Islam in order to emphasize that the American tradition is really a Christian one, despite attempts to describe it as Judeo-Christian or Abrahamic to include Judaism and Islam.

⁹⁷ McIntosh, *supra* note 34, at 80. See also Joseph R. Duncan, Jr., *Privilege, Invisibility, and Religion: A Critique of the Privilege That Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617, 626 (2003) ("People of Christian faiths are privileged in the United States in that they are guaranteed that the Supreme Court will open with a prayer that reflects their faith; that their child will be taught a pledge of allegiance that adopts their God; that when they look at United States currency they will see a reaffirmation of their beliefs; that public laws will be written to secure the display of religious documents in public buildings, including schools, that reflect their beliefs; that if a judge looks to religious texts to justify a decision that those texts will reflect their beliefs; that the legislature will open with a prayer reflecting their faith; and that the president will speak and take an oath of office in terms of their religion.").

⁹⁸ "One nation under God"

⁹⁹ "In God We Trust"

¹⁰⁰ Just as the calendar, with its Saturday-Sunday weekend, may at first seem "Judeo-Christian" but is really just Christian, so too are other practices designated Judeo-Christian. See *infra* notes 116-121 and accompanying text (analyzing Ten Commandments).

at issue in *Salazar v. Buono*. In explaining the Establishment Clause issue with the monument, counsel for the ACLU pointed out that the Latin cross is “the predominant symbol of Christianity.”¹⁰¹ Justice Scalia disagreed, arguing that in the context of a war memorial, it is instead a burial symbol: “the most common symbol of . . . the resting place of the dead.”¹⁰² As far as Justice Scalia was concerned, this was the normal way to mark the dead. But while Christians may equate the Latin cross with respectful honoring of the dead, that is a Christian practice, not a universal one. As the ACLU attorney rebutted, “[t]he cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.”¹⁰³

Moreover, Christianity not only served as Justice Scalia’s unstated norm for burial practices, but Christianity (or monotheistic religions like Christianity) served as Justice Scalia’s unstated norm for religion itself. For example, Justice Scalia defined “sectarian” through a Christian lens. Justice Scalia recognized that government endorsement of religion cannot be sectarian: “And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian.”¹⁰⁴ But he then defined sectarian to mean preferring some God-centered faiths over others. Thus, the quotation ends: “[sectarian] in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”¹⁰⁵ It is as if, for Justice Scalia, the universe of religions were limited to those that believe in God.¹⁰⁶ Consequently, state-sponsored prayers to God are

¹⁰¹ See *Salazar* Transcript, *supra* note 90, at 38–39.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ Obviously, there are many religions that do not worship a God. See Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L. REV.* 1545, 1575 (2010) (“Many Hindus, for example, envision three main manifestations of the Divine—Brahma, Vishnu, and Shiva. Many Buddhists, on the other hand, do

nonsectarian and perfectly constitutional, even in public schools.¹⁰⁷

Moreover, because he equated “religion” to monotheistic religions like Christianity, Justice Scalia could argue that prayers to God were unifying:

I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.¹⁰⁸

Of course, there is no God whom “all worship and seek.”¹⁰⁹ Many religions have multiple gods, or no gods.¹¹⁰ Or, even if they have a Supreme Being, it is not called God.¹¹¹ Not to mention that the United States is home to an ever-growing population of nonbelievers.¹¹² Despite this, Justice Scalia insists on describing worship of God as a unifying practice shared by everyone. In other words, he assumes that Judeo-Christianity is the norm. It should be obvious that a government-sponsored prayer that excludes millions of Americans is not unifying.

Justice Scalia takes this unstated norm further than most. Belief in God is not just the norm for religion. It is the norm for “American-ness.” After rejecting any claim that school-sponsored prayers to God were sectarian, Justice Scalia added:

not worship any deities. Even Muslims, who do worship a Supreme Being, generally refer to their Supreme Being as Allah, and not God.”)

¹⁰⁷ *Lee*, 505 U.S. at 641–42 (“But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States.”) (Scalia, J., dissenting).

¹⁰⁸ *See id.* at 646. Justice Scalia makes this claim more than once. *See id.* (lamenting that decision as “depriv[ing] our society of that important unifying mechanism.”).

¹⁰⁹ *Id.*

¹¹⁰ *See Corbin*, *supra* note 106, at 1575.

¹¹¹ *See id.*

¹¹² In 2014, 22.8% of Americans reported that they were not affiliated with a particular religion, with 3.1% self-identifying as atheist and another 4.0% as agnostic. *See Ten Facts About Atheism*, PEW RESEARCH CTR. (June 1, 2016), <http://www.pewresearch.org/fact-tank/2016/06/01/10-facts-about-atheists/>.

“To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.”¹¹³ In short, to be American is to believe in God.

B. Invisibility of Privilege

One of the hallmarks of white privilege is that white people do not even realize that whiteness serves as the default norm. Consequently, the (oblivious) privileged believe that their perspective is the only, and therefore the definitive one, rather than one of many. At the same time, the privileged never learn, because they never need to learn, other points of view. Justice Scalia seemed to share this trait. Consequently, Justice Scalia regularly assumed his perspective was universal and objective, unaware or disregarding views and information to the contrary.

Justice Scalia’s exchange with the ALCU attorney in *Salazar v. Buono* reveals this blind spot.¹¹⁴ Justice Scalia’s claim that the Latin cross is a common symbol used to honor the dead reflects a Christian perspective, not a universal perspective. The ACLU attorney made this clear when he pointed out that Jews never use a Latin cross on their graves or memorials.¹¹⁵ Despite the laughter that followed, Justice Scalia remained adamant, insisting on his vision of the cross as a universal symbol of reverence.

This same insistence that his perspective is the universal perspective appears in Justice Scalia’s analysis of the Ten Commandments. During oral argument, Professor Chemerinsky explained to the Court, first, that the Ten Commandments were not sacred for all religions, not even for all the Abrahamic ones,¹¹⁶ and, second, that different faith traditions have different versions of the Ten Commandments.¹¹⁷ For example, unlike the

¹¹³ See *Lee*, 505 U.S. at 642.

¹¹⁴ See *Salazar* Transcript, *supra* note 90, at 38–39.

¹¹⁵ See *Salazar* Transcript, *supra* note 90, at 38–39.

¹¹⁶ See Transcript of Oral Argument at 15, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500) (“JUSTICE SCALIA: I thought Muslims accept the Ten Commandments. MR. CHEMERINSKY: No, Your Honor, the Muslims do not accept the sacred nature of the Ten Commandments, nor do Hindus, or those who believe in many gods, nor of course, do atheists.”).

¹¹⁷ See *id.* at 15–16 (“MR. CHEMERINSKY: . . . And for that matter, Your Honor, if a Jewish individual would walk by this Ten Commandments, and see that the first

Ten Commandments at issue in two Supreme Court cases,¹¹⁸ the Jewish Ten Commandments generally starts with full text of Exodus 20:2, acknowledging that God led the Jews out of slavery into freedom.¹¹⁹ Indeed, the retelling of Exodus is at the heart of Passover, one of the most important Jewish holidays. In short, the challenged Ten Commandments were Christian, not Jewish.¹²⁰ As a result, a state-sponsored Ten Commandments display will inevitably play favorites even among religions whose texts refer to the Decalogue. Justice Scalia summarized the argument in a footnote:

Because there are interpretational differences between faiths and within faiths concerning the meaning and perhaps even the text of the

commandment isn't the Jewish version, I am the Lord, thy God, took you out of Egypt, out of slavery, would realize it's not his or her government either."'). Cf. *Van Orden v. Perry*, 545 U.S. 677, 717–18 (2005) (Stevens, J., dissenting) ("There are many distinctive versions of the Decalogue, ascribed to by different religions and even different denominations within a particular faith; to a pious and learned observer, these differences may be of enormous religious significance."); Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1479 (2005) ("[A]ny display of the Commandments is inherently sectarian, because it must choose a translation, ordering, and numbering system that will favor, or endorse one or more religions, and therefore disfavor other religions.").

¹¹⁸ The version upheld in *Van Orden v. Perry*, which mirrors the one struck down in *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 851–52 (2005), was as follows:

I AM the LORD thy God.
 Thou shalt have no other gods before me.
 Thou shalt not make to thyself any graven images.
 Thou shalt not take the Name of the Lord thy God in vain.
 Remember the Sabbath day, to keep it holy.
 Honor thy father and thy mother, that thy days may be long upon
 the land which the Lord thy God giveth thee.
 Thou shalt not kill.
 Thou shalt not commit adultery.
 Thou shalt not steal.
 Thou shalt not bear false witness against thy neighbor.
 Thou shalt not covet thy neighbor's house.
 Thou shalt not covet thy neighbor's wife, nor his manservant, nor
 his maidservant, nor his cattle, nor anything that is thy neighbor's.

Van Orden v. Perry, 545 U.S. 677, 707 (2005) (Stevens, J., dissenting).

¹¹⁹ See *THE TORAH: A MODERN COMMENTARY* 539 (W. Gunther Plaut ed., 1981) ("I the lord am your God who brought you out of the land of Egypt, the house of bondage."). Moreover, Orthodox Jews do not spell out God, writing G-d instead. Finally, these first ten commandments are only a few of the 613 Jewish commandments, all of which are equally important. And this summary itself likely glosses over theological disputes within the Jewish community.

¹²⁰ In fact, the Ten Commandments at issue may represented a Protestant version, not just a Christian version. Catholic Ten Commandments do not include a separate prohibition against graven images. See generally Finkelman, *supra* note 117.

Commandments, Justice STEVENS maintains that any display of the text of the Ten Commandments is impermissible because it “invariably places the [government] at the center of a serious sectarian dispute.”¹²¹

Justice Scalia outright rejected this claim. His response to the point that any version of the Ten Commandments will inevitably favor some religious traditions was resounding: “I think not. The sectarian dispute regarding text, if serious, is not widely known. I doubt that most religious adherents are even aware that there are competing versions with doctrinal consequences (I certainly was not).”¹²² In other words, if he did not know about or think it was important, then no one would. His perspective was the universal one. Even when confronted with people telling him that, in fact, there are other perspectives, he refused to give them weight.

Of course, even if the government-sponsored Ten Commandments did not favor Christianity over Judaism and Islam, they still favored the Abrahamic faith tradition over all others.¹²³ Nevertheless, Justice Scalia steadfastly maintained that the Ten Commandments were nonsectarian.

Nor is it the case that a solo display of the Ten Commandments advances any one faith. They are assuredly a religious symbol, but they are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another. The Ten Commandments are recognized by Judaism, Christianity, and Islam alike as divinely given.¹²⁴

To Justice Scalia, all non-Abrahamic believers, as well as nonbelievers, either do not exist or do not matter. They are not

¹²¹ See *McCreary Cty.*, 545 U.S. at 909 n.12 (Scalia, J., dissenting) (emphasis omitted).

¹²² *Id.*

¹²³ *Van Orden v. Perry*, 545 U.S. 677, 719 (2005) (Stevens, J., dissenting) (“Even if, however, the message of the monument, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism.”).

¹²⁴ *McCreary Cty.*, 545 U.S. at 909 (Scalia, J., dissenting).

on his radar, and therefore, they need not be taken into consideration.

This disregard also explains Justice Scalia's claim that the government's preference for Christianity (dressed up Judeo-Christianity) is inevitable. Justice Scalia argued that:

If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs.¹²⁵

Of course, Justice Scalia was quite right that a truly nonsectarian prayer does not exist.¹²⁶ According to Justice Scalia, because nonsectarian prayers are impossible, then the next best thing is a prayer to God. He did not consider the more obvious solution—or at least obvious to those who do not share his blinkered privileged perspective—which is that if it is impossible for the government to pray in a way that does not exclude some citizens, it should simply refrain from praying.¹²⁷

C. Christian Fragility

Just as white privilege breeds white fragility, Christian privilege breeds Christian fragility. Justice Scalia was not immune. Because Christians are used to thinking that their Christian perspective is universal and that their privileged status is normal, "even a minimum amount of [religious] stress becomes intolerable, triggering a range of defensive moves."¹²⁸ One of those defensive moves used by Justice Scalia is to position

¹²⁵ *Id.* at 893.

¹²⁶ Even among monotheistic religions a non-denominational prayer would be a challenge. Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 829 (1983) ("[T]he very concept of a 'nondenominational prayer' is self-contradictory. There are well over fifty different theistic sects in the United States, each of which has its own tenets regarding the appropriate nature and manner of prayer.").

¹²⁷ This, however, would mean Christians would lose the privilege of having the government sponsor prayer in their faith tradition.

¹²⁸ Diangelo, *supra* note 54, at 54.

Christians as victims. At the same time that Justice Scalia centers and inflates the harm to Christians, he marginalizes and downplays the harm to everyone else, allowing him to create false equivalencies.

As with white fragility, a defining characteristic of Christian fragility is getting easily and overly upset when one's privilege is highlighted. For example, in the exchange about the Latin cross, Justice Scalia decried as "outrageous" the unremarkable argument that a Latin cross is not really the way to honor non-Christians: "I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that's an outrageous conclusion."¹²⁹ Justice Scalia also overreacted when defending a government-sponsored Ten Commandments monument, declaring, "[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all."¹³⁰ The claim was pure hyperbole. There is no risk of religion disappearing from the public forum. The Establishment Clause only applies to government religious speech; private religious speech is constitutionally protected, as a string of Supreme Court cases makes clear.¹³¹

Justice Scalia's tendency to describe any attempt to eliminate Christian privilege as hostility to Christianity illustrates another hallmark of fragility. Thus, for example, when the Supreme Court held that two Kentucky counties could not post the Ten Commandments in their respective county courthouses, Justice Scalia complained, "[t]oday's opinion . . . ratchet[s] up the Court's hostility to religion."¹³² Note that, in the tradition of insisting one's perspective is the universal

¹²⁹ See *Salazar* Transcript, *supra* note 90, at 39.

¹³⁰ *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

¹³¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (school could not exclude religious viewpoint from public forum); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (same); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (same); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (same).

¹³² See *McCreary Cty.*, 545 U.S. at 900 (Scalia, J., dissenting); see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 749 (1994) (Scalia, J., dissenting) ("Justice S[tevens]' statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation, and announces a positive hostility to religion—which, unlike all other noncriminal values, the State must not assist parents in transmitting to their offspring.").

perspective, Justice Scalia equated religion with Christianity.¹³³ While Christians may interpret the removal of the government's Ten Commandments as an attack on their religion, Hindus, Buddhists, Sikhs, and countless others are unlikely to interpret it as an attack on theirs. On the contrary, one of the foundational principles behind the Establishment Clause's separation of church and state is that all religions flourish best when none is singled out for special government favor. Nevertheless, Justice Scalia viewed the Court's refusal to privilege Christianity as an attack, rather than a move towards equality for all religions.¹³⁴

Another tactic of the privileged that Justice Scalia employed is to center the privileged group and their concerns, as displayed by his comments during the *Town of Greece v. Galloway*¹³⁵ oral argument. Each month, the town of Greece would invite a member of the clergy—the “chaplain for the month”—to give a prayer before the start of the town's monthly board meetings.¹³⁶ The vast majority of chaplains were Christians and most of the prayers were explicitly Christian.¹³⁷ As a consequence, non-Christians who were petitioning the government (for a zoning variance for example) faced the Hobson's choice of either joining in a prayer that was contrary to their beliefs or risk angering the demonstrably religious Town Board.¹³⁸ Justice Scalia argues:

There is a serious religious interest on the other side of this thing that -- that -- that people who have religious beliefs ought to be able to invoke the

¹³³ This example, like many before and after it, could be used to illustrate more than one point, as they are intertwined and interrelated.

¹³⁴ This same impulse explains the so-called “War on Christmas.” After years of ignoring all the non-Christians who do not celebrate Christmas, it became standard to wish people “Happy Holidays” instead of “Merry Christmas” during the “holiday season.” In a sign of Christian fragility, this move towards inclusiveness was soon depicted as an attack on Christians and Christmas. See, e.g., Jordan Lorence, *Three Reasons Why the New York Times' War on Christmas Denial is Wrong*, FOX NEWS (Dec. 22, 2016), <http://www.foxnews.com/opinion/2016/12/22/three-reasons-why-new-york-times-war-on-christmas-denial-is-all-wrong.html> (“[B]usinesses, feeling that social pressure, began ordering their workers to say ‘Happy Holidays’ rather than ‘Merry Christmas.’”). As one commentator noted, the author “is confusing equality with persecution.” *Id.*

¹³⁵ 134 S.Ct. 1811 (2014).

¹³⁶ *Id.* at 1816.

¹³⁷ *Id.*

¹³⁸ See *id.* at 1817–18.

deity when they are acting as citizens, and not -- not as judges or as experts in -- in the executive branch.¹³⁹

In other words, deploying a common defense mechanism of the fragile, he shifts the attention back onto the privileged group, in this case the Christians who compose the government.¹⁴⁰

Similarly, in his *Lee v. Weisman*¹⁴¹ dissent, rather than empathize with the young students who might feel coerced into participating in the state's sponsored prayers, Justice Scalia chastises them for failing to exhibit sufficient respect for other people's (Judeo-Christian) religious beliefs: "I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate."¹⁴² If respecting the state-sponsored (Judeo-Christian) religion leads observers to think that students are joining in a prayer that contradicts their own beliefs, well, so be it: "Even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally."¹⁴³ For Justice Scalia, that was an acceptable cost.

This willingness to force the minority members of non-privileged religions to conform to or at least defer to the privileged majority reappears during the *Van Orden v. Perry* oral argument regarding Texas's granite Ten Commandments monument. At one point, Justice Scalia commented:

I mean, we're a tolerant society religiously, but just as the majority has to be tolerant of minority views in matters of religion, it seems to me the minority

¹³⁹ Transcript of Oral Argument at 41, *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) (No. 12-696).

¹⁴⁰ And employing another common tactic, see *infra* note 80-83 and accompanying text, Justice Scalia advances a false equivalency, in this case claiming that the right of government officials to pray while they govern is equivalent to the rights of citizens petitioning their government to be free from government-sponsored sectarian prayers.

¹⁴¹ 505 U.S. 577 (1992).

¹⁴² See *Lee v. Weisman*, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting).

¹⁴³ *Id.* (emphasis omitted).

has to be tolerant of the majority's ability to express its belief that government comes from God, which is what this is about. As Justice Kennedy said, turn your eyes away if it's such a big deal to you.¹⁴⁴

Justice Scalia basically argued that in return for the majority tolerating the mere existence of minority religions—as though freedom of belief were not a fundamental principle of our country and required by the Constitution—the minority should stop complaining when the majority has the power to make the government endorse Christian (Judeo-Christian?) beliefs. In other words, Christian fragility recasts the constitutional requirement of religious liberty for all as “the majority tolerating minority views,” and the privilege of government advocating Christian beliefs as “the minority tolerating majority views.” And the privileged cherry-on-top is the dismissive coda—if the minority do not like seeing the majority’s privilege in action, they should just close their eyes.

As is perhaps evident from these Justice Scalia excerpts, the flip side of the privileged’s tendency to see everything from their own perspective is the inability to see from others’ perspectives. Thus, while Justice Scalia well understood and sympathized with the Christian point of view, he was indifferent to others’ point of view. As far as Justice Scalia was concerned, as long as the government does not legally require someone to participate in a religious exercise, the only harm government sponsored prayers or displays causes is “offense,” and the Constitution is not meant to protect offended sensibilities. “[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views.”¹⁴⁵ Thus, in response to the Seventh Circuit ruling that a public high school could not hold its graduation ceremony in a church, he grouched:

At most, respondents complain that they took offense at being in a religious place. See 687 F.3d,

¹⁴⁴ Transcript of Oral Argument, *Van Orden v. Perry*, *supra* note 116, at 17.

¹⁴⁵ *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284–85 (2014) (Scalia, J., dissenting from the denial of certiorari) (quoting *Town of Greece* with approval).

at 848 (plaintiffs asserted that they ‘felt uncomfortable, upset, offended, unwelcome, and/or angry’ because of the religious setting’ of the graduations). Were there any question before, *Town of Greece* made obvious that this is insufficient to state an Establishment Clause violation.¹⁴⁶

This privileged perspective meant that first, although Justice Scalia did not dispute that the government may not compel participation in government sponsored religious practices, he limited unconstitutional coercion to coercion by force of law. Justice Scalia could not imagine, nor even tried to imagine, what it might feel like to be the sole Muslim or sole Buddhist in a school of Christians, and have your government ask you, during your school graduation, to stand and pray to a God not your own when everyone around you is participating. He rejected out of hand the idea that students might be compelled to participate not from the pressure of a government fine, but from the pressure of social ostracism.

Second, this privileged perspective made Justice Scalia unsympathetic to any other harm besides coercion. He failed to consider that government endorsement of one or some faiths makes second-class citizens of those whose do not share those faiths. From the time of James Madison, proponents of a separation of church and state have explained that even apart from coercion, state-sponsored religion “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”¹⁴⁷ Justice O’Connor captured the idea in her endorsement test, arguing that state-sponsored religion “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹⁴⁸ Christian privilege is not just that Justice Scalia ignored all these potential

¹⁴⁶ *Id.* at 2285.

¹⁴⁷ James Madison, *Memorial and Remonstrance Against Religious Assessments*, [C.A. 20 June] 1785, NAT’L ARCHIVES (July 12, 2016), <http://founders.archives.gov/documents/madison/01-08-02-0163>.

¹⁴⁸ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

harms, it is that Justice Scalia had the nerve to scold religious minorities for asking that their government not treat them like second-class citizens.¹⁴⁹

The combination of overvaluing the harm to the privileged Christians and undervaluing the harm the non-privileged non-Christians leads to false equivalencies. Justice Scalia's quotation above about minority and majority religions tolerating each other in *Van Orden v. Perry* is one example. Another is his claim to equal competing interests in response to Justice Stevens's fear in the other Decalogue case that the government's religious favoritism will marginalizing religious minorities:¹⁵⁰

Justice STEVENS fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling 'excluded'; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors.¹⁵¹

Despite Justice Scalia's concern about thwarting the Christian majority's desire to give thanks as a people,¹⁵² nothing prevents them from doing so. What they really want is for the *government*

¹⁴⁹ Of course, the irony of Justice Scalia dismissing the minority's complaints as mere oversensitivity is that oversensitivity is a defining characteristic of privileged fragility.

¹⁵⁰ *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 899 (2005) (Scalia, J., dissenting) ("Finally, I must respond to Justice STEVENS' assertion that I would 'marginaliz[e] the belief systems of more than 7 million Americans' who adhere to religions that are not monotheistic."). Notably, Justice Scalia did not include the millions of Americans who do not adhere to any religion at all. (In 2007, when there were more than 227 million adults in the United States, *Total Population by Child and Adult Populations*, ANNIE E. CASEY FOUND. (Aug. 2016), <http://datacenter.kidscount.org/data/tables/99-total-population-by-child-and-adult#detailed/1/any/false/18,17,16/39,40,41/416,417>, roughly 4% of Americans identified as atheist or agnostic, Michael Lipka, *A Closer Look at America's Rapidly Growing Nones*, PEW RESEARCH CTR. (May 13, 2015), <http://www.pewresearch.org/fact-tank/2015/05/13/a-closer-look-at-americas-rapidly-growing-religious-nones/>. Those numbers would yield approximately nine million atheists & agnostics).

¹⁵¹ *McCreary Cty.*, 545 U.S. at 900.

¹⁵² Recall that the Ten Commandments at issue is the Christian version. See *supra* notes 116-121 and accompanying text.

to give thanks in accordance with their religious beliefs. However, giving thanks or otherwise practicing one's faith without government participation is not really a harm, never mind one of constitutional magnitude. Indeed, it is the status quo for most religious minorities. Meanwhile, the actual constitutional harm of a caste system based on religious belief is reduced by Justice Scalia to hurt feelings.

In sum, when Christianity's privileged position was challenged, Justice Scalia's Establishment Clause jurisprudence displayed many characteristics of white fragility. He professed outrage. He focused on how change will affect Christians, rather than how the status quo affects non-Christians. Finally, by exaggerating the harm to the already privileged while trivializing the harm to the non-privileged, he created false equivalencies that helped him justify maintaining the status quo, and Christians' privileged status within it.

D. Originalism as a Theory of the Privileged

In closing, I want to suggest that Justice Scalia's originalist approach to the Constitution was itself privilege in action. While originalism does not neatly map onto white privilege, it does share with it the false claim to objectivity and the tendency to reinforce a status quo that favors the privileged.

As an initial matter, a theory of constitutional interpretation where the scope of constitutional protection is pinned to a time rife with hierarchies based on race, religion, sex, etc., is likely more appealing to those who have historically been privileged along these dimensions.¹⁵³ For the privileged,

¹⁵³ Samuel Marcossou, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 *LAW & INEQ.* 429, 483–84 (1998) (“[O]riginalism perpetuates racism by taking race into account in the wrong way: it actually reflects and places primary emphasis on the Framers’ white supremacist racism.”); James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 *ALA. L. REV.* 675, 686 (2016) (“[O]riginalism privilege[s] meanings from a racist (and sexist) age. . . .”). Cf. Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 *PEPP. L. REV.* 13 (2011) (“If *Dred Scott* was correct on originalist grounds, originalism looks morally questionable at least when the original understanding is tied up with earlier prejudices such as racism and sexism.”).

adopting a constitutional theory that reinforces their privileged position may well be a feature and not a bug.¹⁵⁴

Justice Scalia would have argued that he espoused originalism not because it benefits the privileged but because it curtails judicial discretion. Without it, judges could impose their own personal preferences onto constitutional law. Instead, originalism forces judges to interpret the constitutional by relying on something objective, namely the original understanding or original public meaning. It just so happens that in the case of the Establishment Clause, originalism yields a doctrine that countenances government sponsored Judeo-Christianity.

But this claim to objective constitutional interpretation is as spurious as whites' claim that their perspective is objective.¹⁵⁵ A full account, which would include the many different theories of originalism that originalists may choose from,¹⁵⁶ as well as the indeterminacy of history,¹⁵⁷ is beyond the scope of this Essay,

¹⁵⁴ Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 6 (2011) ("Suspensions of rationalization are also in order insofar as originalists maintain that the case for adopting an originalist theory is entirely independent of the theory's conservative valence.").

¹⁵⁵ Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 279 (2004) ("The results of the study suggest that one of the principal justifications for originalism—that it will constrain the ability of judges to impose their own views in the course of decisionmaking—might not be accurate as a descriptive matter."); *see also id.* at 284 ("[T]he results of the study suggest not only that the originalist's object is illusory, but also that originalism's advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal.").

¹⁵⁶ For a list of these theories, *see* Fallon, *supra* note 154, at 7 ("The various originalist theories differ from each other along at least four dimensions, involving: (1) the historical object or phenomenon that originalist judges or scholars should seek to identify—the Framers' intent, the original understanding of a specified group of lawmakers, or the original public meaning of constitutional language; (2) the conclusiveness of originally expected applications of constitutional language in fixing the Framers' intent, the original understanding, or the original public meaning; (3) the degree of determinacy with which historical sources can be expected to fix historical meaning and the role of judges in cases of relative indeterminacy; and (4) the circumstances, if any, under which non-historical considerations such as stare decisis, prudence, and apprehensions of normative desirability can justify constitutional decisions other than those that a purely historical criterion of constitutional meaning would mandate.").

¹⁵⁷ Often there is no fixed "general understanding" or "public meaning" waiting to be discovered. Thus, the claim to determinacy is illusory. *See* Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 437 (1996) ("I view my task in this Article to be proving that history is indeterminate."); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 264–65 (2011) ("Critics of originalism argue that this pretense of objectivity, determinacy, and constraint is unrealistic, considering the highly indeterminate and relativistic nature of history as a

but I will mention two reasons. First, Justice Scalia did not always apply an originalist theory.¹⁵⁸ He was adamant about its necessity for the Establishment Clause, and would have overruled established precedent to do so.¹⁵⁹ In contrast, he did not mention originalism, or deferred to precedent, in other areas. For example, he never acknowledged in affirmative action cases “evidence suggesting that the Framers and ratifiers of the Equal Protection Clause did not expect it to be applied to bar race-based programs for the benefit of racial minorities.”¹⁶⁰ In fact, Justice Scalia’s use of originalism was so inconsistent some scholars have concluded that he was not really an originalist.¹⁶¹

Second, when Justice Scalia did rely on an originalist approach, the strictness with which he applied it varied.¹⁶² For example, when interpreting the Second Amendment, he rejected

discipline, which exposes originalism to the same failing it set out to correct.”); *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (both majority and dissent apply an originalist approach to constitutional interpretation yet come to opposite conclusions); *Marsh v. Chambers*, 463 U.S. 783 (1983) (Justices in the majority and dissent come to different conclusions regarding founding era view of government prayers to or invocations of God).

¹⁵⁸ Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 Nw. U.L. REV. 727, 729 (2009) (“As others have noted, the ‘originalist’ Justices are only opportunistically originalist. When original meaning does not support the result they want to reach, they tend to ignore it . . .”).

¹⁵⁹ Justice Scalia has long argued that the touchstone for Establishment Clause should be history and tradition and not the existing *Lemon* test or endorsement test. *See supra* notes 26–28 and accompanying text (advocating for Establishment Clause jurisprudence based on history and tradition); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (Scalia, J., concurring) (insulting *Lemon* test by comparing it to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried”); *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2283–84 (2014) (Scalia, J., dissenting) (describing the endorsement test as an “errant line of precedent”).

¹⁶⁰ Fallon, *supra* note 154, at 17 (“In *United States v. Virginia*, for example, Justice Scalia appeared to maintain that the Equal Protection Clause did not and could not bar gender-based exclusions from the Virginia Military Institute because the Equal Protection Clause was not originally understood as applicable to gender-based exclusions from public colleges and universities. By contrast, in cases involving race-based admissions preferences at public universities, Justices Scalia and Thomas have felt no need to grapple with evidence suggesting that the Framers and ratifiers of the Equal Protection Clause did not expect it to be applied to bar race-based programs for the benefit of racial minorities.”).

¹⁶¹ *See, e.g.*, Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) (“Justice Scalia is simply not an originalist. Whatever virtues he attributes to originalism, he leaves himself not one but three different routes by which to escape adhering to the original meaning of the text. These are more than enough to allow him, or any judge, to reach any result he wishes.”).

¹⁶² My description of strictness corresponds to Fallon’s second dimension. *See* Fallon, *supra* note 154.

as “frivolous” the idea that the Second Amendment protects only the guns that existed at the time of the founding.¹⁶³ Because the types of guns have significantly changed, so should the scope of the Second Amendment.¹⁶⁴ When interpreting the scope of the Establishment Clause, however, Justice Scalia maintained that the government prayers to God that existed at the time of founding are still perfectly constitutional.¹⁶⁵ Yet prayers that might have been considered constitutional at the founding because they captured everyone’s beliefs no longer do because of significant changes in the country’s religious composition.¹⁶⁶ We are, after all, “a vastly more diverse people than were our forefathers.”¹⁶⁷ But, although Justice Scalia insisted that the originalist interpretation must take into account changes in the country’s gun composition, he rejected the argument that the originalist interpretation must take into account changes in the country’s religious composition.¹⁶⁸

Thus, even though Justice Scalia claimed that originalism curtailed his discretion, and that his conclusions were the result of objective decision-making, they were not.¹⁶⁹ I am not arguing that Justice Scalia intentionally exploited originalism’s indeterminacy in order to achieve his desired outcome all while declaring his personal preferences played no role.¹⁷⁰ After all,

¹⁶³ *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.”).

¹⁶⁴ *Id.* at 582 (“Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 . . . (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35–36 . . . (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”).

¹⁶⁵ *See supra* Part I.

¹⁶⁶ *Marsh v. Chambers*, 463 U.S. 783, 817 (1983) (“[O]ur religious composition makes us a vastly more diverse people than were our forefathers In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons . . .”).

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* Part I.

¹⁶⁹ *McDonald v. Chicago*, 561 U.S. 742, 908 (2010) (Stevens, J., dissenting) (“[A] limitless number of subjective judgments may be smuggled into his [Scalia’s] historical analysis. Worse, they may be *buried* in the analysis.”).

¹⁷⁰ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247 (2009) (“[O]riginalists can and often do move from one version of originalism to another as they decide different issues, thus allowing them to reach results that they

many whites truly believe that their conclusions about race—conclusions that confirm their privileged status—are the result of objective decision-making too. Nevertheless, Justice Scalia’s originalism allowed him to claim objectivity while safeguarding Christianity’s privileged status.

CONCLUSION

Several characteristics of privilege—unstated norms, invisibility, fragility—permeated Justice Scalia’s Establishment Clause jurisprudence. Professor DiAngelo has noted that “if whites cannot engage with an exploration of alternative racial perspectives, they can only reinscribe white perspectives as universal.”¹⁷¹ In a similar way, Justice Scalia’s insistence on originalism, with its questionable claim to objectivity, merely reinscribed Christian privilege.

personally prefer, all the while claiming (and likely mistakenly believing) that they are being guided by nothing more than the external constraint of history.”).

¹⁷¹ DiAngelo, *supra* note 54, at 66.

JUSTICE SCALIA'S LEGACIES

Michael J. Gerhardt*

INTRODUCTION

For nearly thirty years, Antonin Scalia manifested a larger-than-life presence on the United States Supreme Court as an Associate Justice. He dominated oral argument, penned some of the most memorable—and sharply worded—opinions in the Court's history, shaped some of the Court's most significant constitutional decisions of the era, was remarkably candid and forthright in his commentaries off the Court, and made his mark as the Supreme Court's most impassioned conservative, certainly its most impassioned defender of original meaning as the principal source of the Court's constitutional decision-making.

It should therefore have come as no surprise that Justice Scalia's unexpected death on February 13, 2016 sent shockwaves through the political, judicial, and legal worlds. Without warning, it became immediately apparent to everyone that his death had suddenly created a possibility no one had been expecting—a third opportunity for President Barack Obama to make a Supreme Court appointment, one that would have allowed him to secure, for the first time since 1969, a majority of justices who were appointed by Democratic presidents.¹ Nothing less than the Supreme Court's future was at stake. However, also at stake was the preservation of Justice Scalia's seat, which was essential for maintaining the ideological balance of the Court at the time of his death. To many people's surprise, Republican leaders in the Senate proceeded to successfully block President Obama's nomination of the highly-regarded Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia to the vacant seat, leaving it to be filled by the incoming president, Donald

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¹ Jeffrey Toobin, *The Supreme Court After Scalia*, THE NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/magazine/2016/10/03/in-the-balance>.

Trump,² who quickly nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to take the Court's open seat and succeed Justice Scalia.³

Shaping Justice Scalia's legacy was important to both parties, with the Republicans seeking to secure what it believed to be the conservative constitutionalism he championed and the Democrats to weaken or displace it. This essay seeks, however, not to take sides in the fight over the seat vacated by Justice Scalia, but instead, to examine the late justice's constitutional legacy. It does so not from the perspective of the partisan politics surrounding the appointment of his successor, but rather from three perspectives on the texts that he produced as a justice—his written opinions; interviews; and extra-judicial writings, statements, and speeches. Text was, of course, Antonin Scalia's principal preoccupation and focus as a justice,⁴ and the texts he that he produced were not only his own expression about the Constitution and his obligations as a justice (protected in numerous ways by the Constitution) but also the material to which subsequent generations will look to understand his distinctive approach to constitutional interpretation.

These perspectives are not confined to Justice Scalia's opinions or statements on the First Amendment⁵ or any single area of constitutional law. They include, but are not limited to, a relatively narrow focus—first, his impact on constitutional law based primarily on the numbers or his productivity over the span of nearly three decades as the Court's most impassioned conservative; second, what his writings, both on and off the Court, indicate about his desired constitutional legacy

² See Kelly Riddell, *Winner: McConnell's Gamble Saves the Supreme Court*, THE WASHINGTON TIMES (Nov. 16, 2016), <http://www.washingtontimes.com/news/2016/nov/16/mitch-mcconnells-gamble-saves-supreme-court/>.

³ See Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>.

⁴ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998); ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). See also RALPH A. ROSSUM, *ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION* (2006).

⁵ U.S. CONST. amend. I.

(including the patterns in the texts he produced); and third, the possible ways in which subsequent generations might construe these different patterns in an effort to capture the essence of his contributions to constitutional law.

Facetiously, I admit, I initially asked at the *First Amendment Law Review's* Symposium on Justice Scalia's First Amendment legacy if Justice Scalia were a Ben and Jerry's ice cream what kind would he be. I meant no disrespect to the late Justice but instead was prompting the attendees to consider what may be the essential core of his jurisprudence, albeit in a humorous way. More seriously, no one would have understood better than Justice Scalia how his legacy would turn on what subsequent generations, scholars, and justices made of the texts he produced on the Court. Indeed, one of his many motivations in producing voluminous text on the Court (and as a justice) might have been to produce as clearly as he could the essential features of what he regarded as the proper—indeed, the only appropriate—approach to statutory and constitutional construction. Perhaps ironically, there is nothing he alone could have done to prevent subsequent generations, judges, justices, and scholars from making of his legacy what they will, of taking advantage of it and construing it for their own purposes. The battle over the meaning of his various texts will undoubtedly obscure what he aimed to do. The meaning of Justice Scalia's many texts, no matter how direct and plain he tried to make them, now belongs, as Edwin Stanton declared of President Lincoln upon the moment of his death, "to the ages."⁶

I. THE RECORD

As an Associate Justice, Antonin Scalia was remarkably energetic, passionate, combative, and productive on the Supreme Court. The numbers tell that story quite clearly: He was the deciding vote in over 342 cases, a fact that underscores both the critical importance and impact of his particular

⁶ DAVID HERBERT DONALD, *LINCOLN* 599 (1996) (quoting Edwin Stanton moments after Lincoln was pronounced dead).

constitutional vision.⁷ He was the Supreme Court justice who was most written about over the last fifteen years.⁸ He wrote more concurrences than any other justice in American history.⁹ When in the minority, he wrote dissenting opinions fifty-four percent of the time.¹⁰ Indeed, Justice Scalia wrote the third most dissents in history.¹¹ When in the majority, he wrote an opinion twenty-six percent of the time.¹²

Off the Court, Justice Scalia did not produce a large number of published texts, though the few he did produce are among the most influential publications on both constitutional law and statutory interpretation. He published three books, including two on statutory construction;¹³ he published a handful of law review articles including two of the most influential and widely cited law review articles of all time;¹⁴ and others have published compilations of his most memorable or influential opinions.¹⁵ Not insignificantly, he gave numerous talks, including many that were not open to the public and that have not been officially reported or recorded.

On the quality of the late justice's writings, much has been (and should be) said. In the aftermath of his death, accolades for the quality of his writing have poured out.¹⁶ Justices Ruth Bader Ginsburg and Elena Kagan, among others, praised his opinion writing as among the Court's best ever.¹⁷

⁷ See Benjamin Morris, *How Scalia Became the Most Influential Conservative Justice Since the New Deal*, FIVETHIRTYEIGHT (February 14, 2016), <http://fivethirtyeight.com/features/how-scalia-became-the-most-influential-conservative-jurist-since-the-new-deal/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See e.g. ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

¹⁴ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Antonin Scalia, *Originalism: The Lesser Evil*, 57, U. CINN. L. REV. 849 (1989).

¹⁵ See, e.g., ANTONIN SCALIA, *SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS* (Kevin Rings, ed., 2016); ANTONIN SCALIA, *SCALIA'S DISSENTS: WRITINGS OF THE COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE* (Kevin Ring, ed., 2004).

¹⁶ See, e.g., David Lat, *How Justice Scalia's Writing Style Affected American Jurisprudence*, ABOVE THE LAW Nov. 21, 2016, <http://abovethelaw.com/2016/11/how-justice-scalias-writing-style-affected-american-jurisprudence/>.

¹⁷ See David Bernstein, *Justice Kagan's Beautiful Remarks at the Antonin Scalia Law School Dedication*, WASH. POST (Oct. 7, 2016),

While Justice Scalia acknowledged Robert Jackson, whose seat he had occupied, as the Court's greatest writer, he attempted through his own writing, as did Justice Hugo Black before him, to speak to more than just his fellow justices, but also to appeal to a larger general audience, the public.¹⁸ It is no accident that reporters and other Court observers wrote more about him than any other justice over the last many years, as he purposely grabbed their attention with the flare, sizzle, combativeness, and passion of his writing, with his sharply worded dissections (and decimations) of the opinions with which he disagreed (and there were many), and his passionate convictions in the rightness of his views and in what he regarded as the demise, if not the death, of federalism and the rule of law. He shaped, as many people have recognized, many substantive fields including but not limited to freedom of speech, substantive due process, freedom of religion, statutory construction, criminal procedure, and separation of powers.¹⁹ While just how much impact he had on these fields might be difficult to quantify, the substantive views he espoused so strongly and repeatedly that, as the next part suggests, their impact cannot be denied. Given that President Trump, in nominating Judge Gorsuch to the Supreme Court, sought to keep his promise to appoint someone to his seat modeled on Justice Scalia, understanding the nature of Justice Scalia's legacy is profoundly important as it will likely be the principal benchmark, if not the launching pad or foundation, for a justice who will likely serve at least as long as he did.

https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/07/justice-kagans-beautiful-remarks-at-the-antonin-scalia-law-school-dedication/?utm_term=.b152dc87c081 (including video of Justice Kagan's remarks); Daniel Polti, *Read Justice Ruth Bader Ginsburg's Touching Statement on Scalia*, SLATE (Feb. 14, 2016), http://www.slate.com/blogs/the_slatest/2016/02/14/read_justice_ruth_bader_ginsburg_s_touching_statement_on_scalia.html.

¹⁸See, e.g., Michael Stokes Paulsen, *The Supreme Greatness of Justice Scalia*, *The Public Discourse*, WITHERSPOON INST. (Mar. 15, 2016), <http://www.thepublicdiscourse.com/2016/03/16612/>; Jeet Heer, *Antonin Scalia Is the Supreme Court's Greatest Writer*, NEW REPUBLIC (June 26, 2015), <https://newrepublic.com/article/122167/antonin-scalia-supreme-courts-greatest-writer>.

¹⁹See Elizabeth Slattery et. al, *The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law*, HERITAGE FOUNDATION (Aug. 30, 2016), <http://www.heritage.org/research/reports/2016/08/the-legacy-of-justice-antonin-scalia-remembering-a-conservative-legal-titans-impact-on-the-law>.

II. JUSTICE SCALIA'S DISTINCTIVE TEXT

As we move from the sheer magnitude of the volume of texts Justice Scalia produced and his general impact on constitutional law, several other patterns become evident.

First, Antonin Scalia has the distinction of being the only Supreme Court justice who helped to decide two presidential elections. In *Bush v. Gore*,²⁰ Justice Scalia was one of the five members of the majority, which upheld (and foreclosed further judicial action on) the Florida Secretary of State's certification of the vote in the presidential election of 2000 in George W. Bush's favor and thereby helped to secure Bush's victory in the 2000 presidential election.²¹ Though neither Justice Scalia's vote in *Bush v. Gore* nor his death directly involved the First Amendment, each had enormous consequences for it. For example, they each helped in the choice of a president, whose Supreme Court nominations undoubtedly would have an impact on the direction and substantive content of constitutional law generally, including First Amendment law.

When Justice Scalia died sixteen years later, the then-Republican presidential nominee, Donald J. Trump, declared that he wanted the justice who replaced Justice Scalia to be in Justice Scalia's mold.²² The Republican strategy to block President Obama's nominee, Merrick Garland, from filling the seat proved successful. It enabled President Trump to keep the promise he had made to make Justice Scalia the model for his appointment to the Court. That maneuver in itself was historic. By successfully blocking the nomination of Judge Garland to Justice Scalia's seat, Republican leaders, including President Trump, did something that had been never done before—Republican leaders, including the President, turned the appointment of Justice Scalia's successor into a referendum on Justice Scalia's legacy. On the evening of Judge Gorsuch's

²⁰ 531 U.S. 98 (2000).

²¹ *Id.*

²² Vishakha Sonawane, *Donald Trump Wants Supreme Court Judge 'Very Much in Mold' of Justice Scalia*, INT'L BUS. TIMES (Oct. 10, 2016), <http://www.ibtimes.com/donald-trump-wants-supreme-court-judge-very-much-mold-justice-antonin-scalia-2428790>.

nomination, the President and the nominee each took the unusual step of explicitly praising Justice Scalia, the President by reminding everyone that Justice Scalia had been the model for his appointment and Judge Gorsuch by reiterating his reverence for the late justice.²³ Never before had the occasion for making a nomination been used so explicitly to frame a nomination in terms of the immediately departed justice's constitutional ideology. While the First Amendment undoubtedly protects the President's and nominee's pronouncements regarding Justice Scalia, the naming of his successor clearly will have ramifications well beyond First Amendment doctrine.

Second, Justice Scalia dominated oral argument for almost the entirety of his tenure on the Court.²⁴ No justice before him asked as many questions, and he effectively transformed how oral advocates prepared and approached oral argument. Oral argument, almost certainly, will no longer be the same, as the current and future justices grapple with how best to fill the void left in questioning as a result of Justice Scalia's death.

Third, Justice Scalia was one of the most visible, persistent defenders of a conservative approach to constitutional decision-making—namely, originalism, which he considered as instrumental to effective judicial restraint.²⁵ During his first few years on the Supreme Court, he described himself as a “feint-hearted originalist,”²⁶ but later he acknowledged himself more firmly as a “traditional originalist.”²⁷ For Justice Scalia, this meant original public meaning (or the understanding of the general public at the time

²³ Ariane de Vogue, *President Trump nominates Neil Gorsuch for Supreme Court*, CNN POLITICS, (Feb. 1, 2017), <http://www.cnn.com/2017/01/31/politics/donald-trump-supreme-court-nominee/>.

²⁴ See Thane Rehn & Ankur Mandhania, *Changing of the Guard: Oral Argument at the Supreme Court Before and After Justice Scalia*, SUPREME COURT WATCH (Summer 2016), https://www.mto.com/Templates/media/files/Reprints/BASF_Changing%20of%20the%20Guard_AMandhania_July%202016.pdf.

²⁵ On Justice Scalia (and his preferred methodology) as a model of a Supreme Court, see Michael Stokes Paulsen, *The Supreme Greatness of Justice Scalia*, WITHERSPOON INST. (Mar. 15, 2016), <http://www.thepublicdiscourse.com/2016/03/16612/>.

²⁶ Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>.

²⁷ See *Q & A with Justice Scalia*, C-SPAN (July 9, 2012), <https://www.c-span.org/video/?c4533609/scalia-originalism-policy>.

of the ratification of the particular words of the Constitution) was synonymous with the constitutional text and that historical practices were generally irrelevant as a source of constitutional decision. Where the latter were most relevant was in the early years of the Republic in which the generation who framed and ratified the Constitution followed (and thus implemented) the original meaning of the Constitution, as in separation of powers and the Second Amendment.²⁸

Fourth, Justice Scalia, more than any justice who served on the Court before him, developed and put into practice a coherent conception of tradition in constitutional analysis.²⁹ He understood tradition as a majority's understanding of the scope of its (legislative) power over time.³⁰ This conception of tradition achieved several purposes at once—it provided actual texts as the evidence and manifestations of tradition, it constrained judicial discretion to these texts, and allowed an important place for majorities—the public—in constitutional adjudication.

Fifth, no justice before Justice Scalia did as much to articulate and defend the unitary theory of the executive. He did so most famously in his influential dissent in *Morrison v. Olson*,³¹ dissecting the constitutionality of the Independent Counsel Act. The dissent provided arguments that gained traction over time, even with many Democrats, who came to agree with many of them.³² By the end of Bill Clinton's presidency, the Independent Counsel Act lapsed, and by the time Justice Scalia died the unitary theory of the executive in its most robust form was occasionally evident in the Court's removal decisions.³³

²⁸ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁹ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Scalia, J., dissenting in part); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

³⁰ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Scalia, J., dissenting in part); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *United States v. Virginia*, 518 U.S. 515 (1996).

³¹ 487 U.S. 654 (1988) (Scalia, J., dissenting).

³² See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (1st ed. 2008).

³³ See generally Peter Shane, *Donald Trump and the War Against Independent Agencies*, *WASHINGTON MONTHLY* (Nov. 25, 2016),

And, sixth, in stylistic terms, few justices could match the intense imagery and savagery of Justice Scalia's arguments. Just a few examples (of the thousands of scholars and others will be discussing) should hopefully suffice. His dissent in *Morrison v. Olson* was among his favorites, and the imagery with which he began—"this wolf comes as a wolf" captures the essential problem with the statute—that it unleashed a savage force that could not be contained.³⁴ In other memorable language, he denounced the Affordable Care Act as "SCOTUSCare,"³⁵ likened the Court's religion clauses jurisprudence to a midnight horror movie creature which could not be killed,³⁶ and his dissents in *Romer v. Evans*,³⁷ *Lawrence v. Texas*,³⁸ *United States v. Windsor*,³⁹ and *Obergefell v. Hodges*⁴⁰ were among the most strident, argumentative, passionate, and brutal as any in American history. That the majority decisions in each of these cases represented advancements in the Court's recognition of gay rights is one important connection among them, as is Justice Scalia's persistent laments against the demolition of federalism.

Together, Justice Scalia's expressions reflect several values that were plainly important to him, though they have not all been acknowledged or discussed in the countless eulogies to date. These include his commitment to transparency in his writing (no hiding of the ball on where he came down and why); candor (as open as any justice on exactly what he thought of the opinions with which he disagreed); principled (his principles, though subject to criticism, were usually very well-known and clearly set forth); disdain or contempt (his critical attitude toward those positions if not people with whom he disagreed); and authenticity (Justice Scalia could be subject to many criticisms but there was no doubt that what he said

<http://washingtonmonthly.com/2016/11/25/donald-trump-and-the-war-against-independent-agencies/>.

³⁴ 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

³⁵ *King v. Burwell*, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting).

³⁶ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

³⁷ 517 U.S. 620 (1996).

³⁸ 539 U.S. 558 (2003).

³⁹ 133 S. Ct. 2675 (2013) (Scalia, J., dissenting).

⁴⁰ 135 S. Ct. 2584 (2015) (Scalia, J., dissenting).

and did were genuine, no subterfuge about where he stood and for what he stood).

III. AMERICA'S JUDGE

The legacies of Supreme Court justices are at once easier and more difficult to construct than those of presidents. Presidents forge their legacies through their rhetoric—and through their actions, including their leadership in establishing national priorities and constitutional visions that subsequent leaders and generations consider following or investing in.⁴¹ At least in the modern era, presidents can build libraries and foundations and cultivate or motivate political movements to follow their lead. Additionally, they can make myriad appointments, which can transform other public institutions—some, such as the federal courts, for many years after they leave office. Their actions and appointments become symbols and examples of their presidencies, which other leaders wish to emulate or avoid.

Supreme Court justices can do similar things but in different ways. To have substantive impact and enduring influence in constitutional law, they cannot act alone. They of course need Court majorities, not just during their lifetimes but also later, to follow or invest in their constitutional decisions and visions. They can craft memorable opinions which will outlast them, but their methodologies rarely survive them, dependent, as they have been, on the emergence of enduring majorities that will agree on their particulars, something that almost no justice, except perhaps for John Marshall, can claim as his or her legacy.

Supreme Court justices' legacies depend on a variety of factors, only some of which they can control during their lifetimes and almost none of which they can hope to influence after their passing. Considering Justice Scalia's (likely) legacy thus requires doing more than assembling the statistics on his long tenure on the Court and identifying the areas in which he apparently had the greatest impact in constitutional law. It

⁴¹ On presidential legacies generally, *see* MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY* (2014).

requires, as a fundamental matter, understanding that a Supreme Court justice can have more than one kind of legacy and that there may be different legacies that a justice, or other public leader, has forged. Keeping these different, potential legacies and the factors shaping each of them help to illuminate both how justices may be remembered and the ways in which others can shape their legacies.

The potential legacies, which all Supreme Court justices may try to shape, are (1) the labels or characterizations that follow them into history; (2) their writing styles; (3) their substantive impact on the Court's jurisprudence; (4) their temperament, particularly how their fellow justices viewed them as colleagues; and (5) their methodologies or approaches to questions of constitutional law.

The first, potential legacy is among the most elusive for a justice—how their work or jurisprudence might be viewed over time. A New Deal liberal, such as Felix Frankfurter, can now strike many modern readers as conservative, whereas a justice, who saw himself, as conservative, such as John Marshall Harlan the Younger, can strike contemporary readers, of at least some of his major opinions, as moderate to liberal. The categories are not only contestable but they can shift over time.⁴²

In his lifetime, Justice Scalia was widely viewed and written about as conservative, but this was not a term he used to describe himself. He eschewed labels, at least for himself. Though often described by others as the Court's first Italian-America, Justice Scalia took pride in it but did not use that label for himself, preferring (like Frankfurter before him⁴³) to being viewed as an American judge, not the representative of some demographic or segment within it.⁴⁴ He also took umbrage over being called a Catholic justice and took issue with former colleague Geoffrey Stone's suggestion that his being Catholic influenced or affected his constitutional

⁴² See generally Jack Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993).

⁴³ See ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 44-45 (1988).

⁴⁴ See generally JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF JUSTICE ANTONIN SCALIA (2009).

decision-making.⁴⁵ Moreover, his reluctance to characterize the nature of his commitment to originalism was evident in his humorously suggesting that while he was an adherent to it he was not “a nut” like Justice Thomas.⁴⁶

Interestingly, it is unclear to what extent any given label, attempting to characterize the essence of his jurisprudence, will endure. In his passionate defense of his originalism, Justice Scalia was not traditional (since ardent commitment to originalism as a mode of constitutional argument is a relatively new phenomenon dating its own origins only back to the 1970s and 1980s), and his conception of tradition was grounded, not in originalism, but rather an effort to provide a foundation for the American public, particularly majorities, as an important player in the constitutional process.⁴⁷ In addition, traditional originalist seems a bit anemic to describe him since it fails to capture his deep-seated attachment to plain meaning (or what others sometimes called original public meaning), at which he arrived, not by traditional means, but rather by a newer route, which he sketched both on the Court and in his extra-judicial writings. He was an avowed textualist, who thought of himself as fiercely adhering to the text that the framers and ratifiers had fashioned, as a passionate defender of democracy as the critical forum for public debate on contentious issues such as abortion, and as a model for judges and justices to follow in interpreting, rather than, making the law or acting on their personal values.⁴⁸ He attempted to make clear, time and again, that any failure to follow the right steps—those he followed himself—was a non-judicial act and therefore an abuse of authority.

Being distinctively American was central to his conception of himself and his job on the Court. This is apparent

⁴⁵ See Debra Cassens Weiss, *Scalia Reportedly Upset at Suggestion His Judging Is Influenced by Religion*, ABA JOURNAL, (Aug. 28, 2009), http://www.abajournal.com/news/article/scalia_reportedly_upset_at_suggestion_h_is_judging_is_influenced_by_religion; Paris Schutz, *University of Chicago Reflects on Justice Antonin Scalia's Death*, CHICAGO TONIGHT, (Feb. 15, 2006), <http://chicagotonight.wttw.com/2016/02/15/university-chicago-reflects-justice-antonin-scalias-death>.

⁴⁶ Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES, (Feb. 13, 2006), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

⁴⁷ See *supra* notes 29-30 and accompanying text.

⁴⁸ See *supra* notes 25-28 and accompanying text.

perhaps most evidently from his strong disagreement with Justice Breyer on the relevance of international law to constitutional interpretation.⁴⁹ For Justice Scalia, international law had no relevance to constitutional law (except to the extent the framers modeled the Constitution on British common law), and his arguments against Justice Breyer's globalism underscored the uniqueness—the exceptionalism—of American constitutional law.⁵⁰ As a result, it might come closer to the mark to think of Justice Scalia as an American constitutionalist or an American originalist or simply as an American judge as he fervently believed that being a judge necessarily meant being faithful to originalism (and any deviation as an abuse of power).

Ironically, for someone who took pride in labeling others with whom he disagreed, Justice Scalia was loath to choose a label for himself. His reluctance to settle on a simple label for his own approach reflected a sensible realization that his legacy was not simple. With so many different dimensions to his tenure on the Court, none could be easily captured with a neat phrase—the aggressive interrogator in oral argument, the combative debater, the lover of opera, the sharp-tongued arbiter of judicial correctness, the devout Catholic off the bench, the loving husband and father, the loyal Republican, the fierce textualist and defender of tradition, the disdainful critic of any view with which he disagreed, and the jovial comrade in arms. The attempt to capture the late justice in a neat phrase will likely persist as the contending forces within the Court (and society more generally) vie to characterize his impact on the Court.

His second, potential legacy—justices' writing styles—is perhaps the one over which they have the greatest influence. Stylistically, Justice Scalia's written opinions were distinctive. His writing stands out for its flair, memorable language, sharp (and sharply-worded) criticisms of the views and opinions he held in disdain, and fierce, passionate, defense of the approach

⁴⁹ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Full Written Transcript of Scalia-Breyer debate on foreign law*, U.S. ASSOCIATION OF CONSTITUTIONAL LAW DISCUSSION, <http://www.freerepublic.com/focus/news/1352357/posts>.

⁵¹ *Id.*

to constitutional construction. Some imagery and argumentation undoubtedly will be hard to forget, and was widely celebrated and noted in the days after his passing.⁵¹ His questioning was aggressive and disdainful of the arguments he held in disdain. But, a justice's writing style is as unique as the justice himself, and reflects (indeed, embodies) his distinctive approach to the job, something that others may learn from but no one may be able to execute precisely in the same way as the late justice did.

Substantively, Justice Scalia's impact on constitutional doctrine will almost certainly outlast him in at least a few areas (apart from predicting whether, how, or to what extent constitutional doctrine over time moves in his preferred ideological direction), most notably including, as I and others have noted, statutory construction as well as criminal procedure, the Eleventh Amendment, administrative law, the Takings Clause, standing, and establishment and free exercise jurisprudence.⁵² How long his influence persists in these areas is, to state the obvious, a function of the extent to which other justices (and public leaders) agree with the substance of his opinions, such as in separation of powers and Second Amendment cases. Whether constitutional law follows his substantive preferences depends entirely therefore on its persuasive authority, the extent to which others will be persuaded or choose to adopt the same substantive outcomes as did he.

Fourth, Justice Scalia was temperamentally quite unique. Many of his fellow justices, particularly Justice Ginsburg, liked him personally, while his bare-knuckled approach in constitutional clashes produced friction on the Court as well, even with justices who were in the same ideological wing of the Court.⁵³ Consequently, his temperament

⁵¹ See, e.g., Yuri Kapgan, *What Made Antonin Scalia a Great Writer*, SLATE (Feb. 13, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_s_writing_assessed.html.

⁵² See Slattery et. al, *supra* note 19 and accompanying text.

⁵³ See, e.g., Josh Gerstein, *Supreme Court Justices Stop Playing Nice*, POLITICO, (June 26, 2015), <http://www.politico.com/story/2015/06/supreme-court-justices-antonin-scalia-samuel-alito-119486>.

reflected something that students of the Court and subsequent generations will likely not revere (at least in large numbers)—a relentless combativeness over constitutional methodology and penchant for debate, which seemed to know few bounds. At the same time, subsequent generations will admire, albeit sometimes grudgingly, his disposition for candor and the transparency of his opinion, values which undoubtedly other justices may consider in fashioning their own, respective approaches to their duties on the Court.

His final, potential legacy pertains to the methodology he vigorously expounded for statutory and constitutional interpretation over nearly three decades on the Court. No one would have understood better than Justice Scalia that a legacy does not constrain and that the methodology he meticulously defended and relentlessly championed was only as strong, again, as its persuasive force. He was, after all, only a single justice, and, without being physically present any longer on the Court, the forcefulness of his arguments—not their sting or contempt—remains his most important legacy, for as long as there are people open to persuasion.

One important aspect of his methodology was his approach to constitutional *stare decisis*. Early in his career, Justice Scalia urged the Court to reconsider cases based primarily on whether they were wrongly decided.⁵⁴ Later, he moderated the approach. If, however, his successor adopts a similar disdain as the late justice had with respect to any of the Court's opinions with he disagreed, it will likely increase the chances the Court will lower, rather than maintain or heighten, the bar for reconsidering wrongly decided cases. In other words, the prospect for transformation of constitutional law may increase.

Justice Scalia had quite limited control over the meaning of extension of his legacy, less in all likelihood than even a single precedent can constrain how subsequent authorities understand or apply it. The fate of everything Justice Scalia did on the Court, particularly his nuanced understanding of plain meaning, rests in the hands and judgment of current and future

⁵⁴ See generally, MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008).

justices, national leaders, scholars, and generations of Americans. Of these, Justice Scalia trusted the American public the most; they were the least fickle, the most under-appreciated expounder of the Constitution in his judgment, but ultimately the expounders with the greatest stake in the Constitution.

No doubt, we will hear more about the meaning of Justice Scalia's legacy in the weeks, months, and years ahead. It will be the focus of debate in the Senate when it considers President Trump's nomination of Judge Gorsuch, who repeatedly expressed his reverence for Justice Scalia and who described himself as an originalist; debate on the Supreme Court as current and future justices consider whether to follow or deviate from the particular paths Justice Scalia demanded others to take on the Court; debate among scholars on the extent to which the Court will have followed, or should not be following, the approaches he set forth in decades of opinions; debate among historians on how to understand not only his tenure on the Court but also the efforts to stop President Obama's nomination of Merrick Garland to replace him and the nomination of Judge Gorsuch to extend Justice Scalia's legacy. Given the more recent (and likely success) of President Trump's nomination of Judge Gorsuch to succeed Justice Scalia, Justice Scalia's legacy will likely depend, at least to some extent, on how the justice who replaces him will treat his pronouncements on the Court, the precedents he helped to fashion, and the precedents he opposed.

CONCLUSION

Justice Scalia consistently defended the Constitution's protection of robust, fierce, aggressive, passionate expression about all things political. His defense derived from many things including his broad construction of the First Amendment's guarantee of freedom of speech, his conception of his obligations and duties as a justice of the Supreme Court, and his character, particularly his penchant for debate. Justice Scalia gave as good as he got; he pulled no punches, and he was convinced, doubtlessly until his dying day, that truth was on his own side. He rode into battle every day, convinced of the

rightness of his cause, the protection of the fundamental democratic process established by the Constitution, which he resolutely revered.

Justice Scalia was a student of history, too, and undoubtedly understood that he was always playing for a bigger audience. The ultimate judge of a justice's legacy (or, for that matter, anyone's legacy) is history. The texts he produced were left not just to the judgment of his colleagues and scholars but also to history.

The impact of a single justice's distinctive views in constitutional law tends to recede over time. Without the justice there to continually press his particular views, they are left almost entirely to their persuasive force, which diminishes as both the Court's cases and composition change. The principal safeguard against this diminution, from a deceased justice's vantage point, will be left, ironically, less to the justice than to the political authorities empowered to shape the Court's composition over time. Hence, President Trump's certitude that, in nominating Judge Gorsuch, he fulfilled his promise to nominate someone "in the mold" of Justice Scalia presents the most significant opportunity to entrench or extend Justice Scalia's impact on constitutional law.⁵⁵ Presumably, that justice will play a key role in defining Justice Scalia's legacy.

As students, lawyers, justices, and historians wrestle with Justice Scalia's texts, they will inevitably give them new meaning. Justice Scalia tried mightily to be as clear, direct, and candid as he could in his constitutional decision-making; his colleagues—and the world—usually knew where he stood on the issues of his day. But, the clarity, directness, and candor will be tested time and again, as the Court, without Justice Scalia, considers new cases and revisits old ones. In these contests, it matters less that Justice Scalia lost more than he won. What will matter most will be the extent to which presidents and the Senate have constructed a Court in his mold, devoted, even at least as fiercely as he, to protecting fundamental constitutional values, such as federalism and

⁵⁵ Andrew Chung, *Trump Supreme Court nominee Gorsuch seen in the mold of Scalia*, Reuters (Feb. 1, 2017), <http://www.reuters.com/article/us-usa-court-trump-gorsuch-newsmaker-idUSKBN15G381>.

judicial restraint, against the relentless push toward a judicial imperialism, which Justice Scalia opposed. A constitutional conservative's challenge is to conserve, and thus the ultimate test of Justice Scalia's legacy will be to what extent the Supreme Court will conserve the constitutional values about which he cared the most.

PEYOTE AND GHOULS IN THE NIGHT: JUSTICE SCALIA'S RELIGION CLAUSE MINIMALISM

John D. Inazu*

INTRODUCTION

The late Justice Antonin Scalia held a minimalist view of the religion clauses: the Free Exercise Clause does not protect against neutral laws of general applicability, and the Establishment Clause prohibits neither longstanding traditional practices nor legislative acts with a plausible secular purpose. In both free exercise and establishment cases, Scalia resisted judicial second-guessing of legislative judgments unless he saw an explicit singling out of religious practice. Yet Scalia had an uneven influence on religion clause jurisprudence. When it came to the Free Exercise Clause, he played a pivotal role in shaping a doctrinal framework that has arguably created more tensions than it has resolved. In contrast, when it came to the Establishment Clause, he failed to influence his colleagues to alter a doctrinal framework that arguably remains less coherent than it would have been under his proposed alternative. The net result is the worst of both worlds: a Court that followed Scalia into a murky free exercise experiment and ignored his pleas to clarify its understanding of establishment.

This Article explores Justice Scalia's religion clause minimalism in six opinions. It then considers three difficulties raised by his approach: one theoretical, one doctrinal, and one normative. The theoretical difficulty is that Scalia's minimalism made him less likely to help religious minorities that he believed worth protecting. The doctrinal difficulty is that his minimalism makes it difficult to justify the Court's protections for religious institutions. The normative difficulty—for those who favor strong religious liberty protections—is that his minimalism makes it hard to require that discretionary public funding include religious beneficiaries.

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I. JUSTICE SCALIA'S KEY RELIGION CLAUSE OPINIONS

Much of Justice Scalia's religion clause minimalism is captured in the views he expressed in a small number of opinions. This section first considers four of his concurrences and dissents in Establishment Clause cases: *Edwards v. Aguillard*,¹ *Lee v. Weisman*,² *Lamb's Chapel v. Ctr. Moriches Union Free School District*,³ and *Bd. of Educ. of Village of Kiryas Joel v. Grumet*.⁴ It then turns to two Free Exercise Clause cases: his majority opinion in *Employment Division v. Smith*⁵ and his dissent in *Locke v. Davey*.⁶

A. *Edwards v. Aguillard*

Edwards v. Aguillard was decided during Scalia's first year on the Supreme Court.⁷ The case involved Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act," which prohibited public schools from teaching evolution unless they also taught the theory of "creation science."⁸ The purpose of the Act, according to its sponsor, Senator Bill Keith, was to promote academic freedom.⁹

The majority applied the three-part test announced in *Lemon v. Kurtzman*,¹⁰ which requires courts to examine a law challenged under the Establishment Clause to ensure that it has a secular legislative purpose, that its principal or primary effect neither advances nor inhibits religious practice, and that it does not result in an "excessive government entanglement" between religion and government.¹¹ Based on its review of the legislative history, the Court concluded that the Act was intended to give an unfair advantage to a "particular religious doctrine."¹²

¹ 482 U.S. 578 (1987).

² 505 U.S. 577 (1992).

³ 508 U.S. 384 (1993).

⁴ 512 U.S. 687 (1994).

⁵ 494 U.S. 872 (1990).

⁶ 540 U.S. 712 (2004).

⁷ 482 U.S. 578 (1987).

⁸ *Id.* at 580–81 (1987).

⁹ *Id.* at 581.

¹⁰ 403 U.S. 602 (1971).

¹¹ *Id.* at 612–13.

¹² *Aguillard*, 482 U.S. at 592 ("The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to

Accordingly, the Act violated *Lemon*'s purpose prong: "a State's articulation of a secular purpose . . . [must] be sincere and not a sham."¹³

Justice Scalia's dissent scoffed at *Lemon*'s purpose prong.¹⁴ He noted that the Court had found a lack of secular purpose in just three prior cases.¹⁵ But even if *Lemon* controlled, he reasoned, the Act did not violate the Establishment Clause.¹⁶ For Scalia, "it should not matter if legislators have a religious purpose in enacting a statute or if the statute happened to coincide with the legislators' religious beliefs, as long as there was also some secular purpose."¹⁷ In Scalia's view, the Act's secular purpose was just what Senator Keith had claimed it was. Scalia also argued that the Act need not effectively further that secular purpose, so long as those who passed it did so with the secular purpose in mind.¹⁸

B. *Lee v. Weisman*

In 1992, the Court held in *Lee v. Weisman* that a "nonsectarian" prayer delivered during a public middle school's graduation ceremony violated the Establishment Clause.¹⁹ Justice Kennedy's opinion for the Court ignored *Lemon* and focused instead on whether the prayer had a "coercive" effect on students attending the graduation ceremony.²⁰ Kennedy argued that students required to attend the ceremony were "psychologically obligated" to stand during the prayer.²¹

provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety.").

¹³ *Id.* at 586–87.

¹⁴ *Id.* at 613 (Scalia, J., dissenting) ("I doubt whether that 'purpose' requirement of *Lemon* is a proper interpretation of the Constitution. . .").

¹⁵ *Id.* at 614.

¹⁶ *Id.* at 625–26. Scalia also argued that a secular purpose alone is sufficient "regardless of whether that purpose is likely to be achieved by the provisions they enacted." *Id.* at 614. He added: "Our task is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed. The vast majority of them voted to approve a bill which explicitly stated a secular purpose; what is crucial is not their *wisdom* in believing that purpose would be achieved by the bill, but their *sincerity* in believing it would be." *Id.* at 621.

¹⁷ Christopher E. Smith & Linda Fry, *Vigilance or Accommodation: The Changing Supreme Court and Religious Freedom*, 42 SYRACUSE L. REV. 893, 924 (1991).

¹⁸ *Aguillard*, 482 U.S. at 621 (Scalia, J., dissenting).

¹⁹ *Lee v. Weisman*, 505 U.S. 577 (1992).

²⁰ *Id.* at 592–93.

²¹ *Id.* at 637 (Scalia, J., dissenting).

Scalia's dissent lambasted Kennedy's coercion framework as "a boundless, and boundlessly manipulable, test."²² For Scalia, the "argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent."²³ He believed that students could freely choose to remain seated, but even if they were somehow "coerced" to stand, "maintaining respect for the religious observances of others is a fundamental civic virtue that government . . . can and should cultivate"²⁴

Scalia's *Lee* dissent also highlighted his emphasis on the role of tradition in resolving Establishment Clause challenges. For Scalia, any test "that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."²⁵ Whatever line the Court drew must be "one which accords with history and faithfully reflects the understanding of the Founding Fathers."²⁶ Scalia called Kennedy's *Lee* opinion "conspicuously bereft of any reference to history."²⁷ In his view, applying the Establishment Clause through the lens of history was the only acceptable approach.²⁸ And, he argued, our history is "replete with public ceremonies featuring prayers of thanksgiving and petition."²⁹

²² *Id.* at 632.

²³ *Id.* at 636.

²⁴ *Id.* at 638.

²⁵ *Id.* at 631 (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). Cf. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389 (2000) (Justice Scalia "takes an extremely narrow view of the protections" of the Establishment Clause as evidenced by his opinion in *Lee v. Weisman*, and "he emphasizes deference to majoritarian government decision-making. He gives no weight to the need for the judiciary to enforce these clauses, especially to protect those of minority religions.").

²⁶ *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

²⁷ *Id.* at 631.

²⁸ *See id.* at 632 ("Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.").

²⁹ *Id.* at 633 (Scalia, J., dissenting) (referencing the Declaration of Independence, President George Washington's first inaugural address, President Thomas Jefferson's first inaugural address, President James Madison's first inaugural address, President George W. Bush's inaugural address, the national celebration of Thanksgiving, and the opening of congressional sessions with a chaplain's prayer). *But see* Nadine

Scalia concluded his opinion by criticizing *Lemon*. He observed that the Court in *Lee* had revealed the “irrelevance” of *Lemon* by ignoring the test altogether.³⁰ But he found the Court’s application of the “psycho-coercion test” no better, asserting that it “suffers the double disability of having no roots whatever in our people’s historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.”³¹

C. *Lamb’s Chapel*

The year after *Lee v. Weisman*, Scalia penned one of his most memorable lines concurring in *Lamb’s Chapel v. Center Moriches Union Free School District*.³² The case involved a church’s challenge to a public school district denying it access to a school’s facilities to show films on parenting and the family. The Court concluded that allowing the church to use the school’s facilities did not violate the Establishment Clause.³³ Relying on *Lemon*, the Court concluded that the policy passed muster because the “film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members.”³⁴

Scalia’s concurrence argued that allowing the church access to the school’s facilities did not violate the Establishment Clause because “it does not signify state or local embrace of a particular religious sect.”³⁵ He thought *Lemon* utterly unhelpful to the Court: “When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs no more than helpful signposts.”³⁶ Yet despite

Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 461 (1997) (arguing that Justice Souter’s historical interpretation “met and bested” Justice Scalia’s).

³⁰ *Lee*, 505 U.S. at 644 (Scalia, J., dissenting).

³¹ *Id.* at 644.

³² 508 U.S. 384 (1993).

³³ The case also involved a free speech claim, on which the Court held that the school district’s decision constituted viewpoint discrimination. *See id.* at 394 (“The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.”).

³⁴ *Id.* at 395.

³⁵ *Lamb’s Chapel*, 508 U.S. at 401 (Scalia, J., concurring).

³⁶ *Id.* at 399 (internal citations and quotations omitted).

Lemon's indeterminacy, and much to Scalia's chagrin, the test persisted: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."³⁷

D. Board of Education of Village of Kiryas Joel v. Grumet

The following year, Justice Scalia dissented in a different Establishment Clause case.³⁸ This time, the plaintiffs were a minority religious sect, the Satmar Hasidim, who practiced a strict form of Judaism.³⁹ In 1977, a group of Satmars incorporated the village of Kiryas Joel.⁴⁰ Most of their children attended private religious schools within the village, but because those schools were unable to accommodate children with special needs, some children attended public schools outside the village.⁴¹ This arrangement proved unsatisfactory to parents who saw their children confronting severe emotional difficulties in the public schools.⁴² In 1989, the New York legislature responded by creating the Kiryas Joel Village School District.⁴³

After other state residents sued the legislature, the Supreme Court held that the school district violated the Establishment Clause.⁴⁴ Writing for the majority, Justice Souter noted that "[b]ecause the religious community of Kiryas Joel did

³⁷ *Id.* at 398.

³⁸ *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 732–52 (1994) (Scalia, J., dissenting). The residents of Kiryas Joel "interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls." *Id.* at 691 (majority opinion).

³⁹ *Id.* at 690.

⁴⁰ *Id.* at 691.

⁴¹ *Id.*

⁴² As a result, these children often went without the special services they were entitled to by law. *Id.* at 691–92.

⁴³ Although the statute granted the school board authority over elementary and secondary education of all school-aged children in the village, Kiryas Joel children without special needs continued to attend private religious schools. Accordingly, the new school district operated only a special education program for children with special needs. *Id.* at 693–94.

⁴⁴ *Id.* at 705.

not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one.”⁴⁵ Souter explained that the majority’s holding did not prevent New York’s legislature from finding another way to accommodate the Satmars’ special needs children,⁴⁶ but reasoned that “accommodation is not a principle without limits” and concluded that the statute “crosse[d] the line from permissible accommodation to impermissible establishment.”⁴⁷

Justice Scalia disagreed with the majority’s invalidation of the school district. He believed there was “no possible doubt of a secular basis” for the law and argued that the majority had failed to overcome the “strong presumption of validity that attaches to facially neutral laws” by showing the absence of a secular basis.⁴⁸ Scalia also paid particular attention to the Satmars’ non-mainstream beliefs, contending that even if the district had been created as a special arrangement *because* of those beliefs, it would be a constitutionally permissible accommodation.⁴⁹ In Scalia’s view, our nation’s history encouraged accommodations like this one: “When a legislature acts to accommodate religion, particularly a minority sect, ‘it follows the best of our traditions.’”⁵⁰ He argued that the majority’s “demand for ‘up front’ assurances of a neutral system”

⁴⁵ *Id.* at 703.

⁴⁶ The majority proposed alternatives to the separate school district including bilingual and bicultural instruction for Kiryas Joel special needs children at a public school in the encompassing district and a separate bilingual and bicultural program offered by the encompassing district at a neutral site near a village parochial school. *Id.* at 707.

⁴⁷ *Id.* at 706–10. Writing for the majority, Souter also reasoned that similar to the law at issue in *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982), the law creating Kiryas Joel Village School District was an impermissible “fusion of governmental and religious functions” because it “effectively identifies . . . recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly.” *Id.* at 699, 702. In his dissent, Justice Scalia represented Souter’s reasoning as “steamrolling . . . the difference between civil authority held by a church and civil authority held by members of the church,” arguing that the “critical factor” that made *Larkin* unique was that the law at issue explicitly gave civil authority to churches as institutions, unlike the law creating Kiryas Joel Village School District that gave authority to a group of citizens who happened to be of a particular religious faith. *Id.* at 735 (Scalia, J., dissenting).

⁴⁸ *Id.* at 738, 752 (Scalia, J., dissenting).

⁴⁹ *Id.* at 743.

⁵⁰ *Id.* at 744 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

from the New York legislature violates both traditional accommodation doctrine and the role of judiciary,⁵¹ concluding that their decision to strike down the law “continues, and takes to new extremes, a recent tendency of this Court to turn the Establishment Clause into a repealer of our Nation’s tradition of religious toleration.”⁵²

E. Employment Division v. Smith

The 1990 decision in *Employment Division v. Smith*⁵³ is easily Justice Scalia’s most important, and most controversial, religion clause opinion.⁵⁴ The case involved two Native American spiritualists who sued under the Free Exercise Clause after losing their jobs and being denied unemployment benefits for using peyote during one of their worship services. Scalia’s majority opinion showed little empathy for the plaintiffs. The law banning peyote, Scalia wrote, was a “neutral law of general applicability.”⁵⁵ It did not single out any particular religious belief or even religious belief in general. Rather, it applied to all people, religious or not, and it applied to all peyote use, religious or not.⁵⁶ These generally applicable laws need only pass the rational basis test—the fact that they might incidentally curtail religious practice did not matter.

Scalia’s conclusion had far-reaching effects: most laws are neutral laws of general applicability, and the few that are not typically run afoul of equal protection norms.⁵⁷ *Smith* thus relegated the constitutional protections for free exercise to almost

⁵¹ *Id.* at 747.

⁵² *Id.* at 752.

⁵³ 494 U.S. 872 (1990).

⁵⁴ See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) (“The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades.”).

⁵⁵ 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

⁵⁶ *Id.* at 884 (describing the Oregon ban on peyote as an “across-the-board criminal prohibition”).

⁵⁷ See Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 465 (1997) (arguing that under *Smith*, “the Free Exercise Clause amounts merely to a shadow of the Equal Protection Clause, guaranteeing only formally equal treatment of all religious beliefs; so long as a governmental rule on its face applies equally to all religious beliefs and was not intentionally designed to have an adverse impact on any particular faith....”).

no practical significance.⁵⁸ For Scalia, this reasoning was part and parcel of an ordered democracy.⁵⁹ Anything else would raise the specter of anarchy.⁶⁰

Smith also shifted the focus of free exercise jurisprudence from constitutional to statutory law. Its broad holding triggered a number of state and federal legislative responses.⁶¹ In 1993, Congress enacted the Religious Freedom Restoration Act

⁵⁸ Scalia's opinion also drew ire for its attempt to distinguish precedent. In what qualifies as one of his most implausible doctrinal contributions, Scalia announced the concept of "hybrid rights." On this view, a free exercise challenge to a neutral law of general applicability might nonetheless trigger heightened scrutiny if the law also implicated some other constitutional right. *Smith*, 494 U.S. at 881–82. For example, Scalia wrote, "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id.* at 882. The confused doctrine was soon debunked as unworkable; in fact, as Professor Christopher Lund has noted, even Justice Scalia eventually abandoned the idea. Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y, 627, 631–32 (2003) (citing *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring)).

⁵⁹ Scalia believed he was on firm historical ground, as evidenced by his concurring opinion in *City of Boerne v. Flores*, 521 U.S. 507, 537–38 (1997). As Professor Gregory Sisk observes, Scalia's *Boerne* concurrence "contended that the historical evidence also undercuts a broad reading of the Free Exercise Clause. He interpreted colonial and revolutionary era religious freedom charters to prohibit only discriminatory laws targeted at religion; he construed charter caveats or provisos limiting the scope of religious liberty to peaceable conduct as broadly mandating obedience to general civil laws; and he argued that exemptions from civil laws on religious grounds during the colonial and founding period were understood to be a matter of legislative grace." Gregory C. Sisk, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 519 (2004); see also Richard Garnett, *Justice Scalia, Religious Freedom, and the First Amendment*, HERITAGE FOUNDATION SPECIAL REPORT NO. 186 (August 30, 2016) (arguing that *Smith* "is better grounded in history and tradition than [Scalia's] critics contend.").

⁶⁰ See *Smith*, 494 U.S. at 888 ("[T]he rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."); see also *id.* at 890 ("that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself"). Justice O'Connor offered a different view. See *id.* at 902 (O'Connor, J., concurring) ("The Court's parade of horrors . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."). It is worth noting that the two hundred years prior to the *Smith* opinion had not produced this "parade of horrors."

⁶¹ The legislative response was itself consistent with Justice Scalia's views. See Marc O. DeGirolami, *The Optimist: For Scalia, Textualism Was a Matter of Trust*, COMMONWEAL (Feb. 23, 2016), <https://www.commonwealmagazine.org/optimist> ("Many critics of *Smith* . . . miss that what may first appear as a hard and parsimonious rule for religious freedom is closely coupled in Scalia's opinion with a deep faith and optimism that people, acting through their legislatures, would do right by their religious brethren, would be magnanimous and charitable toward them whenever they could be...").

(RFRA) in direct response to *Smith*.⁶² After the Supreme Court struck down a major section of RFRA,⁶³ Congress responded in 2000 with the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁶⁴ With the exception of the Court's recognition of the ministerial exception in its 2012 *Hosanna-Tabor* decision,⁶⁵ almost every major free exercise case in the last quarter-century has been a statutory RFRA or RLUIPA case rather than a case arising under the federal Free Exercise Clause.⁶⁶

Smith led to another decision that would have later ripples in free exercise law: *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.⁶⁷ In *Lukumi*, the Court held that several city ordinances banning animal sacrifice violated the Free Exercise Clause.⁶⁸ In doing so, the Court offered a more detailed framework for evaluating whether a law is “neutral” and “generally applicable.” The neutrality inquiry focused on whether the law “targets religious conduct.”⁶⁹ The generality inquiry focused on the law’s “categories of selection”—whether it was overbroad or underinclusive with respect to the government interests it aimed to promote.⁷⁰ The Court found that the ordinances in *Lukumi* were neither neutral nor generally applicable.⁷¹ Taken together, the ordinances “had as their object the suppression of religion,” and they proscribed only “conduct motivated by religious belief.”⁷² Accordingly, the ordinances triggered strict scrutiny, and the Court invalidated them under that standard.⁷³ More than twenty years later, *Lukumi* remains the Court's definitive

⁶² Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

⁶³ *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

⁶⁴ 42 U.S.C. § 2000cc (2012).

⁶⁵ *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012).

⁶⁶ See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (RLUIPA); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (RFRA); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (RFRA); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (RFRA).

⁶⁷ 508 U.S. 520 (1993).

⁶⁸ *Id.* at 547.

⁶⁹ *Id.* at 534.

⁷⁰ *Id.* at 542.

⁷¹ *Id.* at 542–43.

⁷² *Id.* at 542, 545.

⁷³ *Id.* at 546 (“It follows from what we have already said that these ordinances cannot withstand this scrutiny.”).

statement on how to analyze free exercise claims in light of *Smith*.

Yet even the strongest reading of *Lukumi* leaves holes in post-*Smith* free exercise protections. The ongoing effects of *Smith*'s prescription for evaluating neutral laws of general applicability are illustrated in the Court's 2010 decision, *Christian Legal Society v. Martinez*.⁷⁴ The case involved a Christian student group whose members held to a theological creed and met regularly for Bible study and prayer.⁷⁵ Neither the composition nor the practices of the religious group made any difference in light of *Smith*. Because the regulation at issue (a policy requiring student groups to accept "all-comers") was a neutral law of general applicability, the majority dismissed the free exercise claim in a footnote.⁷⁶

F. Locke v. Davey

In *Locke v. Davey*, the Supreme Court considered a Washington state college scholarship program that was not available to students pursuing a degree in "devotional theology."⁷⁷ Davey, a student who was denied the scholarship because he was studying to be a pastor, challenged the program as violating the Free Exercise Clause.⁷⁸ After noting the existence of "play in the joints" between the Establishment and Free

⁷⁴ 561 U.S. 661 (2010).

⁷⁵ Brief for Petitioner at 5, *Martinez*, 561 U.S. 661 (No. 08-1371) ("The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice, organize transportation to worship services, and host occasional dinners. The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship. . . . [T]o be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly." (citations omitted)); see also *id.* at 6 (quoting CLS's Statement of Faith).

⁷⁶ *Martinez*, 561 U.S. at 697 n.27 ("CLS briefly argues that Hastings' all-comers condition violates the Free Exercise Clause. Our decision in *Smith* forecloses that argument. In *Smith*, the Court held that the Free Exercise Clause does not inhibit enforcement of otherwise valid regulations of general application that incidentally burden religious conduct. In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." (citations omitted)).

⁷⁷ *Locke v. Davey*, 540 U.S. 712, 712 (2004).

⁷⁸ *Id.* at 720–23.

Exercise Clauses, the Court distinguished the facts in *Locke* from those in *Lukumi*.⁷⁹ The law at issue in *Lukumi* was an absolute ban on ritualistic animal slaughter; the Court characterized the program in *Locke* as a mere “disfavoring” of religion that did not rise to the level of non-neutrality. The Court also pointed to the Establishment Clause implications of using state funds to fund religious study.⁸⁰ The Court found that the state’s legitimate interest in not funding religion was enough to outweigh any chance that the refusal to fund devotional theology majors stemmed from animus towards religion.⁸¹

Scalia’s *Locke* dissent picked up on two themes from his *Kiryas Joel* dissent. First, he restated his concern for minority faiths: “Let there be no doubt: This case is about discrimination against a religious minority.”⁸² To be sure, the “minority” status of Locke’s Christianity was less apparent than that of the Satmar Jews. But Scalia rested his claim on the state’s singling out of Locke’s “deep religious conviction” as distinct from “only a tepid, civic version of faith” to which “the State’s policy poses no obstacle.”⁸³

Scalia was less consistent about another aspect of *Kiryas Joel*. In the earlier case, he had approvingly enlisted the Court’s view that “there is ample room for . . . ‘play in the joints’ productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”⁸⁴ By *Locke*, he had soured on the concept, castigating the majority’s “principle of ‘play in the joints’” and noting “I use the term ‘principle’ loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives.”⁸⁵

II. THREE DIFFICULTIES

⁷⁹ *Id.* at 718–20.

⁸⁰ *Id.* at 718.

⁸¹ *Id.* at 725.

⁸² *Id.* at 733.

⁸³ *Id.* at 733.

⁸⁴ 512 U.S. at 743–44 (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 669 (1970)).

⁸⁵ 540 U.S. at 728.

The six opinions from Justice Scalia discussed in the previous part highlight some of the major themes of his religion clause jurisprudence. Collectively, they show his minimalist approach to the religion clauses: The Free Exercise Clause does not protect against neutral laws of general applicability, and the Establishment Clause prohibits neither longstanding traditional practices nor legislative acts with a plausible secular purpose. In both free exercise and establishment cases, Scalia resisted judicial second-guessing of legislative judgments unless he saw the explicit singling out of religious practice.

Scalia's approach to religion clause cases also raises a number of difficulties. This section considers three of them: one theoretical, one doctrinal, and one normative.

A. Legislative Deference and Religious Minorities

Part and parcel to Justice Scalia's religion clause minimalism was his deference to legislative decision making.⁸⁶ But Scalia also repeatedly expressed concern and empathy for religious minorities.⁸⁷ These two preferences are in some theoretical tension with each other. Lacking the power of the majority, religious minorities are less likely to prevail in legislative contexts. The political vulnerability of religious minorities seems to be an explicit cost of the free exercise regime established by *Smith*.

The theoretical tension between legislative deference and a concern for religious minorities is also evident in the Establishment Clause context. For example, in many parts of

⁸⁶ Steven Goldberg, *Antonin Scalia, Baruch Spinoza, and the Relationship Between Church and State*, 23 CARDOZO L. REV. 653, 660–62 (2002) (“In *Boerne*, Scalia vigorously defended the *Smith* approach, under which the church must make its case before the representative branches of government, not the courts. . . . Scalia does not explicitly rely on the idea that legislatures are more rational than alternative institutions such as the courts, although he may believe they are. Scalia’s focus is instead on legitimacy: legislatures are elected; federal judges are not.”).

⁸⁷ In addition to his express concern for religious minorities in *Kiryas Joel* and *Locke*, Justice Scalia also supported the minority religion litigant in a number of other cases. See Antony Barone Kolenc, *Mr. Scalia’s Neighborhood: A Home for Minority Religions?*, 81 ST. JOHN’S L. REV. 819, 837 (2007) (collecting cases). Antony Kolenc suggests that “Scalia’s record reveals a man deeply concerned with the rights of practitioners of minority religions.” *Id.* “Indeed, when it comes to government targeting of religion, Scalia has proved himself a more vigilant guardian of minority religious rights than most of the Court, conservatives and liberals alike.” *Id.* at 838.

this country, legislators are quick to endorse religious symbolism that reflects majoritarian religious preferences. The kind of civil religion that flows out of this symbolism is far from neutral toward religious traditions. It is most often aligned with American Protestantism, and most frequently alienates religious minorities. Seen from this light, Scalia's legislative deference seems largely unsympathetic to those disadvantaged by the preferentialism for civil religion.⁸⁸

The costs of legislative deference may also increase if more general support for religious freedom starts to wane. For example, in past eras, even when Catholics failed to influence majoritarian policies, they typically prevailed in seeking legislative exemptions. But the possibility of exemptions even for relatively mainstream religions may be less plausible today in light of changing cultural norms.

We can see the implications of these shifting norms—and Justice Scalia's absence from the Court—in the recent denial of certiorari in *Stormans v. Selecky*.⁸⁹ *Stormans* involved a grocery store and pharmacy owned by Christians whose sincerely held religious beliefs prevented them from selling certain emergency contraceptives, like Plan B, that they believed prevented fertilized egg implantation. The Washington State Board of Pharmacy mandated that pharmacies stock and sell contraceptives like Plan B.⁹⁰ While the regulations contained a number of secular exceptions, the Board's regulations did not accommodate sincerely held religious beliefs.⁹¹

The Stormans family argued that the regulations unfairly targeted “religiously motivated referrals.”⁹² They prevailed in the district court, but the Ninth Circuit reversed, accepting the State's position that the regulations were “necessary ‘to ensur[e]

⁸⁸ As Professor Erwin Chemerinsky has argued, “Justice Scalia ignores the importance of the Establishment Clause in preventing the government from making those of other religions feel unwelcome and keeping the government from using its power and influence to advance religion or a particular religion.” Justice Kagan raised similar themes in her dissent in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1841 (2014) (Kagan, J., dissenting).

⁸⁹ 136 S. Ct. 2433 (2016).

⁹⁰ *Id.* at 2434.

⁹¹ *Id.* at 2435.

⁹² *Id.* at 2434–35 (“‘The rule,’ it warns, ‘does not allow a pharmacy to refer a patient to another pharmacy to avoid filling the prescription due to *moral or ethical objections.*’”) (emphasis in original).

that its citizens have safe and timely access to their lawful and lawfully prescribed medications.’”⁹³ The Supreme Court denied certiorari.

Justice Alito’s dissent from the denial of certiorari argued that the Board’s regulations effectively created a religious gerrymander.⁹⁴ He contended that the regulations were likely invalid under *Lukumi* and pointed out that while *Smith* shielded a “neutral law of general applicability,” *Lukumi* clarified that “a law that discriminates against religiously motivated conduct is not ‘neutral.’”⁹⁵ Alito and two other justices saw evidence of “discriminatory intent” in *Stormans* similar to that criticized in *Lukumi*.⁹⁶ Beyond intent, Alito saw “striking” similarities between the rules in *Stormans*.⁹⁷

The religious pharmacists in *Stormans* are reasonably viewed as a religious minority within the Washington regulatory framework. Yet *Smith*’s framework limits the free exercise protections available to them, and the Court’s denial of certiorari suggests a more narrow reading of *Lukumi* in Scalia’s absence. The theoretical tension between legislative deference and a concern for religious minorities persists.

B. Free Exercise Minimalism and Religious Institutionalism

The second difficulty is a doctrinal one. *Smith* is widely seen as having limited the free exercise right. As Michael McConnell has observed, Scalia correctly observed that free exercise law prior to *Smith* was “poorly developed and unacceptably subjective,” owing largely to “the arbitrariness of judicial balancing under the prior compelling interest test.”⁹⁸ But instead of developing a “more principled approach,” the *Smith*

⁹³ *Id.* at 2435.

⁹⁴ *Id.* at 2437 (Alito, J., dissenting) (“While requiring pharmacies to dispense all prescription medications for which there is demand, the regulations contain broad secular exceptions but none relating to religious or moral objections; the regulations are substantially underinclusive because they permit pharmacies to decline to fill prescriptions for financial reasons; and the regulations contemplate the closing of any pharmacy with religious objections to providing emergency contraceptives, regardless of the impact that will have on patients’ access to medication.”).

⁹⁵ *Id.* at 2436.

⁹⁶ *Id.* at 2436–37.

⁹⁷ *Id.* at 2437.

⁹⁸ McConnell, *supra* note 54, at 1144.

opinion “proposes to solve this problem by eliminating the doctrine of free exercise exemptions.”⁹⁹

Scalia never retreated from his position in *Smith*, but he nevertheless joined the Court’s opinion in *Hosanna-Tabor v. EEOC*, the 2012 decision that recognized a ministerial exception for religious organizations.¹⁰⁰ It is difficult to see why the minimal rational basis scrutiny that Scalia applied to neutral laws of general applicability should not apply to the generally applicable neutral law in *Hosanna-Tabor*.¹⁰¹ Nor is the Court’s reliance in *Hosanna-Tabor* on the intersection of free exercise and establishment principles entirely convincing. If *Smith* is right about the weak protections of the Free Exercise Clause, then combining those protections with anti-establishment concerns means either that the Establishment Clause is doing all of the work (in which case the free exercise references are purely cosmetic) or that the combination between free exercise and establishment creates some kind of “super right.”¹⁰²

I have suggested elsewhere that the Court’s deference to neutral laws of general applicability in *Smith* and its recognition of the ministerial exception in *Hosanna-Tabor* appear to be on a collision course.¹⁰³ To illustrate the doctrinal tension, consider a twist on the “all-comers” policy validated by the Court in *Christian Legal Society v. Martinez*.¹⁰⁴ Based on the reasoning of *Martinez*, a public school can deny recognition of a private student group if the group refuses to open its membership and leadership to any student at the school. The policy is a neutral law of general applicability, and as the Court itself observed in

⁹⁹ *Id.*

¹⁰⁰ 565 U.S. 171, 188 (2012).

¹⁰¹ See JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 25 (2016) (critiquing the logic of *Hosanna-Tabor* in light of *Smith*).

¹⁰² Or perhaps even a “hybrid right”? See Emp’t Div., Dep’t of Human Res. v. *Smith*, 494 U.S. 872, 881-82 (1990) (proposing concept of “hybrid rights”). In my view, the real problem with *Hosanna-Tabor* is that the Court’s weak free exercise and freedom of association precedents left it without the jurisprudential resources to protect the church in a more straightforward manner. See John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 823-26 (2014); see also Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 111-12 (arguing that “*Smith* augured the waning of religious accommodation” and “[*Hosanna-Tabor*’s] ministerial exception simply represents the refracted glow of constitutional protection in the gathering gloom”).

¹⁰³ See INAZU, *supra* note 101, at 25.

¹⁰⁴ 561 U.S. 661 (2010).

Martinez, the *Smith* rule means that the free exercise clause does not come into play. But suppose that the student group denied recognition for noncompliance with the school's all-comers policy is a Baptist group sponsored by a church that considers every member to be a minister of the Gospel.¹⁰⁵ Under the reasoning of *Hosanna-Tabor*, the group's ministerial designation of every member plausibly brings it within the protections of the ministerial exception, even against a neutral law of general applicability. It's not clear how the above hypothetical is resolved in light of *Smith* and *Hosanna-Tabor*. And the ambiguity points to the doctrinal tension that *Smith* creates and that *Hosanna-Tabor* does not sufficiently resolve.

C. Public Funding of Religion

For those who favor strong protections for religious freedom, Scalia's religion clause minimalism creates a normative difficulty in cases involving public funding. Many funding cases raise both an Establishment Clause issue (*may* the government fund religion?) and a Free Exercise Clause issue (*must* the government fund religion?). Scalia's approach to Establishment Clause cases almost always answered the first question affirmatively, and when it comes to funding cases (as distinct from other Establishment Clause cases), the Court, at least during Scalia's tenure, usually agreed. But Scalia was less clear when it came to the Free Exercise Clause. The key question for him, consistent with his views in *Smith*, was whether the government had singled out religion for negative treatment in its funding decision. Scalia believed that the scholarship program in *Locke* violated the Free Exercise Clause because it had singled out religion. But in the absence of such discriminatory treatment, the denial of funding would presumably pass muster under *Smith*.

One wrinkle to this inquiry emerges from a line in Scalia's *Locke* dissent:

¹⁰⁵ In fact, the group might not even have to be formally attached to a church. See *Conlon v. Intervarsity Christian Fellowship*, 777 F.3d 829, 833–37 (6th Cir. 2015) (applying the ministerial exception to parachurch campus ministry organization).

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.¹⁰⁶

The complicating questions are what counts as “generally available” and what counts as “solely on the basis of religion.”

Consider recently withdrawn legislation in California that would have denied state grants to religious colleges and universities that failed to comply with the state’s antidiscrimination norms pertaining to sexual orientation and gender identity (SOGI).¹⁰⁷ First, it is not evident that the state grants qualify as a “generally available” public benefit or whether they fall into a different category of funding. Second, because the proposed law focused on SOGI protections and not, for example, gender, it would have affected only religious colleges and universities. Does this mean that the SOGI antidiscrimination norm was a funding limitation based “solely on the basis of religion”? The question is one of *de facto* vs. *de jure* effects on religion. In fact, the legislation discriminates against only religious schools. But on its face, the legislation is a neutral law of general applicability. Scalia’s free exercise minimalism makes it difficult to protect religious colleges and universities from this kind of legislation.¹⁰⁸

CONCLUSION

This Article has examined some of Justice Scalia’s contributions to the Supreme Court’s religion clause jurisprudence, and some of the difficulties that these contributions have left with us. The Court that moves forward without Justice Scalia will continue to struggle with those

¹⁰⁶ *Locke v. Davey*, 540 U.S. 712, 726–27 (2004). For a similar argument, see INAZU, *supra* note 101 [Confident Pluralism], at 66–80 (applying a public forum analysis to generally available forms of public funding).

¹⁰⁷ See Patrick McGreevy, *State Senator Drops Proposal that Angered Religious Universities in California*, L.A. TIMES, Sept. 1, 2016.

¹⁰⁸ The question of *de facto* and *de jure* singling out of religion applies in contexts beyond funding.

difficulties. In this area of the law, his colleagues and those who follow the Court's religion clause jurisprudence will likely come to see a mixed record. Scalia helpfully clarified some aspects of religion clause doctrine, and he rightly pushed against some of the vague doctrine that emerged around the Establishment Clause. But he also left us with *Smith*—a case that creates unsatisfying doctrinal tensions, substantially weakens religious liberty protections and which, to borrow a memorable line, like some ghoul in a late night horror movie, continues to stalk our free exercise jurisprudence.

JUSTICE SCALIA AND FOURTH ESTATE SKEPTICISM

RonNell Andersen Jones*

INTRODUCTION

When news broke of the death of Justice Antonin Scalia, some aspects of the Justice's legacy were instantly apparent. It was immediately clear that he would be remembered for his advocacy of constitutional originalism, his ardent opposition to the use of legislative history in statutory interpretation, and his authorship of the watershed Second Amendment case of the modern era.¹

Yet there are other, less obvious but equally significant ways that Justice Scalia made his own unique mark and left behind a Court that was fundamentally different than the one he had joined thirty years earlier. Among them is the way he impacted the relationship between the Court and the press. When Scalia was confirmed as a Justice of the U.S. Supreme Court in 1986, he joined a Court that had spent the previous two decades actively characterizing the press as an invaluable "Fourth Estate."² The Court had repeatedly and glowingly depicted a free press as an essential component of democracy—an accountability-enhancing watchdog,³ a shaper of community

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¹Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

²For greater discussion of this trend and additional examples, see RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253 (2014), [hereinafter Jones, *What the Supreme Court Thinks*].

³*See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (asserting that "the basic assumption of our political system [is] that the press will often serve as an important restraint on government"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (the press "does not simply publish information about trials but guards against the miscarriage of justice"); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (calling the press "the handmaiden of effective judicial administration" and saying that its "record of service over several centuries" has been "impressive"); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

dialogue,⁴ a trusted public educator,⁵ and a valuable proxy for the citizen in observing government affairs.⁶ Thirty years later, that model of the press as a positively contributing social entity worthy of protection appears to be greatly diminished.⁷ The old model has been replaced with Court depictions of the press as a profit-driven institution prone to error, guilty of distorting the political process and oversimplifying or ignoring issues, and unworthy of special constitutional consideration.⁸

This essay explores the frequency, tenor, and consequences of Justice Scalia's characterizations of the press, examining the Justice's personal and jurisprudential relationship with the media. It focuses on the ways in which Scalia signaled, both on and off the bench, his distrust of the institutional press and his wholesale rejection of any Fourth Estate specialness. It observes that this powerful brand of Fourth Estate skepticism not only dominated Justice Scalia's media-law jurisprudence—in which he repeatedly and adamantly insisted that the press is no different than any other speaker—but also permeated his writings on other topics, from election law and separation of powers to court cameras and recusals, and helped shepherd the Court into an era of profound cynicism about the media and its role in American society.

Justice Scalia was by no means alone in his personal misgivings about the press,⁹ nor was he alone in expressing less-

⁴ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (emphasizing the importance of the exercise of newspapers' editorial judgment); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (describing the press as "a mighty catalyst in awakening public interest in governmental affairs").

⁵ *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (asserting that "[a]n untrammelled press [is] a vital source of public information"); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (noting the press is central to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system").

⁶ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.").

⁷ Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261–62.

⁸ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 351 (2010).

⁹ See generally RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA* (Cambridge Univ. Press 2011).

than-positive characterizations of the media in Court opinions.¹⁰ Moreover, the media itself—and society’s relationship with, reliance upon, and trust in the institutional press—changed radically in this critical time period that Justice Scalia occupied the bench.¹¹ This suggests that there are many more factors at play in the shift in press characterizations than the insistent views of one jurist. But a close look at the linguistic and attitudinal movement by the Court on the question of press characterization shows Justice Scalia pulling the laboring oar in many ways—moving the typical depiction away from a more positive view of the institutional press and toward a more denigrating one. This change, which Justice Scalia urged and contributed to both on and off the bench, may matter well beyond its ramifications for the press itself, and it may place the Court and the nation at an important turning point as Justice Scalia’s replacement is named.

I. FOURTH ESTATE SKEPTICISM IN JUSTICE SCALIA’S PERSONAL INTERACTIONS WITH THE PRESS

Justice Scalia’s characterizations of the media were complicated by the fact that he was not only a jurist who considered the question of press rights in his judicial opinions, but also a public figure who was himself the subject of press coverage. His personal interactions with the press were marked by agitation and tension for nearly all of the Justice’s time on the Court.

Reporters who covered the Justice’s appearances described his attitude toward working journalists as “churlish”¹² and “prickly”¹³ and suggested that their exchanges were punctuated with “animosity.”¹⁴ Scalia “did not make it easy for journalists to cover his appearances,” almost never allowing

¹⁰ See *infra* notes 138–56 and accompanying text (discussing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (majority opinion by Justice Kennedy)).

¹¹ See Jones, *What the Supreme Court Thinks*, *supra* note 2, at 264 (discussing changes in the technology by which news is delivered and the quality with which news is delivered that might have had an impact on the ways the Court depicts the press).

¹² Associated Press, *AP Photog Angers Scalia*, EDITOR & PUBLISHER (Oct. 21, 2004), <http://www.editorandpublisher.com/news/ap-photog-angers-scalia/>.

¹³ *Id.*

¹⁴ Gina Holland, Associated Press, *Scalia Turns Journalists Away From Speech*, EDITOR & PUBLISHER (Oct. 12, 2005), <http://www.editorandpublisher.com/news/scalia-turns-journalists-away-from-speech/>.

these appearances to be broadcast, and for many years forbidding them from being recorded “even by print reporters seeking to ensure the accuracy of their notes.”¹⁵ Over the course of his tenure on the Court, the Justice regularly made headlines when various reporters seeking to cover his remarks were turned away from public speeches or otherwise impeded in their work.¹⁶ In 2003, he faced particularly sharp criticism for banning broadcasters from an event at which he received an award for supporting free speech.¹⁷ The Justice gave remarks after being given a recognition called the “Citadel of Free Speech Award” at The City Club in Cleveland, Ohio.¹⁸ The club traditionally taped its speakers for subsequent broadcast on public television,¹⁹ but Scalia insisted on barring all television and radio coverage as a condition for accepting—a position media organizations criticized as hypocritical.²⁰

The following year, Justice Scalia’s tussles with the press made headlines again, when reporters from the Associated Press and a local newspaper were ordered by U.S. Marshals to erase their audiotape recordings of comments the Justice had made

¹⁵ Liptak, *supra* note 1. The Justice’s policy evolved to allow recordings by print journalists, but he continued to impose very strict limitations on coverage of his remarks. See *Biden, Clinton, Kagan, and Scalia Join Leaders from Government, Business, and Law at Conference Marking LSC’s 40th Anniversary*, LEGAL SERV. CORP. (Sept. 12, 2014), <http://www.lsc.gov/media-center/press-releases/2014/biden-clinton-kagan-and-scalia-join-leaders-government-business-and> (“U.S. Supreme Court Justice Antonin Scalia delivered remarks during an afternoon luncheon. Justice Scalia’s media guidelines allowed only still camera and/or pencil-and-pad coverage during the speech. Photos were [to] be limited to the first and last 1-2 minutes of the event. Recording devices were permitted for note-taking purposes and not for broadcast.”).

¹⁶ See James Vicini, *Justice Scalia Defends Bush v. Gore Ruling*, REUTERS (April 24, 2008), <http://www.reuters.com/article/us-usa-court-scalia-idUSN2443345820080424> (describing a 2004 event in which Justice Scalia’s “security detail forced two reporters in Mississippi to erase tape recordings of a speech he gave”); Gina Holland, *supra* note 14 (describing how an Associated Press reporter was turned away from a speech to the American Council of Life Insurers, “which was said to be a mistake as the event was not supposed to be closed to print press”); Paul Singer, Associated Press, *Justice Bars Media from Free-Speech Event*, TOPEKA-CAPITAL J. (March 20, 2003), http://cjonline.com/stories/032003/usw_freespeech.shtml#_WAoxizsdDww (describing Justice Scalia’s insistence that television and radio coverage be banned when he received a free speech award) [hereinafter *Justice Bars Media from Free-speech Event*].

¹⁷ *Justice Bars Media from Free-Speech Event*, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (quoting the president of the Radio-Television News Directors as saying “[t]he irony of excluding journalists from an event designed to celebrate the First Amendment’s guarantee of free speech is obvious to all”).

during an event at a high school in Hattiesburg, Mississippi.²¹ The event was open to the press, but the Justice had insisted that it not be recorded, and the Marshal who required the tapes to be erased had cited this policy in doing so.²² The Reporters Committee for Freedom of the Press wrote Justice Scalia a letter expressing disappointment in the action and encouraging the Justice to change his policy of forbidding recording. Scalia later apologized,²³ saying that neither the event security nor the U.S. Marshals work at the Justices' direction, but that he would express a preference that they not confiscate recordings. He agreed to reconsider his policy and begin allowing recording for the use by print media, but held firm on his ban on broadcasting any of his remarks. "The electronic media have in the past respected my First Amendment right not to speak on radio or television when I do not wish to do so," he said, "and I am sure that courtesy will continue."²⁴

On some occasions, though, Justice Scalia's run-ins with reporters were angry and hostile. Once, during a meeting of the National Italian American Foundation, he brusquely snapped "that's enough" at a newspaper photographer who was shooting pictures of another panelist. When the photographer moved to the back of the room and began using a telephoto lens, Scalia "pointed out the photographer to the panel moderator and vigorously gestured for him to stop. Another photographer ventured to the front to take pictures, but scurried away in the face of angry looks from Scalia—dropping some of his camera

²¹ See Vicini, *Justice Scalia Defends Bush v. Gore Ruling*, *supra* note 16.

²² *Id.*

²³ See Gene Policinski, *Justice Scalia: The 45 Words – and Original Meaning – of the First Amendment*, NEWSEUM INST. (Feb. 16, 2016), <http://www.newseuminstitute.org/2016/02/16/justice-scalia-the-45-words-and-original-meaning-of-the-first-amendment/> (last visited Sept. 16, 2016) (quoting the letter to the reporter as saying "I abhor as much as any American the prospect of a law enforcement officer's seizing a reporter's notes or recording. The marshals were doing what they believed to be their job, and the fault was mine in not assuring that the ground rules had been clarified . . . I have learned my lesson (at your expense), and shall certainly be more careful in the future. Indeed, in the future I will make it clear that recording for use of the print media is no problem at all."); Liptak, *supra* note 1 (describing Scalia's apology to Antoinette Konz of the Hattiesburg American).

²⁴ Liptak, *supra* note 1; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *Six degrees of Antonin Scalia*, 40 NEWS MEDIA & THE LAW (Winter 2016), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2016/six-degrees-antonin-scalia>.

equipment, which he left behind.”²⁵ A few years later, as Justice Scalia exited Red Mass in Boston, he was approached by a reporter who asked whether Scalia had taken “a lot of flak for publicly celebrating” his religious beliefs,²⁶ and who suggested that parties before the Court “might question his impartiality in church-state matters.”²⁷ Justice Scalia responded with a chin flick that the journalist reported to be an obscene gesture, sparking a firestorm of commentary about the interaction.²⁸ Scalia ultimately wrote a letter to the Boston Herald, rebuking the reporter as having watched too many episodes of *The Sopranos* and insisting that the gesture was not vulgar, but simply meant “I couldn’t care less. It’s no business of yours. Count me out.”²⁹

Other journalists also found themselves the subjects of Scalia’s vitriol and personal ire. In the fall of 2000, the Justice lashed out at *Legal Times* Supreme Court reporter, Tony Mauro, in a letter to the editor to the publication, in which he sarcastically used Mauro’s surname as a derogatory adjective: “Mauronic.”³⁰ Mauro and another journalist had published an article focused on a proposal to lift a ban on federal judges receiving speaking fees.³¹ The article had suggested that Justice Scalia might be a major instigator of the push for these increased honoraria, quoting an unnamed judge as saying that “Scalia’s the

²⁵ Associated Press, *AP Photog Angers Scalia*, EDITOR & PUBLISHER (Oct. 21, 2004), <http://www.editorandpublisher.com/news/ap-photog-angers-scalia/>.

²⁶ Peter Lattman, *Scalia’s Gesture: Obscene or Not?*, WALL ST. J. L. BLOG (March 31, 2006 2:59 PM), <http://blogs.wsj.com/law/2006/03/31/justice-scalias-gesture-obscene-or-not-obscene/>.

²⁷ Vicini, *Justice Scalia Defends Bush v. Gore Ruling*, *supra* note 16.

²⁸ See, e.g., Lattman, *supra* note 26; NATIONAL PUBLIC RADIO, *Day to Day: Justice Scalia’s Under-the-Chin Gesture* (March 30, 2006, 1:00 PM) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=5312065>); Dahlia Lithwick, *How Do You Solve the Problem of Scalia?*, SLATE (March 30, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/03/how_do_you_solve_the_problem_of_scalia.html; Hillary Profita, *The Gesture in Question*, CBS NEWS (March 29, 2006), <http://www.cbsnews.com/news/the-gesture-in-question/>; Gina Pace, *Justice Scalia Gives Obscene Gesture?*, CBS NEWS (March 27, 2006), <http://www.cbsnews.com/news/justice-scalia-gives-obscene-gesture/>.

²⁹ *Scalia Letter to the Editor*, *Boston Herald*, PBS (Dec. 2006), https://www.pbs.org/wnet/supremecourt/personality/sources_document16.html; see also Liptak, *supra* note 1.

³⁰ Tony Mauro, *When Justice Scalia Turned My Name into an Adjective*, NAT’L L. J. (Feb. 24, 2016), <http://www.nationallawjournal.com/id=1202750517722/When-Scalia-Turned-My-Name-Into-an-Adjective?slreturn=20160920173517>.

³¹ *Id.*

only one who talks about” the idea and asserting that “[o]n Capitol Hill, it became known as the ‘Keep Scalia on the Court’ bill,” because the ban “was one of several factors that caused [Scalia] to muse aloud from time to time about leaving the court.”³²

Justice Scalia’s response letter—a rare public statement by a sitting Justice—acknowledged that he had responded positively to inquiries about the proposal and believed it to be a “good idea,” but castigated the reporters for falsely suggesting that he was driven purely by financial gain and for engaging in what he called “a mean-spirited attack on my personal integrity.”³³ He wrote that “[o]nly someone intent on writing a slanted story” would make such assertions, and said that the article was “gossipy, titillating (and thus characteristically Mauronic).”³⁴

For most of his years on the bench, Justice Scalia insisted that interactions between the press and sitting Justices were inappropriate.³⁵ He deviated from this position in 2008, when commentators noticed something of a “turnabout” as the “justice who once shunned the media” engaged in a “media blitz” while promoting a book he had written.³⁶ Outside this relatively brief period, however, Scalia’s personal relationship with the press was at best strained, and at worst, deeply confrontational, with his skepticism of the Fourth Estate role both implicit in his behaviors and explicit in his commentary.

II. FOURTH ESTATE SKEPTICISM OUTSIDE OF MEDIA CASES

These more public demonstrations of disdain for the press were only the tip of the iceberg for the Justice. More than any of his peers, Justice Scalia went out of his way to negatively

³² *Id.*; *Justice Scalia Tears into Newspaper, Denies his Needs Led Him to Back Pay Hike*, SF GATE (Oct. 3, 2000), <http://www.sfgate.com/news/article/Justice-Scalia-Tears-Into-Newspaper-Denies-His-2703193.php>; Anne Gearan, *Justice Scalia Complains of ‘Attack’*, WASH. POST (Oct. 2, 2000), http://www.washingtonpost.com/wp-srv/aponline/20001002/aponline140643_000.htm.

³³ Gearan, *supra* note 32.

³⁴ *Justice Scalia Tears into Newspaper*, *supra* note 32.

³⁵ *Q&A with Justice Antonin Scalia* (CSPAN television broadcast July 19, 2012) [hereinafter *Q&A with Justice Antonin Scalia*], <http://www.c-span.org/video/?307035-1/justice-antonin-scalia-19362016>.

³⁶ Vicini, *Justice Scalia Defends Bush v. Gore Ruling*, *supra* note 16.

characterize the press in judicial opinions where the press was not a party and where press freedoms were not squarely at issue. Likewise, in orders that he issued, in commentary during oral argument, and in interviews, speeches, and congressional hearings on various Court matters, Justice Scalia depicted the press as problematic, harmful, intrusive, gossip-seeking, confused, and above all, not worthy of any special protection—views that made their way into the Justice’s opinions in press cases and ultimately influenced the characterization embraced by the Court’s majority.

A. Skepticism in Commentary from the Bench

Scalia was prone to bringing up the press when other matters were being debated, and when he did so, his negative views were apparent. For example, in the oral argument for the case of *Garett v. Ceballos*,³⁷ a case focused on the scope of First Amendment free speech protections for government employees, Justice Scalia drew attention for turning the line of questioning to the behaviors of the press,³⁸ casting the media as focused on “gossip”³⁹ and “scurrilous”⁴⁰ rumors. He sarcastically doubted aloud whether the press’s judgment about the newsworthiness of a matter was a proper mechanism for determining matters of public concern or legitimate news interests.⁴¹ Although the Court’s previous commentary on the Fourth Estate had insisted upon great deference to determinations of editorial judgment by the working press and had repeatedly praised the press for its role in identifying matters of public concern and educating the

³⁷ 547 U.S. 410 (2006).

³⁸ Gina Holland, *supra* note 14 (Scalia “talked about gossip-seeking reporters during a court argument about free-speech rights.”).

³⁹ Transcript of Oral Argument at 50, *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (No. 04-473) (“[H]is boss’s wife, a mayor of a big city, is running around with somebody. Okay? And that’s picked up by the press. It’s there on the gossip pages. She’s a public figure. You say that would be covered by this. . . . Anything that would get in the press. That’s it. . . . Wow.”).

⁴⁰ *Id.* at 49.

⁴¹ *Id.* at 48–49 (discussing “legitimate news interest”: “[S]o if an employee . . . comes forward with some scurrilous information about a family member of his boss, who is a public figure, and his whole families are public figures, which would be picked up by the press, that would be a matter of public concern? . . . Gee, I never understood that that’s what the test was”).

citizenry about those matters,⁴² Justice Scalia's tone and substance presupposed the opposite.

The Justice asserted a similarly critical characterization of the press in his 2004 memorandum describing why he would not be recusing himself from a case in which Vice President Dick Cheney was a named party.⁴³ Calls for Scalia's recusal had emerged when it came to light that while the case was pending before the Supreme Court, Scalia and Cheney had gone duck hunting together in Louisiana, with Cheney providing transportation on his plane for Scalia and members of his family.⁴⁴ Justice Scalia's memorandum detailed his reasoning for why recusal was not required under relevant precedent,⁴⁵ but also described a litany of sins that the Justice believed the media had committed. Although Scalia expressed concern about what he perceived as irresponsible factual errors committed by the press in reporting on the particular issue,⁴⁶ he also set forth a significantly more skeptical overarching view of the press than the Court had embraced in the immediately preceding years.⁴⁷ While the Court that Justice Scalia joined had consistently lauded the value of the press as a check on government,⁴⁸ Scalia's Cheney memorandum issued a rather blistering rebuke against

⁴² See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (calling the press the "chief[]" source of public information); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (praising the press for "informing the citizenry of public events and occurrences"); *Grosjean v. American Press Co.* 297 U.S. 233, 250 (1936) (noting that "[t]he newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality . . .").

⁴³ *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 923, 927–28 (2004).

⁴⁴ *Id.*

⁴⁵ *Id.* at 921, 926 (arguing that a mere friendship with a government official who was a named party did not warrant recusal and that the flight on the jet was not a gift of any value).

⁴⁶ *Id.* at 928.

⁴⁷ See *id.*

⁴⁸ See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (asserting that "the basic assumption of our political system [is] that the press will often serve as an important restraint on government"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976) (the press "does not simply publish information about trials but guards against the miscarriage of justice"); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (calling the press "the handmaiden of effective judicial administration" and saying that its "record of service over several centuries" has been "impressive"); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (noting that "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve").

what he saw as “inappropriate” and potentially “silly,” “so-called investigative journalists,”⁴⁹ who assert too bold a role in calling for recusals⁵⁰ and who had produced a “blast of largely inaccurate and uninformed opinion.”⁵¹ He sweepingly argued that “constant baseless allegations of impropriety” are “the staple of Washington reportage”⁵² and described newspapers that had covered him as misinformed, misleading, and miseducated.⁵³ “It is well established,” he wrote, “that the recusal inquiry must be ‘made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*,’” and the press, he said, should not be considered such an observer.⁵⁴ To the contrary, he said, the media is “eager to find foot-faults”⁵⁵—a criticism that stands in stark contrast to the repeated statements from the Court, in the time before Scalia joined it, that the willingness of the press to act as a watchdog was one of its most praiseworthy traits⁵⁶ and that it needed

⁴⁹ *Cheney*, 541 U.S. at 927 (“My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons.”).

⁵⁰ *Id.* (“[R]ecusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.”).

⁵¹ *Id.* at 924.

⁵² *Id.* at 928.

⁵³ *Id.* at 924 (“And these are just the inaccuracies pertaining to the *facts*. With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney’s reputation and integrity) is ground for recusal.”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 928 (“The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.”).

⁵⁶ *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (noting “the basic assumption of our political system that the press will often serve as an important restraint on government”); *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (noting that “the role of the media is important,” commenting that “they can be a powerful and constructive force, contributing to remedial action in the conduct of public business” and indicating that “[t]hey have served that function since the beginning of the Republic”); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (stating that “[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs,” that “[t]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials,” and that “the right of the press to praise or criticize governmental agents and to clamor and contend for or against change” is a matter that “the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free”); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (noting the “free press has

“breathing space” to perform this task.⁵⁷ Justice Scalia’s memorandum balked at the suggestion that “[he] must recuse because a significant portion of the press, which is deemed to be the American public, demands it.”⁵⁸ Yet, during the Fourth Estate era, the Court had repeatedly suggested that the press did, in fact, echo the will of, and act on behalf of, the American public. It had explicitly noted that among the valuable roles played by the press is its capacity to reflect upon on and shape conversations for the American public.⁵⁹ Justice Scalia’s counter-narrative rejected this Fourth Estate quality. The memorandum, like other writings from Scalia, offered a derogatory subtext about the American media and what the Justice perceived as its diminished place in the democracy.

B. Skepticism in Off-the-Bench Commentary

This same pattern of Fourth Estate skepticism permeated many of Justice Scalia’s comments off the bench, with the Justice going out of his way to negatively depict the press even when it was not the primary topic at hand. He faulted it for public misinformation and used comments about the unpraiseworthy behaviors of the press as illustrative negative examples when he had other, wider points to make.

One of the most notable examples of this is seen in Justice Scalia’s tendency to disapprovingly reference the landmark press case of *New York Times v. Sullivan*.⁶⁰ In panel discussions, interviews, and congressional hearings, the Justice regularly was asked for his views on separation of powers and the role of the judiciary in constitutional interpretation. Those views, for which Justice Scalia became well known during his time on the Court, centered on a concern about judicial overreach and an

been a mighty catalyst in . . . exposing corruption among public officers and employees”).

⁵⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

⁵⁸ *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 923 (2004).

⁵⁹ See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (emphasizing the importance of the exercise of newspapers’ editorial judgment); *Estes*, 381 U.S. at 539 (describing the press as “a mighty catalyst in awakening public interest in governmental affairs”); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (“A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.”).

⁶⁰ 376 U.S. 254 (1964).

opposition to the notion of a “living constitution.”⁶¹ But of all the examples of perceived judicial activism and departures from constitutional originalism that Justice Scalia could have drawn upon to demonstrate his uneasiness, he most regularly used the illustration of *Sullivan*,⁶² a case that focused on the press’s reporting on the civil rights movement. The case established a heightened standard that must be met by public officials who accuse the press of libel on matters related to their official duties,⁶³ and it was in many ways a centerpiece of the Fourth Estate jurisprudence of the pre-Scalia court. In his off-the-bench commentary, Justice Scalia acerbically condemned the decision as “a marvelous example of the living Constitution,”⁶⁴ in which the Court “simply [decided to] give the First Amendment a meaning that nobody, *nobody* ever ratified.”⁶⁵ His fuller comments on the issue almost always accentuated his originalism by highlighting that Thomas Jefferson or George Washington “would have been appalled at the notion that they could be libeled with impunity”⁶⁶ and by insinuating that *Sullivan*

⁶¹ *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the Subcomm. on the Judiciary*, 112th Cong. 36–38 (2011) [hereinafter *Judicial Hearings*] (statement of J. Antonin Scalia) available at <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg70991/pdf/CHRG-112shrg70991.pdf>.

⁶² See *The Kalb Report: Justices Scalia and Ginsburg on the First Amendment and Freedom* (CSPAN television broadcast Apr. 17, 2014) [hereinafter *Kalb Report*], <http://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014>; Don Franzen, *Reading the Text: An Interview with Justice Antonin Scalia of the U.S. Supreme Court*, L.A. REV. OF BOOKS (Oct. 1, 2012), <https://lareviewofbooks.org/interview/reading-the-text-an-interview-with-justice-antonin-scalia-of-the-u-s-supreme-court>; *Judicial Hearings*, *supra* note 61; *Washington Ideas Forum, Day 2, Morning Session* (CSPAN television broadcast Oct. 6, 2011), <http://www.c-span.org/video/?301921-16/washington-ideas-forum-day-2-morning-session>.

⁶³ *Sullivan*, 376 U.S. at 269.

⁶⁴ *Judicial Hearings*, *supra* note 61.

⁶⁵ Franzen, *supra* note 62 (“An example of how you could distort the First Amendment is *New York Times vs. Sullivan*. I mean, at the time the First Amendment was adopted, libel was not a permissible form of speech. You could be liable for slandering someone. The Warren Court just decided, well, it’d be better if the press could criticize political figures with impunity, so long as they had some reasonable basis.”).

⁶⁶ *Kalb Report*, *supra* note 62 (“So long as he heard from somebody, you know, it makes it very difficult for a public figure to win a libel suit. I think George Washington, I think Thomas Jefferson, I think the framers would have been appalled at the notion that they could be libeled with impunity. And, when the Supreme Court came out with that decision, it was revising the Constitution. Now, it may be a very good idea to set up a system that way. And New York State could have revised its libel laws by popular vote to say, if you libel a public figure, it’s okay unless it’s

gave the press an unwarranted windfall to be able to act irresponsibly without consequence:

[Y]ou can libel public figures without liability so long as you are relying on some statement from a reliable source, whether it's true or not. Now the old libel law used to be you're responsible, you say something false that harms somebody's reputation, we don't care if it was told to you by nine bishops, you are liable. *New York Times v. Sullivan* just cast that aside because the Court thought in modern society, it'd be a good idea if the press could say a lot of stuff about public figures without having to worry. Now, and that may be correct, that may be right, but if it was right it should have been adopted by the people. It should have been debated in the New York Legislature and the New York Legislature could have said, 'Yes, we're going to change our libel law.' But the living constitutionalists on the Supreme Court, the Warren Court, simply decided, 'Oh, yes, it used to be that . . . George Washington could sue somebody that libeled him, but we don't think that's a good idea anymore.'⁶⁷

Justice Scalia made clear that he thought *Sullivan* “distort[ed] the First Amendment”⁶⁸ and that it represented a shift in law by judicial fiat, a practice of which he strongly disapproved. But his repeated narrative on this point—that the Court “just decided it would be a good idea if there were no such thing as libeling a public figure so long as you have good reason to believe the lie you tell about him”⁶⁹—was as critical of the press as it was of the Court, and was an additional manifestation of his Fourth Estate skepticism.

malicious. But New York State didn't do that. It was nine lawyers who decided that that's what the Constitution ought to mean, even though it had never meant that.”)

⁶⁷ *Washington Ideas Forum, Day 2, Morning Session* (C-SPAN television broadcast Oct. 6, 2011), <http://www.c-span.org/video/?301921-16/washington-ideas-forum-day-2-morning-session>.

⁶⁸ Franzen, *supra* note 62.

⁶⁹ *Judicial Hearings*, *supra* note 61, at 38.

Likewise, on the recurring question of cameras in the U.S. Supreme Court, Justice Scalia was heavily focused on his distrust of the media. To be sure, he was not the only Justice who was against the idea. Many justices have testified before Congress and spoken publicly over the years in opposition to broadcast coverage of the Court's oral arguments⁷⁰—and even those who have initially expressed support for cameras have changed their minds and spoken against them.⁷¹ But Justice Scalia's responses to inquiries about the possibility are unique among his colleagues for their strong Fourth Estate skepticism. His colleagues' resistance to cameras has often focused on the Court and its Justices. Justice Thomas, for example, has emphasized his security concerns.⁷² Justices Kennedy and Breyer have usually discussed their fears that cameras would present a disruption to the traditional decorum of the Court's proceedings.⁷³ Justice Scalia's focus, in contrast, was often on the press, and his total surety that broadcast journalists covering oral argument would not use the footage in any responsible or helpful way.⁷⁴ In his remarks on the subject, he regularly suggested that

⁷⁰ See RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791, 1812 (2012).

⁷¹ *Id.*; see also Matt Sedensky & Sam Hananel, *Supreme Court's Kagan, Sotomayor Rethink Support for Cameras in the Courtroom*, WASH. POST (Feb. 2, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-courts-kagan-sotomayor-rethink-support-for-cameras-in-the-courtroom/2015/02/02/1fb9c44c-ab34-11e4-ad71-7b9eba0f87d6_story.html?utm_term=.e542d340bb9f.

⁷² *Fiscal Year 2007 Supreme Court Budget* (C-SPAN television broadcast Apr. 4, 2006), <https://www.c-span.org/video/?191906-1/fiscal-year-2007-supreme-court-budget&start=1158> (statement of Clarence Thomas, Assoc. J. of the United States Supreme Court) (“[Cameras] will raise additional security concerns as the other members of the Court who now have some degree of anonymity, lose that anonymity. I probably have more of a public recognition than any of the current members of the Court, and that loss of anonymity raises your security issues considerably.”).

⁷³ See Justice Stephen Breyer, Interview Response, *The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices*, 25 BERKLEY J. INT’L L. 71, 86 (2007) (“[W]e see men and women of every race, every religion, every point of view, who have come into our court to resolve their differences . . . [a]nd we are trustees of that institution. And none of us, I think, wants to do anything to harm that institution.”); *Cameras in the Court*, C-SPAN, <http://www.c-span.org/The-Courts/Cameras-in-The-Court/> (last visited Sept. 19, 2016) (Justice Kennedy suggesting that “[w]e teach, by having no cameras, that we are different”).

⁷⁴ Mark Sherman, Associated Press, *Scalia Loves His Gadgets, but Not Cameras in Court*, SAN DIEGO UNION-TRIBUNE (Nov. 22, 2010), <http://www.sandiegouniontribune.com/sdut-scalia-loves-his-gadgets-but-not-cameras-in-court-2010nov20-story.html> (noting Scalia's opposition to cameras: “[I]n the Court's heated cases about abortion, school prayer, gay rights and other high-

the press “miseducates” the American public.⁷⁵ His commentary nearly always included a disparaging reference to media “outtakes,”⁷⁶ which he said would confuse the public about the actual work of the Court, and he often chided the press for what he said he could “guarantee”⁷⁷ would be sensationalized or unrepresentative “man bites dog” coverage,⁷⁸ rather than serious journalism addressing the issues of the Court. Although his commentary on cameras was primarily focused on the broadcast media, it also conveyed distrust for print journalists who covered the Court.⁷⁹ He implied that the press would uniformly seek to make the Court and its Justices “entertainment” rather than

profile topics, he said interest would be so great that broadcasters would take snippets from the arguments and air them out of context.”).

⁷⁵ *Constitutional Conversation* (C-SPAN television broadcast Apr. 21, 2005) [hereinafter *Constitutional Conversation*], <http://www.c-span.org/video/?186408-1/constitutional-conversation> (“I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised.”); *Judicial Hearings*, *supra* note 61 (“[T]hey would, in effect, be given a misimpression of the Supreme Court. I am very sure that that would be the consequence, and, therefore, I am not in favor of televising.”); *Kalb Report*, *supra* note 62 (“[W]hy should I participate in the miseducation of the American people?”); *Q&A with Justice Antonin*, *supra* note 35 (“I am against it because I do not believe, as the proponents of television in the court assert, that the purpose of televising our hearings would be to educate the American people. That’s not what it would end up doing . . . I am sure it will miseducate the American people, not educate them.”).

⁷⁶ *Constitutional Conversation*, *supra* note 75 (“But if you send it out on C-SPAN, what will happen is, for every one person who sees it on C-SPAN gavel-to-gavel . . . 10,000 will see 15-second takeouts on the network news, which I guarantee you will be uncharacteristic of what the court does. So, I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised.”); Harry A. Jessell, *Scalia’s Media Legacy: More Good Than Bad*, TVNEWSCHECK (Feb. 19, 2016), <http://www.tvnewscheck.com/article/92469/scalias-media-legacy-more-good-than-bad> (“What most of the American people would see would be 30-second, 15-second take outs from our arguments and those take outs would not be characteristic of what we do.”); *Q&A with Justice Antonin Scalia*, *supra* note 35 (“You have to be sure, what most of the American people would see would be 30-second, 15-second take-outs from our argument and those take-outs would not be characteristic of what we do. They would be uncharacteristic.”).

⁷⁷ *Judicial Hearings*, *supra* note 61 (“a 30-second outtake from one of the proceedings, which I guarantee you would not be representative of what we do . . . I am very sure that would be the consequence . . .”); *Constitutional Conversation*, *supra* note 75 (“15-second takeouts on the network news, which I guarantee you will be uncharacteristic of what the court does.”).

⁷⁸ *Constitutional Conversation*, *supra* note 75 (“They want ‘man bites dog’ stories. They don’t want people to watch what the Supreme Court does over the course of a whole hour of argument.”); *Kalb Report*, *supra* note 62.

⁷⁹ *Q&A with Justice Antonin Scalia*, *supra* note 35 (when asked whether the broadcast snippets that he feared are merely the equivalent of newspaper quotations and summaries from oral argument, Justice Scalia replied that readers might conclude that “it’s an article in the newspaper and the guy may be lying or he may be misinformed”).

engaging in thoughtful news reporting.⁸⁰ Thus, while the Court that Justice Scalia joined in 1986 repeatedly characterized the press as trustworthy—as a valuable educator of and proxy for the citizens of the democracy⁸¹ and as a particularly capable conveyor of accurate information about the work of Courts⁸²—Justice Scalia presupposed the opposite, that the media would actively confuse and distort the goings-on of this branch of government and that it would never serve the Fourth Estate function if given the opportunity to record the proceedings of the high Court.

The Justice expressed similar sentiments minimizing the value of the press and emphasizing the inadequacies of media coverage when he participated in interviews and question-and-answer sessions, regularly opining that the press is biased, overly simplistic, unfairly critical, untethered by any standards, and unlikely to get things right, particularly as it pertains to the Court. In one 2012 speech, for example, Scalia “expressed disdain for the news media and the general reading public, and suggested

⁸⁰ *Today Show* (CNBC television broadcast Oct. 10, 2005), <http://www.today.com/id/9649724/ns/today/t/justice-scalia-says-not-chance-cameras/#.V3mNS7grLb0> (Justice Scalia, when asked whether cameras would be allowed in the courtroom, replying, “Not a chance, because we don't want to become entertainment. I think there's something sick about making entertainment about real people's legal problems.”).

⁸¹ *See, e.g., Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (noting that “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations,” describing the “[g]reat responsibility” of the “news media to report fully and accurately the proceedings of government,” and stating that “[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally”); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (footnote omitted) (calling press freedom necessary “to supply the public need for information and education with respect to the significant issues of the times”).

⁸² *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980) (citation omitted) (calling the press critical to “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system” and describing how it is a “surrogate [] for the public”); *Cox Broad. Corp.*, 420 U.S. at 491–92 (noting that “the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice”); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (stating that the “responsible press has always been regarded as the handmaiden of effective judicial administration,” noting that “[i]ts function in this regard is documented by an impressive record of service over several centuries,” and describing how the press “guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism”).

that together they condone inaccurate portrayals of federal judges and courts.”⁸³ He asserted:

“The press is never going to report judicial opinions accurately[.]” . . . “They’re just going to report, who is the plaintiff? Was that a nice little old lady? And who is the defendant? Was this, you know, some scuzzy guy? And who won? Was it the good guy that won or the bad guy? And that’s all you’re going to get in a press report[.]”⁸⁴

In testimony before the Senate Judiciary Committee, he made a similarly sweeping denunciation, saying that “criticism in the press” has “nothing to do with the law”:

If they like the result, it is a wonderful opinion and these are wonderful judges. And if they dislike the result, it is a terrible opinion. They do not look to see what the text of the statute is that was before us and whether this result is indeed a reasonable interpretation. None of that will appear in the press reports, which will just tell you who the plaintiff was, what the issue was, and who won.⁸⁵

Justice Scalia made clear that he was angry with—and felt personally harmed by—the irresponsible press. When asked in a CSPAN program what things made him “mad,” he answered that “the press . . . if you read it . . . gets under your skin,” because “effectively, they can say whatever they want.”⁸⁶ He noted that “one of the difficult things about the job . . . is that we are criticized in the press for our opinions, but cannot respond to press criticism.”⁸⁷ Although Justice Scalia did, in fact, respond on a number of occasions to what he perceived as false or unfair statements by the press about matters other than his judicial opinions,⁸⁸ he bemoaned the “disabilit[y] we operate under” that

⁸³ John Heilprin, *Scalia Sees Shift in Court’s Role*, WASH. POST, Oct. 23, 2006, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/22/AR2006102200965.html>.

⁸⁴ *Id.*

⁸⁵ See *Judicial Hearings*, *supra* note 61, at 18.

⁸⁶ *Q&A with Justice Antonin Scalia*, *supra* note 35.

⁸⁷ *Id.*

⁸⁸ See, e.g., *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004) (“The

precluded response to reporting about opinions themselves.⁸⁹ “We get clobbered by the press all the time,” he said.⁹⁰ “I can’t tell you how many wonderful letters I’ve written to the Washington Post just for my own satisfaction and then ripped up and thrown away.”⁹¹

Toward the end of his time on the Court, Justice Scalia told a *New York Magazine* reporter in an interview that he had long since cancelled his subscriptions to the *Washington Post* and *New York Times*, because they were “slanted and often nasty” and “so shrilly, shrilly liberal” that he “couldn’t handle it anymore.”⁹² When the reporter questioned whether his consumption of only conservative media was an “isolating” behavior, he pushed back at the accusation.⁹³ But in another portion of same interview, he lobbed a similar accusation at the journalist, calling her “so out of touch with most of America” and “so, so removed from mainstream America” when she questioned some of his religious beliefs.⁹⁴

All told, a blend of anger, cynicism, and sense of victimization permeated nearly all of Justice Scalia’s

implications of this argument are staggering. I must recuse because a significant portion of the press . . . demands it. The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right.”); Peter Lattman, *Scalia’s Gesture: Obscene or Not?*, WALL ST. J. LAW BLOG (March 31, 2006 2:59 PM), <http://blogs.wsj.com/law/2006/03/31/justice-scalias-gesture-obscene-or-not-obscene/>; (“[A] . . . reporter asked [Scalia] whether his participation in the Mass might cause some people to question his impartiality in matters of church and state. In response, Scalia gave the reporter a hand-off-the-chin gesture. The Herald wrote a story the next day characterizing Justice Scalia’s gesture as obscene. Justice Scalia responded . . . explaining that the gesture was limited to ‘fanning the fingers of my right hand under my chin’ meaning ‘I couldn’t care less.’ He concluded . . . ‘your staff seems to have acquired the belief that any Sicilian gesture is obscene—especially when made by an “Italian jurist.””).

⁸⁹ *Considering the Role of Judges*, *supra* note 61, at 18

⁹⁰ *Q&A with Justice Antonin Scalia*, *supra* note 35.

⁹¹ *Id.*

⁹² Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>.

⁹³ *Id.* (“Oh, c’mon, c’mon, c’mon! [Laughs.] Social intercourse is quite different from those intellectual outlets I respect and those that I don’t respect. I read newspapers that I think are good newspapers, or if they’re not good, at least they don’t make me angry, okay? That has nothing to do with social intercourse. That has to do with ‘selection of intellectual fodder,’ if you will.”).

⁹⁴ *Id.* (“You’re looking at me as though I’m weird. My God! Are you so out of touch with most of America, most of which believes in the Devil? I mean, Jesus Christ believed in the Devil! It’s in the Gospels! You travel in circles that are so, so removed from mainstream America that you are appalled that anybody would believe in the Devil! Most of mankind has believed in the Devil, for all of history. Many more intelligent people than you or me have believed in the Devil.”).

commentary on and rhetoric about the press. He did not like the press, did not trust the press, and did not convey that he found any value in the work of the press. His persistent vocalization of this Fourth Estate skepticism was in stark contrast to the Court's previous, "almost uniformly affirmative characterization of the press as a critically important, positively contributing social entity that is worthy of protection and uniquely valuable[.]"⁹⁵ His contrary views may have shifted the Court more permanently in profound ways.

III. FOURTH ESTATE SKEPTICISM IN DEBATES OVER THE PRESS CLAUSE

These skeptical and accusatory characterizations of the press also appeared in Justice Scalia's judicial opinions, which were at times pointed in their commentary and were nearly always unflattering in their depictions of the press. In time, they became the characterization of the press adopted by the Court's majority. Scalia's position—that the press does little societal good and, as both a practical and an originalist matter, warrants no special protection or even praise from the Court—was rare at the beginning of his tenure, but by its conclusion, had infused itself into the rhetoric of the Court's most prominent statements on the press.

Justice Scalia believed the First Amendment's Press Clause was a companion to the Speech Clause, with the latter guaranteeing all speakers' right to speak and the former guaranteeing all speakers' right to publish.⁹⁶ The Press Clause was not, the Justice emphasized, "referring to the institutional press, the guys that run around with a fedora hat with a sticker in it that says 'Press.'"⁹⁷ Rather than giving "any prerogatives to the institutional press," it protects "anybody who has a Xerox

⁹⁵ Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261.

⁹⁶ Marvin Kalb, *The Kalb Report: 45 Words, A Conversation with U.S. Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg on the First Amendment*, THE KALB REPORT, 1, 7 (April 17, 2014) [hereinafter *45 Words, A Conversation with U.S. Supreme Court Justices*],

https://research.gwu.edu/sites/research.gwu.edu/files/downloads/45Words_Transcript.pdf (answering question about why the founding fathers added "of the press" after "freedom of speech" by asserting that, "all it means is the freedom to speak or to write.").

⁹⁷ *Id.*

machine.”⁹⁸ The Supreme Court’s media law jurisprudence had in fact been hesitant to afford special, affirmative rights to the press, but the Court in the 1960s and 1970s had nevertheless “recognized the press as constitutionally unique from nonpress speakers”⁹⁹ in cases dealing with distinctive press issues and, especially, in dicta praising the media “as a democracy-enhancing, power-checking, community-building institution with a critical role to play in informing, educating, and empowering a voting public.”¹⁰⁰ Justice Scalia’s strong view that the First Amendment should protect the freedom to speak and to publish without any special solicitude for the press as an entity¹⁰¹ was accompanied by a new brand of negative dicta that, by the end of his time on the Court, had made its way from his separate opinions into the opinions of the majority, substituting pro-press rhetoric with rhetoric that was anti-press and, especially, anti-press specialness.

Both Justice Scalia’s insistence that the press is no different from any speaker and his assertion that the press was not to be celebrated or trusted had appeared in opinions he authored as an appellate judge on the United States Court of Appeals for the District of Columbia Circuit before his nomination to the United States Supreme Court. In cases directly involving the press,¹⁰² but also in cases not centered on media issues,¹⁰³ he commented that the Press Clause was not designed

⁹⁸ *Id.*

⁹⁹ Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 731 (2014).

¹⁰⁰ Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261.

¹⁰¹ *45 Words, A Conversation with U.S. Supreme Court Justices*, *supra* note 96 (“All it means is the freedom to speak and to write . . . I don’t know that there were any special rules applicable to the press. The press did not have to get permission of a censor to publish. But neither did anybody else . . . I have never thought that [the Press Clause] was anything except identical [to the Speech Clause]. I can’t imagine that you can limit some things that can be spoken but cannot limit things that can be printed. I think it’s the same . . .”).

¹⁰² *In re Reporters Comm. for Freedom of Press*, 773 F.2d 1325, 1331 (1985) (“[T]he First Amendment generally grants the press no right to information about a trial superior to that of the general public.”) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)).

¹⁰³ *Cnty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting) (“I start from the premise that when the Constitution said ‘speech’ it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address ‘freedom of the press’ separately—or, for that matter, ‘freedom of assembly,’ which was obviously directed at facilitating expression. The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication . . .”).

to create press-specific treatment under the First Amendment. In *Ollman v. Evans*,¹⁰⁴ when a majority of the D.C. Circuit's *en banc* panel held that allegedly defamatory statements set forth in a syndicated column were protected expressions of opinion entitled to absolute First Amendment protection, Scalia dissented in part, emphasizing again that he believed any additional protections for the press should be the result of legislative action and not judicial declaration.¹⁰⁵ In the process of doing so, he conveyed negative depictions of the press and its work—describing the media's "intentional destruction of reputation,"¹⁰⁶ intimating that it had disproportionate power over government decision makers,¹⁰⁷ and placing the phrase "investigative reportage" in quotation marks, presumably to signal a lack of confidence that the practice occurs.¹⁰⁸ He colorfully empathized with those who "discern a distressing tendency for our political commentary to descend from discussion of public issues to destruction of private reputations," those who believe that the First Amendment is enhanced by "putting some brake upon that tendency," and those who "view high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate with that power."¹⁰⁹

This same tendency to judge the press as unlikely to make positive societal contributions followed Scalia to the high court, where he insisted that the press not be treated more favorably than any other speaker and where his judicial opinions repeatedly offered side jabs at the press in cases not directly involving the media.¹¹⁰ Justice Scalia was consistently opposed

¹⁰⁴ 750 F.2d 970, 1038–39 (D.C. Cir. 1984) (Scalia, J., dissenting).

¹⁰⁵ *Id.* at 1038.

¹⁰⁶ *Id.* at 1038–39 (describing the problem of "the willfully false disparagement of professional reputation in the context of political commentary").

¹⁰⁷ *Id.* at 1039 ("It has not often been thought, by the way, that the press is among the least effective of legislative lobbyists.").

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See, e.g.,* *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 787 (2004) (Scalia, J., concurring) ("The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd."); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 253 (2003) (Scalia, J., dissenting); *McIntyre v.*

to differential treatment of the press, whether positive or negative.¹¹¹ So, for example, in *Florida Star v. B.J.F.*, when the Court held that a newspaper that lawfully obtained a rape victim's name from public police records could not be held liable for invasion of privacy, Scalia wrote separately to note that the spread of the news of her assault amongst her family and friends would have harmed the victim as much, if not more, than the publication of her name by a news outlet to people who did not know her.¹¹² Scalia objected to the imposition of a restriction upon the press that did not also apply to individual speakers.¹¹³ In *Los Angeles Police Dep't v. United Reporting Pub. Corp.*,¹¹⁴ Justice Scalia again wrote separately to articulate his concern with a law that distinguished the press from other speakers, this time to the media's benefit.¹¹⁵ A publishing company challenged an amendment to a California law that limited the release of information about recent arrestees to those using it for certain purposes, including journalistic purposes.¹¹⁶ Addressing the question of facial and as-applied challenges to the law, Scalia emphasized that "a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information."¹¹⁷

The pattern of insisting that the press not receive special treatment was most prominent in the Court's campaign finance cases, where Justice Scalia wrote separately to offer a characterization of the press as "media corporations" with a bald moneymaking agenda no different than that of any other

Ohio Elections Comm'n, 514 U.S. 334, 373 (1995) (Scalia, J., dissenting) ("But, of course, if every partisan cry of 'freedom of the press' were accepted as valid, our Constitution would be unrecognizable"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

¹¹¹ See e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999).

¹¹² 491 U.S. 524 at 542 (Scalia, J., concurring).

¹¹³ *Id.* ("This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself.").

¹¹⁴ 528 U.S. 32 (1999).

¹¹⁵ See *id.* at 42 (Scalia, J., concurring).

¹¹⁶ *Id.* (majority opinion).

¹¹⁷ *Id.* at 42 (Scalia, J., concurring).

corporate speaker. The trajectory of these opinions can be traced to their culmination in the majority opinion in *Citizens United v. Federal Election Commission*,¹¹⁸ where, for the first time, a majority of the Court embraced not only Scalia's position on the regulation of corporate speech in the campaign finance setting but also the deep Fourth Estate skepticism that accompanied it.¹¹⁹

In 1990's *Austin v. Michigan Chamber of Commerce*,¹²⁰ the Court upheld, against First Amendment challenge, a provision of the Michigan Campaign Finance Act that prohibited all corporations except media corporations from using general treasury funds for independent expenditures in connection with state candidate elections.¹²¹ Justice Scalia dissented.¹²² He pushed back against the majority's assertion that there is a compelling state interest in preventing corruption or the appearance of corruption in the political arena by reducing the threat of amassed corporate wealth skewing political debate, and he emphasized that he found this assertion inconsistent with the majority's decision to uphold the exemption for media corporations.¹²³ In the course of doing so, he countered the longstanding narrative regarding "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate,'"¹²⁴ and argued that, under the majority's rationale, the press should actually be seen as a particularly *harmful* entity that Michigan had an especially strong reason to regulate.¹²⁵

Substituting the Fourth Estate depiction with a characterization of the press as primarily or exclusively driven by financial gain and bent on skewing public debate,¹²⁶ Justice Scalia abandoned previous rhetoric about the press being likely

¹¹⁸ 558 U.S. 310 (2010).

¹¹⁹ *See id.*

¹²⁰ 494 U.S. 652 (1990).

¹²¹ *Id.* at 657–66.

¹²² *Id.* at 690 (Scalia, J., dissenting).

¹²³ *Id.* at 690–91.

¹²⁴ *Id.* (internal citation omitted).

¹²⁵ *Id.* at 691.

¹²⁶ *Id.* ("But media corporations make money *by* making political commentary, including endorsements. For them, unlike any other corporations, the whole world of politics and ideology is fair game.").

to act for the public good. Where the Court in the preceding years had called the media “the ‘eyes and ears’ of the public,”¹²⁷ had assumed it would “report fully and accurately on the proceedings of government,”¹²⁸ and had credited it with being a “mighty catalyst” in exposing citizens to competing viewpoints on civic matters,¹²⁹ Scalia spoke of the threat of “[a]massed corporate wealth that regularly sits astride the ordinary channels of information,”¹³⁰ the likelihood that media companies would produce “too much of one point of view,”¹³¹ and his view that the press had both “vastly greater power”¹³² and “vastly greater opportunity”¹³³ to “perpetrate the evil of overinforming.”¹³⁴ As he had done in the past, he stressed the non-specialness of the press under the First Amendment: “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”¹³⁵ To Justice Scalia, this principle was not just one of Press Clause doctrine; it was a new and diminished description of an entity and its societal worth.

More than a decade later, in another campaign finance case, *McConnell v. Federal Election Commission*,¹³⁶ Justice Scalia again pressed his position that limitations on campaign contributions violate the First Amendment and again did so by invoking media cases in ways that challenged the Fourth Estate framework. Before Justice Scalia joined, the Supreme Court had made clear that differential taxation of the press was constitutionally problematic,¹³⁷ and its opinions in those tax

¹²⁷ *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

¹²⁸ *Cox Broad. Corp.*, 420 U.S. at 492.

¹²⁹ *Estes v. Texas*, 381 U.S. 532, 539 (1965).

¹³⁰ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* (internal citation omitted) (Thus, the Court’s holding on this point must be put in the following discouraging form: “Although the press’ unique societal role may not entitle the press to greater protection under the Constitution . . . it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations . . . One must hope, I suppose, that Michigan will continue to provide this generous and voluntary exemption.”).

¹³⁶ 540 U.S. 93, 253 (2003) (Scalia, J., dissenting).

¹³⁷ *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

cases contained some of the strongest statements of press specialness and some of the strongest rhetoric about the value of a free press in a democracy.¹³⁸ Media scholars have recognized that the tax cases are among the best examples of “ways in which the press is historically and functionally unique” and “the Constitution seeks to protect those differences.”¹³⁹ As Professor Sonja West described, the “logic and language of the taxation of the press cases reveals that the Court was recognizing that press speakers function differently from individual speakers.”¹⁴⁰ Indeed, the best reading of these cases is that the Court believed the uniquely valuable contributions of a free press demand uniquely careful protection from targeted tax schemes, which “can operate as effectively as a censor to check critical comment by the press [and undercut] the basic assumption of our political system that the press will often serve as an important restraint on government.”¹⁴¹

Scalia’s use of the selective press taxation cases in his separate opinion in *McConnell* turned this characterization on its head. He cited the major newspaper-taxation cases, not to illustrate the distinct value of the press or the particularly pressing need to protect it, but rather to suggest the opposite—the identicalness of all “money used to fund speech.”¹⁴² Justice Scalia noted, as an originalist matter, that the founders considered taxes on the press that were responses to unfavorable coverage to be “grievous incursions on the freedom of the press,”¹⁴³ but his central thesis was not that the cases showed rhetorical support for press specialness, but that “[t]hese press-taxation cases belie the claim that regulation of money used to

¹³⁸ See *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (stating that “the basic assumption of our political system that the press will often serve as an important restraint on government” and emphasizing that “[a]n untrammelled press [is] a vital source of public information’ and an informed public is the essence of working democracy”) (quoting *Grosjean*, 297 U.S. at 250); *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 n.7 (noting that “the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press”).

¹³⁹ Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 736–37 (2014).

¹⁴⁰ *Id.* at 738.

¹⁴¹ *Minneapolis Star & Tribune Co.*, 460 U.S. at 585. See also *id.* at 586 (referencing “the censorial threat implicit in a tax that singles out the press”).

¹⁴² *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 252 (2003) (Scalia, J., dissenting) (arguing that “where the government singles out money used to fund speech as its legislative object, it is acting against speech as such”).

¹⁴³ *Id.* at 253.

fund speech is not regulation of speech itself.”¹⁴⁴ That the press was involved in those cases was seemingly irrelevant to him.

After twenty years of insisting that the press plays no special First Amendment role—and of replacing positive press depictions with skeptical ones—Justice Scalia ultimately saw his position embraced by a majority of the Court. In *Citizens United v. Federal Election Commission*,¹⁴⁵ five members of the Court not only adopted Justice Scalia’s substantive position in the case, holding that the First Amendment precludes the government from limiting the independent political expenditures of corporations and unions,¹⁴⁶ but also, along the way, built a negative characterization of the press on the foundation Scalia had laid. Commentators recognized in the majority opinion a new and “deep suspicion, even hostility, to the media’s role as the ‘Fourth Estate’” that “gives cause for concern that future decisions might erode the few ‘special rights’ the media currently enjoy.”¹⁴⁷ Among “the extensive dicta in *Citizens United* suggesting that a majority of the Justices on the Roberts Court are deeply suspicious of the claim that the media play a special constitutional role in our democracy,”¹⁴⁸ much of the language was Justice Scalia’s. Indeed, Justice Kennedy’s majority opinion, joined by Chief Justice Roberts and by Justices Scalia, Alito, and Thomas,¹⁴⁹ cited Justice Scalia’s *McConnell* opinion for its reference to the press taxation cases¹⁵⁰ and cited his *Austin* dissent for the proposition that newspapers are no different than

¹⁴⁴ *Id.* at 253–54 (arguing that “restrictions on the expenditure of money for speech are equivalent to restrictions on speech itself” and that “[i]f denying protection to paid-for speech would shackle the First Amendment, so also does forbidding or limiting the right to pay for speech”) (internal citations and quotations omitted).

¹⁴⁵ 558 U.S. 310 (2010).

¹⁴⁶ *See id.* at 386.

¹⁴⁷ Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1832 (2012). For my earlier discussion of this hostility, see Jones, *What the Supreme Court Thinks*, *supra* note 2.

¹⁴⁸ Lidsky, *supra* note 147, at 1831–32.

¹⁴⁹ *Citizens United*, 558 U.S. at 310.

¹⁵⁰ *Id.* at 353 (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 at 252–53 (2003) (Scalia, J., dissenting) and *Grosjean v. American Press Co.*, 297, U.S. 233, 245–48) (1936) (suggesting the First Amendment “was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies,” but that it “was certainly not understood to condone the suppression of political speech in society’s most salient media”)).

any other corporation¹⁵¹—using Scalia’s precise language from *Austin* to “reject[] the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”¹⁵²

The *Citizens United* majority also echoed Justice Scalia’s earlier sentiments, both on and off the bench, about the press, with an overall theme that “media corporations are elitist, wield political power and influence disproportionate to their public support, and are no more deserving of special protection than any other corporation.”¹⁵³ The longstanding prevailing depiction of the press as an entity that “plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse”¹⁵⁴ was, for the first time in the modern media era, relegated to the dissenting position. It was replaced by a majority view that the press is just another speaker that “use[s] money amassed from the economic marketplace to fund [its] speech.”¹⁵⁵ The majority repeatedly described the press as primarily an “[a]ccumulator of wealth” and of “unreviewable power.”¹⁵⁶ Gone was any mention of the press as a surrogate for the people, of the press’s “impressive record of service over several centuries” in “guard[ing] against the miscarriage of justice,”¹⁵⁷ or of the way “the press serves and was designed to serve as a powerful antidote to any abuses of power”¹⁵⁸ — replaced by strong suggestions that the press bears no meaningful relationship to the citizenry and is itself likely to abuse its own power. The Court characterized members of the media as

purveyors of a “24-hour news cycle” that is “dominate[d]” by “sound bites, talking points, and scripted messages,” and as players in an institution on the “decline”—amorphous and

¹⁵¹ *Id.* at 352, 361 (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 687, 691 (1990) (Scalia, J., dissenting)).

¹⁵² *Id.* at 352.

¹⁵³ Lidsky, *supra* note 147, at 1833.

¹⁵⁴ *Citizens United*, 558 U.S. at 473 (Stevens, J., dissenting).

¹⁵⁵ *Id.* at 351.

¹⁵⁶ *Id.* (asserting that there are “vast accumulations of unreviewable power in the modern media empires[,]” and that “media corporations accumulate wealth with the help of the corporate form [and] the largest media corporations have ‘immense aggregations of wealth’”) (internal citations omitted).

¹⁵⁷ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 560 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

¹⁵⁸ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

hard to peg because, given “the advent of the Internet and the decline of print and broadcast media, . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”¹⁵⁹

The opinion implied that press coverage was “distorting” to the political process,¹⁶⁰ and it characterized the press as expressing “views [that] often ‘have little or no correlation to the public’s support’ for those views.”¹⁶¹

Justice Scalia concurred separately in *Citizens United* to reinforce both his originalist position on the First Amendment and this sea change in press depiction.¹⁶² He drove home his now firmly cemented position that the press is not a specific entity with any constitutional otherness, but rather includes any publisher, whether an individual, a printer, a newspaper, or other corporate entity.¹⁶³ He chastised the dissent’s interpretation of “the Freedom of the Press Clause to refer to the institutional press,” calling it “passing strange to interpret the phrase ‘the freedom of speech, or of the press’ to mean, not everyone’s right to speak or publish, but rather everyone’s right to speak or the institutional press’s right to publish.”¹⁶⁴ He praised the majority for confirming the stance that he had long asserted, both judicially and personally: that the decades of Fourth Estate

¹⁵⁹ Jones, *What the Supreme Court Thinks*, *supra* note 2, at 261 (citing *Citizens United*, 558 U.S. at 364, 352) (internal citations omitted).

¹⁶⁰ *Citizens United*, 558 U.S. at 326.

¹⁶¹ *Id.* at 351 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

¹⁶² *See id.* at 385 (Scalia, J., dissenting).

¹⁶³ *Id.* at 390 (“Historical evidence relating to the textually similar clause ‘the freedom of . . . the press’ also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection. The freedom of ‘the press’ was widely understood to protect the publishing activities of individual editors and printers . . . But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit.”).

¹⁶⁴ *Id.*, n.6 (“No one thought that is what it meant. Patriot Noah Webster’s 1828 dictionary contains, under the word ‘press,’ the following entry: ‘*Liberty of the press*, in civil policy is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state.’ As the Court’s opinion describes, our jurisprudence agrees with Noah Webster and contradicts the dissent.”) (internal citations omitted).

rhetoric from the Court should no longer be the prevailing characterization.

IV. POTENTIAL CONSEQUENCES OF FOURTH ESTATE SKEPTICISM

The about-face in characterization of the press during Justice Scalia's three decades on the Court is worthy of a discussion about its underlying causes and also a discussion about its potential effects. As I have noted elsewhere,¹⁶⁵ both the explanations for the shift and the possible ramifications of it are complex and multifaceted. Scalia's push for a new, less positive depiction of the press came at a time when the institutional press experienced significant change and its reputation among the American public plummeted—suggesting that Justice Scalia (and, ultimately, his colleagues on the Court) were merely being perceptive observers of the new media reality, “[m]apping [their] views onto more widely held societal views that the press is no longer valuable or laudable” and reflecting in their opinions the growing consensus that “the modern-day press, in its day-to-day operations, is not doing a good job of being press-like in the constitutional sense.”¹⁶⁶ But the reversal from positive to skeptical depictions by the Court is noteworthy, no matter its cause, both because of its likely impact on the institutional press and because of the potential that it will impact wider First Amendment rights.

Working journalists in America will surely find this diminished characterization distressing, because the Court's positive rhetoric about the press in the past appears to have been key to positive outcomes in cases involving the press.¹⁶⁷ “A negative Supreme Court characterization of the press thus might be expected to have a correspondingly negative effect on the operation of the journalistic enterprise and, concomitantly, on the many Americans who consume that journalistic work product.”¹⁶⁸

¹⁶⁵ See Jones, *What the Supreme Court Thinks*, *supra* note 2.

¹⁶⁶ *Id.* at 266.

¹⁶⁷ See *id.*

¹⁶⁸ *Id.*

More broadly, the new Fourth Estate skepticism in the Court's writings about the press is cause for concern because the victories that the press garnered during the pre-Scalia era of positive portrayals were not victories enjoyed by the press alone, but instead expanded the First Amendment rights of all citizens. As I investigate in more detail elsewhere, "[a] sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively fought for fundamental democratic principles that had public benefits beyond the scope of the individual [press] litigants' successes."¹⁶⁹ It is primarily, and sometimes exclusively, because of cases argued before the high court by the positively characterized press that the wider citizenry enjoys a First Amendment right to observe trials and other government proceedings, to access public documents, to be free from prior restraints, and to speak openly about matters of public concern.¹⁷⁰

Justice Scalia's personal and jurisprudential statements devaluing the press, recharacterizing it as something less than a Fourth Estate, appear to have held sway with a majority of his colleagues by the end of his time on the Court. Among the questions that should be asked as we reflect on his legacy is whether that negative characterization might have lasting effects that are detrimental to the nation as a whole.

¹⁶⁹ RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 571 (2011).

¹⁷⁰ Jones, *What the Supreme Court Thinks*, *supra* note 2, at 269–71.

JUSTICE SCALIA AND ABORTION SPEECH

*Timothy Zick**

INTRODUCTION

Justice Antonin Scalia was certainly no fan of *Roe v. Wade* and the right to abortion.¹ He was, by contrast, a very strong defender of the freedom of speech². This was true in a variety of contexts.³ However, for a number of reasons his opinions concerning restrictions on anti-abortion speech at or near abortion clinics stand out. In four cases involving such communications, Justice Scalia railed against restrictions on expressive activity.⁴ True to form, he pulled no punches. Justice Scalia accused his colleagues of distorting First Amendment precedents and doctrines, using an “ad hoc nullification machine” to limit or deny free speech protections,⁵ and applying an “abridged edition of the First Amendment” to anti-abortion speech.⁶ Not even the Court’s decision in *McCullen v. Coakley* (the last in the quartet), which invalidated a Massachusetts law setting a thirty-five-foot buffer zone around all abortion clinics, mollified Justice Scalia.⁷ In his concurrence, the Justice argued

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¹ See *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part) (“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.”); see also *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (arguing that *Roe v. Wade*, 410 U.S. 114 (1973), should be overruled).

² See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1676 (2015) (Scalia, J., dissenting) (“The first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content.”).

³ See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 798 (2011) (invalidating a statute that restricted the sale of violent video games by asserting that despite “astounding” violence depicted in many video games, “disgust is not a valid basis for restricting expression”); see also *Citizens United v. FEC*, 558 U.S. 310, 392–93 (2010) (Scalia, J., concurring) (advocating for the extension of free speech to corporations by saying, “[t]he [First] Amendment is written in terms of ‘speech,’ not speakers”).

⁴ See *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (Scalia, J., concurring); *Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

⁵ *Madsen*, 512 U.S. at 785.

⁶ *McCullen*, 134 S. Ct. at 2541 (Scalia, J., concurring).

⁷ *Id.*

that the Massachusetts law was plainly content-based and that the majority's contrary conclusion was a product of its own bias against anti-abortion speakers and speech.⁸

In the abortion clinic speech cases, Justice Scalia's rhetoric and emotion sometimes threatened to obscure significant insights and contributions with regard to freedom of speech.⁹ His opinions raised important and fundamental concerns about access to the public forum, the importance of hearing unwanted speech, the requirement of content neutrality, the democratic values of political speech, and the evils of prior restraints.¹⁰ Justice Scalia's opinions also highlighted the intersection between free speech rights and abortion rights.¹¹ In the clinic cases, he argued that the presence of the abortion right established in *Roe* had skewed the Court's interpretation of free speech rights.¹²

⁸ See *id.* at 2543–48 (arguing that the law was not content-neutral).

⁹ See *id.* at 2544 (criticizing the majority's failure to require a truly narrowly tailored statute by characterizing their reasoning as “rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*”); see also Daniel A. Farber, *Playing Favorites? Justice Scalia, Abortion Protests, and Judicial Impartiality*, 101 MINN. L. REV. HEADNOTES 23, 32 (2016) (arguing that Justice Scalia's reasoning in the clinic cases suggested he was “emotionally overwrought”).

¹⁰ See *McCullen*, at 2544–45 (Scalia, J., concurring) (“Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority distorts not only the First Amendment but also the ordinary logic of probative inferences.”); see also *id.* at 2547 (“Moreover, a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits.”); *Madsen*, 512 U.S. at 803 (Scalia, J., concurring in part and dissenting in part) (“[A]ny characterization of a political protest movement as a violent conspiracy ‘must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.’” (quoting *Justice Stevens in NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993–94 (1982))).

¹¹ *McCullen*, 134 S. Ct. at 2541 (Scalia, J., concurring) (“Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents.”).

¹² See, e.g., *Madsen*, 512 U.S. at 795 (Scalia, J., dissenting) (arguing that the Court upheld injunctive provisions that violated free speech principles because “the context here is abortion”); *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (“Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.”).

Thus, for defenders of robust public free speech rights, there is much to commend in these opinions. However, looking solely at the abortion clinic cases provides an incomplete and misleading perspective on Justice Scalia's abortion speech legacy. Justice Scalia was not always a fierce defender of "abortion speech"—communications about or concerning the recognition, scope, or exercise of abortion rights. He joined or authored opinions upholding (1) restrictions on targeted picketing of an abortion provider's residence,¹³ (2) state laws mandating that physicians disclose certain information about abortion procedures to their patients,¹⁴ and (3) federal spending conditions that prohibited fund recipients from counseling their patients about abortion.¹⁵ In these cases and contexts, Justice Scalia voted to authorize restrictions on abortion speech. Justice Scalia's opinions and votes in non-clinic cases also exhibited an incomplete understanding of the abortion-free speech dynamic. His clinic opinions treated the relationship between free speech and abortion rights as one-directional, with abortion rights negatively affecting free speech rights. However, the exercise of free speech rights can impede or suppress the exercise of abortion rights, and changes to understandings of abortion rights can negatively impact free speech rights.¹⁶ By focusing narrowly on only one possible direction or avenue of influence, Justice Scalia elided the complex dynamic between free speech rights and abortion rights.

My aim is not to assess whether Justice Scalia's opinions or votes in these cases were "correct" in doctrinal terms.¹⁷ Rather, I will take stock of Justice Scalia's abortion speech legacy in terms of his contributions to freedom of speech and our

¹³ *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988).

¹⁴ *Planned Parenthood of Pa. v. Casey*, 505 U.S. at 967–69 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing, in a portion of an opinion joined by Justice Scalia, that informed consent provisions were valid).

¹⁵ See *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (upholding prohibition on abortion speech at federally funded health care clinics).

¹⁶ See *Madsen*, 512 U.S. at 758 ("The protests, the court found, took their toll on the clinic's patients. A clinic doctor testified that, as a result of having to run such a gauntlet to enter the clinic, the patients 'manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures.'").

¹⁷ Cf. Farber, *supra* note 9 (declining to assess whether Justice Scalia's claims about free speech and other doctrines were correct).

understanding of the intersection between free speech and abortion rights. By those lights, Justice Scalia's abortion speech legacy is more complicated than the abortion clinic cases would indicate.

Part I describes Justice Scalia's concurring and dissenting opinions in the abortion clinic cases, as well as his votes in other abortion speech cases. Part II situates abortion speech as part of a constitutional discourse about rights, and discusses in general terms the dynamic manner in which constitutional rights often intersect with one another. Part III critically evaluates Justice Scalia's abortion speech legacy as it relates to rights speech, rights discourse, and rights dynamism.

I. JUSTICE SCALIA AND ABORTION SPEECH REGULATIONS

During his tenure on the Supreme Court, Justice Scalia reviewed a number of abortion speech regulations.¹⁸ Some of those regulations involved restrictions on anti-abortion speech at or near health care facilities that provided abortion services.¹⁹ However, the clinic cases were part of a more extensive abortion speech jurisprudence.²⁰ This Part describes Justice Scalia's opinions and votes in all of the cases decided during his tenure that involved abortion speech.

A. Abortion Speech At or Near Clinics

Protests at or near abortion clinics have long raised concerns regarding women's access to abortion services and the safety of those who visit abortion clinics.²¹ Courts and legislatures have responded to these and other concerns by imposing injunctive and statutory limits on expressive and other activities at or near clinics.²² In terms of First Amendment free

¹⁸ The Court decided a few abortion speech precedents prior to Justice Scalia's appointment. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809 (1975) (invalidating statute making it a crime to publish material encouraging procurement of abortion).

¹⁹ *See infra* Part I.A. (discussing abortion clinic free speech cases).

²⁰ *See infra* Part I.B. (describing non-clinic abortion speech cases).

²¹ *See Madsen*, 512 U.S. at 758–59 (describing the effects that protests had both on the women obtaining abortions and the staff working at the clinics).

²² *See* TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 118–21 (2014) (discussing abortion clinic protests).

speech rights, two classes of speakers—anti-abortion protesters and sidewalk counselors (individuals on site who seek through one-on-one counseling to persuade women not to have an abortion)—have been burdened by these restrictions.²³

In four cases decided during Justice Scalia's tenure, the Supreme Court reviewed judicial injunctions or state laws imposing limits on abortion speech at or near clinics.²⁴ Justice Scalia wrote concurring and/or dissenting opinions in all four cases.

In *Madsen v. Women's Health Center, Inc.*,²⁵ the Court reviewed a broad injunction that set up a thirty-six-foot buffer zone around the clinic, prohibited loud noises and sound amplification during surgical hours, and prohibited the defendants from physically approaching anyone seeking to use the clinic without that person's consent.²⁶ In an opinion authored by Chief Justice Rehnquist, the Court invalidated the bubble provision that banned all unwanted physical approaches, but upheld the thirty-six-foot buffer zone and other injunctive provisions.²⁷

Justice Scalia's concurrence in the judgment and partial dissent accused the majority of departing from settled First Amendment standards concerning judicial review of injunctions.²⁸ He contended that the majority applied a novel and weak form of scrutiny ("intermediate" scrutiny) to an injunction that was specifically sought by "persons and organizations with a business or social interest in suppressing" the view of "a single-issue advocacy group."²⁹ In Justice Scalia's view, the injunction

²³ See *id.* at 136–39.

²⁴ See *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014) (invalidating Massachusetts law); *Hill v. Colorado*, 530 U.S. 703, 724–25 (2000) (finding a Colorado state law content neutral); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (concluding that the underlying governmental interest justified the injunction to secure unimpeded physical access to clinics); *Madsen*, 512 U.S. at 768 (1994) (agreeing with the Supreme Court of Florida that governmental interests justified an appropriately tailored injunction to protect the well-being of patients).

²⁵ 512 U.S. 753 (1994).

²⁶ *Id.* at 757–79.

²⁷ *Id.* at 757.

²⁸ *Id.* at 785. For an argument that Justice Scalia overstated the clarity of the law on this point, see Farber, *supra* note 9, at 30–31.

²⁹ *Madsen*, 512 U.S. at 793 (Scalia, J., concurring in part and dissenting in part).

directly targeted anti-abortion speech, and thus should have been subjected to the strictest form of First Amendment scrutiny.³⁰

In a rhetorical pattern that would continue throughout the abortion clinic cases, he attributed this departure to the fact that “the context here is abortion.”³¹ In the abortion context, he contended, the Court was prone to bending or breaking doctrinal rules. Justice Scalia wrote that “[t]oday the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.”³²

Justice Scalia’s opinion in *Madsen* contains a lengthy description of a videotape depicting the events that led to the injunction.³³ As he described it, the video shows that both opponents and supporters of *Roe v. Wade* gathered near the clinic to participate in peaceful and non-disruptive protests, demonstrations, and other forms of expression.³⁴ Justice Scalia emphasized that all of this activity occurred on a public sidewalk area, where speakers had a First Amendment right to gather and communicate.³⁵

Justice Scalia warned that the Court’s exceptional abortion speech jurisprudence constituted a “powerful loaded weapon lying about” for others to invoke in efforts to stifle viewpoints with which they disagreed.³⁶ He concluded his opinion: “What we have decided seems to be, and will be reported by the media as, an abortion case. But it will go down in the lawbooks, it will be cited, as a free-speech injunction case—and the damage its novel principles produce will be considerable.”³⁷

The Court reviewed a second abortion speech injunction in *Schenck v. Pro-Choice Network*.³⁸ The injunction in *Schenck* required individuals at all times to stay fifteen feet away from

³⁰ See *id.* at 792–93 (discussing why strict scrutiny is the appropriate standard).

³¹ *Id.* at 785.

³² *Id.*

³³ *Id.* at 786–90.

³⁴ See *id.* at 790 (“What the videotape, the rest of the record, and the trial court’s findings do not contain is any suggestion of violence near the clinic, nor do they establish any attempt to prevent entry or exit.”).

³⁵ *Id.* at 786–90.

³⁶ *Id.* at 815.

³⁷ *Id.*

³⁸ 519 U.S. 357 (1997).

those entering or leaving the clinic (a floating buffer zone) and imposed a fifteen-foot buffer zone around the entrances of the clinic (a fixed buffer zone).³⁹ The Court, again in an opinion delivered by Chief Justice Rehnquist, invalidated the floating buffer zone but upheld the fixed buffer zone.⁴⁰ Justice Scalia, concurring in part and dissenting in part, repeated his charge from *Madsen* that the Court had not applied the correct standard of review for injunctions that burden speech.⁴¹

Justice Scalia also lectured his colleagues extensively on the evil of injunctions and their use as a suppressive weapon. His specific contention was that the injunctive buffer zone could not be upheld on the basis of public safety or access interests, which he argued could only be raised by the state executive.⁴² Instead, he argued that the only basis for upholding the injunctive buffer zone was the invalid one of protecting a non-existent “right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics.”⁴³ Justice Scalia rejected that interest as contrary to fundamental free speech principles and precedents.⁴⁴ He argued that courts had a “responsibility of special care” that required them to accommodate speech rights in public places.⁴⁵ He chastised his colleagues for treating this duty as a form of “judicial gratuity,” and for taking it upon themselves to posit public safety justifications for an injunction that he viewed as plainly supported by other interests—including the invalid one of protecting public audiences from unwelcome speech.⁴⁶

The Court also reviewed two statutory restriction on abortion speech near clinics. In the first case, *Hill v. Colorado*,⁴⁷ the Court upheld a Colorado law that forbade any person within 100 feet of an abortion clinic to “knowingly approach” within eight feet of another person, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign

³⁹ *Id.* at 367.

⁴⁰ *See id.* at 380–81.

⁴¹ *See id.* at 385 (Scalia, J., concurring in part and dissenting in part).

⁴² *Id.* at 392–93.

⁴³ *Id.* at 386.

⁴⁴ *See id.* at 390 (explaining the Court’s obligation to protect free speech).

⁴⁵ *Id.* at 391.

⁴⁶ *Id.* at 391–94.

⁴⁷ 530 U.S. 703 (2000).

to, or engaging in oral protest, education, or counseling with such other person”⁴⁸ Writing for the majority, Justice Stevens concluded that the statute was content-neutral, that the state had a significant interest in protecting individuals using the clinic from unwanted speech, and that the restriction was narrowly tailored to serve that interest.⁴⁹

Justice Scalia argued that the law was obviously content-based—indeed, he contended that it was aimed directly at the speech of sidewalk counselors and others who sought to persuade women not to exercise the right to abortion.⁵⁰ He had “no doubt that this regulation would be deemed content based *in an instant* if the case before us involved antiwar protesters, or union members seeking to ‘educate’ the public about the reasons for their strike.”⁵¹ As a content-based restriction on speech in a traditional public forum, Justice Scalia argued that the law was subject to strict scrutiny and could not be justified under that standard.⁵²

As he had in *Schenck*, Justice Scalia took particular issue with the Court’s recognition of a privacy-based interest in avoiding unwanted speech in public fora.⁵³ Noting that the Court had recognized an interest in avoiding unwanted speech only in the context of a person’s residence, he asserted that the Court “today elevates the abortion clinic to the status of the home.”⁵⁴ He argued that the Court’s recognition of a “right to be let alone” in public places would imperil labor picketing and other means of speech that audiences might deem unwelcome or offensive.⁵⁵ As Justice Scalia noted, the majority reasoned that “the statute aims to protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics.”⁵⁶ “If these

⁴⁸ COLO. REV. STAT. § 18-9-122(3) (1999).

⁴⁹ *Hill*, 530 U.S. at 705, 718, 726–31.

⁵⁰ *Id.* at 742–48 (Scalia, J., dissenting) (arguing that the Colorado law was content-based).

⁵¹ *Id.* at 742.

⁵² *See id.* at 748–49, 755–56 (explaining why strict scrutiny analysis is applicable to this regulation).

⁵³ *Id.* at 750–54.

⁵⁴ *Id.* at 753.

⁵⁵ *Id.* at 751, 753.

⁵⁶ *Id.* at 777.

are punishable acts,” he argued, “they should be prohibited in those terms.”⁵⁷

Justice Scalia accused the majority of “willful ignorance” regarding the “type and nature of communication affected by the statute’s restrictions.”⁵⁸ He characterized as “absurd” the notion that sidewalk counselors would still be able under the terms of the law to communicate with women seeking to access abortion clinics.⁵⁹ Justice Scalia charged that “the Court *must know* that most of the ‘counseling’ and ‘educating’ likely to take place outside a health care facility cannot be done at a distance and at a high-decibel level.”⁶⁰ He depicted the sidewalk counselor as a peaceful persuader—a “woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart.”⁶¹ Justice Scalia also criticized the Court for not protecting First Amendment rights to engage in handbilling and leafleting—things he said the Court knew or should have known could not be realistically accomplished if each woman had to provide affirmative consent to the speaker’s approach.⁶²

Finally, in *Hill*, Justice Scalia criticized the Court for not being adequately sensitive to the importance of the special *place* affected by the Colorado speech restriction.⁶³ He wrote: “The public forum involved here—the public spaces outside health care facilities—has become, by necessity and by virtue of this Court’s decisions, a forum of last resort for those who oppose abortion.”⁶⁴ Justice Scalia argued:

[Since t]he possibility of limiting abortion by legislative means—even abortion of a live-and-kicking child that is almost entirely out of the womb—has been rendered impossible by our

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* at 756.

⁵⁹ *Id.*

⁶⁰ *Id.* at 757 (emphasis added).

⁶¹ *Id.*

⁶² *Id.* at 757–58.

⁶³ *Id.* at 763 (“A proper regard for the ‘place’ involved in this case should result in, if anything, a commitment by this Court to adhere to and rigorously enforce our speech-protective standards.”).

⁶⁴ *Id.* at 763.

decisions . . . [f]or those who share an abiding moral or religious conviction (or, for that matter, simply a biological appreciation) that abortion is the taking of a human life, there is no option but to persuade women, one by one, not to make that choice.⁶⁵

“[A]s a general matter,” he wrote, “the most effective place, if not the only place, where that persuasion can occur is outside the entrances to abortion facilities.”⁶⁶ Justice Scalia concluded by comparing the Court’s decision in *Hill* to its invalidation of a state partial birth abortion ban handed down that same day: “Does the deck seem stacked? You bet.”⁶⁷

Returning to themes of bias and distortion from his opinions in *Madsen* and *Schenck*, Justice Scalia described *Hill* as yet another precedent in the Court’s “relentlessly proabortion jurisprudence”⁶⁸ and repeated his charge that “the jurisprudence of this Court has a way of changing when abortion is involved.”⁶⁹ Palpably losing patience with what he saw as a pattern of discriminatory treatment of anti-abortion speech and speakers and a distorting bias in favor of abortion rights, Justice Scalia ended his dissent in *Hill* with this:

What is before us . . . is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the “ad hoc nullification machine” that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.⁷⁰

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 764.

⁶⁸ *Id.* at 750.

⁶⁹ *Id.* at 742.

⁷⁰ *Id.* at 741–42 (citation omitted).

Most recently, in *McCullen v. Coakley*, the Court invalidated a Massachusetts law that established a thirty-five-foot buffer zone around all facilities in the state where abortions were performed.⁷¹ Although the Court struck down the buffer zone law, which it treated as content-neutral, Justice Scalia characterized the majority opinion of Chief Justice Roberts as one that “carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents.”⁷² “There is,” he wrote, “an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.”⁷³

Justice Scalia’s primary criticism of the majority opinion was that it did not treat the Massachusetts law, which applied only at abortion clinics and did not restrict all speech in the designated zone, as content-based and subject to strict scrutiny.⁷⁴ He argued that it “blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content-based.”⁷⁵

As Justice Scalia had in previous cases, he accused the majority of fashioning novel rules for analyzing restrictions on anti-abortion speech, as well as for offering dicta and advice that was designed to ease First Amendment limits on anti-abortion speech regulation.⁷⁶ He concluded: “The obvious purpose of the Massachusetts Reproductive Health Care Facilities Act is to ‘protect’ prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks.”⁷⁷

B. Abortion Speech in Other Contexts

⁷¹ *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014).

⁷² *Id.* (Scalia, J., concurring).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2543.

⁷⁶ *See id.* at 2542–43 (charging that the Court’s dictum would encourage jurisdictions to enact and enforce abortion speech restrictions).

⁷⁷ *Id.* at 2548–49.

The Supreme Court's abortion speech jurisprudence extends beyond the four clinic cases. During Justice Scalia's tenure, the Court also reviewed abortion speech restrictions in three other contexts: restrictions on residential picketing, mandatory disclosures by physicians counseling patients seeking an abortion, and funding conditions restricting abortion communications. Justice Scalia did not write separately in these cases. However, his voting record and the opinions he joined indicate his views with regard to abortion speech in these contexts.

In *Frisby v. Schultz*,⁷⁸ which was the first abortion speech precedent decided during Justice Scalia's tenure, the Supreme Court upheld a local ordinance prohibiting speakers from engaging in what it referred to as "focused picketing"—essentially, maintaining a continuous presence outside a person's residence.⁷⁹ On several occasions, the speakers in *Frisby* had gathered on the sidewalks outside an abortion provider's suburban residence in order to quietly and peacefully protest his provision of abortion services.⁸⁰ Under the terms of the ordinance, as the Court interpreted it, speakers were permitted to march along the streets and sidewalks of the residential neighborhood but were barred from focusing their protest on a single residence.⁸¹

Despite the fact that it operated to restrict anti-abortion speech, Justice Scalia joined the majority opinion upholding the ordinance.⁸² Since he did not write separately, we do not have a record of Justice Scalia's rationale. However, in *Hill*, Justice Scalia cited *Frisby* for the principle that individuals enjoy a strong right to privacy in the home that does not extend to the public sidewalks and streets.⁸³ Also in *Hill*, Justice Scalia distinguished *Frisby* on the ground that the picketing ordinance was content-neutral on its face—i.e., it prohibited anyone, regardless of

⁷⁸ 487 U.S. 474 (1988).

⁷⁹ *See id.* at 488.

⁸⁰ *Id.* at 476.

⁸¹ *Id.* at 483.

⁸² *Id.* at 475.

⁸³ *Hill v. Colorado*, 530 U.S. 703, 752 (2000) (Scalia, J., dissenting).

subject matter or viewpoint, from engaging in the practice of targeted picketing.⁸⁴

The Court has also addressed, although only cryptically, First Amendment concerns raised by state laws mandating that physicians convey certain factual and other information to women seeking abortions. Before discussing the free speech issue, some background regarding mandatory physician disclosures is useful.

Mandatory abortion disclosure laws have been a mainstay of post-*Roe* abortion regulation. States have typically defended these laws on the ground that they ensure that women are giving their informed consent to the abortion procedure. By contrast, abortion rights proponents have attacked mandatory disclosure laws as thinly disguised efforts to interfere with a woman's right to choose.

Between *Roe v. Wade* and *Planned Parenthood v. Casey*⁸⁵—which retained *Roe*'s basic premise that there is a right to abortion, but abandoned the trimester approach and recalibrated the state's interests in the abortion decision⁸⁶—the Court invalidated some mandatory state disclosure laws. For example, in a 1983 case, the Court voided a provision mandating that physicians communicate a detailed set of guidelines regarding the development of the fetus, the date of possible viability, and the complications that might result from an abortion.⁸⁷ Although free speech arguments were raised in these cases, the Court invalidated the mandatory disclosures on the ground that they violated the Due Process Clause by interfering with exercise of the right to abortion.⁸⁸ The Court concluded that the mandated disclosures were “designed not to inform the woman's consent but rather to persuade her to withhold it altogether.”⁸⁹

After *Roe*, the Court held that state and federal governments were not required to fund or otherwise financially

⁸⁴ *Id.*

⁸⁵ 505 U.S. 833 (1992).

⁸⁶ *Id.*

⁸⁷ *City of Akron v. Akron Ctr. for Reprod. Health, Inc. (Akron I)*, 462 U.S. 416, 444–45 (1983) (invalidating information and informed consent provisions).

⁸⁸ *See, e.g., id.* at 451–52.

⁸⁹ *Id.* at 444.

support access to abortion services.⁹⁰ It also clarified that governments were entitled to make a “value judgment” that childbirth was preferable to abortion—through allocation of public funds and by other means.⁹¹ These decisions set the stage for *Planned Parenthood v. Casey*, in which the Court established a new framework for structuring physician-patient conversations about abortion.⁹² Under this framework, governments are permitted to seek to *persuade* women not to exercise their constitutional right to choose to terminate a pregnancy, so long as they do not *coerce* women or otherwise unduly interfere with the abortion decision.⁹³

Applying this framework in *Casey*, the Court upheld a Pennsylvania requirement that compelled physicians, within twenty-four hours of performing an abortion, to inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the “probable gestational age of the unborn child.”⁹⁴ It also upheld a requirement that the physician or a qualified non-physician inform the woman that printed materials were available from the state that described the fetus and provided information about medical assistance for childbirth, information about child support from the father, and a list of agencies offering adoption and other services as alternatives to abortion.⁹⁵

In *Casey*, the Court overruled prior precedents invalidating almost identical compulsory disclosures under the Due Process Clause. The joint opinion reasoned that the State was entitled “to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”⁹⁶ The joint opinion rejected the physicians’ claim that the mandatory

⁹⁰ See *Harris v. McRae*, 448 U.S. 297, 315–18 (1980) (rejecting challenges to the Hyde Amendment, which barred payments even for most medically necessary abortions); see also *Maher v. Roe*, 432 U.S. 464, 480 (1977) (upholding denial of Medicaid funds for abortion services).

⁹¹ *Maher*, 432 U.S. at 474.

⁹² *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833, 877–78 (1992).

⁹³ *Id.*

⁹⁴ *Id.* at 881.

⁹⁵ *Id.*

⁹⁶ *Id.* at 883.

disclosures compelled speech in violation of the First Amendment.⁹⁷ With regard to the free speech issue, the joint opinion contained only this ambiguous paragraph:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard* . . . , but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe* We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.⁹⁸

This was the *only* reference to the First Amendment in any of the *Casey* opinions. Although the authors of the *Casey* joint opinion appeared to conclude that the First Amendment applied to the mandated physician communications, they seemed to reason that Pennsylvania could compel abortion disclosures pursuant to its authority to license the practice of medicine.⁹⁹ The Court did not indicate what First Amendment standard of review applied in the context of mandatory abortion disclosures.

In his dissenting opinion in *Casey*, Justice Scalia concluded that *all* of the Pennsylvania regulations, including the mandatory disclosure provisions, would satisfy rational basis review—the standard he would have applied after overruling *Roe v. Wade*.¹⁰⁰ Justice Scalia also joined a partial dissent authored by Chief Justice Rehnquist, in which the Chief Justice reasoned that the Court's precedents invalidating mandatory disclosures had been wrongly decided and were thus not controlling.¹⁰¹ The Chief Justice's opinion did not mention the physicians' free speech claim. Thus, neither in his own opinion, nor the opinion he joined, is there any discussion of Justice Scalia's views

⁹⁷ *Id.* at 884.

⁹⁸ *Id.*

⁹⁹ *See id.* (rejecting compelled speech claim).

¹⁰⁰ *See id.* at 980 (Scalia, J., dissenting).

¹⁰¹ *See id.* at 966 (Rehnquist, J., dissenting in part).

regarding the First Amendment as it pertains to compulsory physician communications. His unambiguous views that states have broad power to regulate abortion and can convey their own points of view regarding abortion suggest that Justice Scalia did not see merit in the First Amendment claim.

Notably, with regard to free speech, Justice Scalia also expressed irritation at what he viewed as the illegitimate proposition that the Court should take public opinion into account when considering abortion rights. He was particularly perturbed that the public would address their arguments about abortion to the justices. In his *Casey* opinion, Justice Scalia expressed distress “about the ‘political pressure’ directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions.”¹⁰² He did not take the position that these expressive activities ought to be suppressed; his point was that they were misdirected.¹⁰³

In addition to conveying their views about abortion through private physicians, states can also influence private speech about abortion through the power of the purse. Again, there is no requirement that taxpayer funds be provided for even medically necessary abortions.¹⁰⁴ Nor is the government required to financially support pro-choice or pro-life advocacy. It is generally free to communicate its own views with regard to abortion.

In *Rust v. Sullivan*,¹⁰⁵ the Court held that the federal government could prohibit physicians working at federally-funded family planning projects from engaging in abortion counseling or advocacy while using program funds.¹⁰⁶ Federal regulations required that if asked about abortion services, physicians at federally funded projects should respond that the facility did not consider abortion an appropriate method of family planning.¹⁰⁷ Funding recipients and their patients argued

¹⁰² *Id.* at 999 (Scalia, J., dissenting in part).

¹⁰³ *See id.* at 999–1000.

¹⁰⁴ *See, e.g., Harris v. McRae*, 448 U.S. 297, 326–27 (holding that federal law denying subsidy for medically necessary abortions did not violate the Fifth Amendment’s Due Process Clause).

¹⁰⁵ 500 U.S. 173 (1991).

¹⁰⁶ *See id.* at 196.

¹⁰⁷ *Id.* at 180 (“[I]n implementing the statutory prohibition by forbidding counseling, referral, and the provision of information regarding abortion as a method of family

that the federal funding restrictions amounted to forbidden viewpoint discrimination.¹⁰⁸ However, the Court reasoned that when it distributes taxpayer funds, the government is allowed to limit activities—including expressive activities—to the scope of the funded project.¹⁰⁹ Thus, the Court held, in a project that is designed to fund pregnancy and other prenatal health care services, the government is allowed to prohibit the expenditure of funds for abortion services and to ban abortion speech that might lead to the provision of such services.¹¹⁰

Governments may also expend funds to communicate directly with the public about abortion. Although the *Rust* decision itself did not explicitly mention the government's role as speaker, subsequent Supreme Court precedents have interpreted *Rust* to stand for the proposition that when the government speaks, it is not required to maintain viewpoint neutrality with regard to abortion.¹¹¹ Thus, for example, governments may run public service announcements to convey pro- or anti-abortion speech messages and may finance public programs to facilitate the communication of their preferred abortion messages. The Court has indicated that when the government speaks about abortion or other matters, it is excused from complying with the First Amendment's content-neutrality requirement as it pertains to private speech.¹¹²

Justice Scalia joined the majority opinion in *Rust* in full. If he had any reservations about conditional funding and its effect on abortion speech, he did not express them. Nor, in subsequent cases, did he feel that it was necessary to characterize

planning, the regulations simply ensure that appropriate funds are not used for activities, including speech, that are outside the federal program's scope.”).

¹⁰⁸ *Id.* at 192.

¹⁰⁹ *See id.* at 200.

¹¹⁰ Lower courts have upheld a similar set of restrictions with regard to the funding of international family planning projects. *See* DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 288 (D.C. Cir. 1989) (upholding government's refusal to fund abortion speech by international organizations); *see also* Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 601 n.98 (2007).

¹¹¹ *See* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (recognizing that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”) (citing *Rust*, 500 U.S. at 194).

¹¹² *See* *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (holding that government speech is not limited by the Free Speech Clause).

or recast *Rust* as a “government speech” precedent in order to uphold limits on government funding programs.¹¹³ As Justice Scalia explained in a subsequent case, *Rust* recognized that when the government provides funding it may decline to subsidize activities or communications that are beyond the scope of the funding program.¹¹⁴ In short, Justice Scalia took a broad view of the government’s funding authority vis-à-vis the free speech rights of funding recipients. His view, as suggested by his vote in *Rust* and his opinions in other cases, was that speakers were free to refuse public funds and communicate as, and what, they wished.¹¹⁵

In stark contrast to his approach and tone in the abortion clinic cases, in other contexts Justice Scalia was not disturbed by restrictions on abortion speech. In the context of residential protests, he voted to uphold restrictions on targeted anti-abortion speech.¹¹⁶ He also approved government mandates that private physicians convey factual and other abortion-related information to patients.¹¹⁷ Finally, Justice Scalia took a broad view of the government’s power to ban abortion speech as a condition of public funding programs.¹¹⁸

II. RIGHTS SPEECH, RIGHTS DISCOURSE, AND RIGHTS DYNAMISM

As I have indicated, my goal is not to assess whether Justice Scalia’s opinions and votes in the abortion clinic and other cases were doctrinally correct. Rather, I wish to assess his abortion speech legacy from a broader perspective, at a level or two removed from the details of individual cases. In order to do so, I want first to situate abortion speech as a form of “rights speech” and as part of a discourse about or concerning

¹¹³ See *Legal Servs. Corp v. Velazquez*, 531 U.S. 533, 554 (2001) (Scalia, J., dissenting).

¹¹⁴ See *id.*

¹¹⁵ See, e.g., *id.* at 558–59 (“The LSC subsidy neither prevents anyone from speaking nor coerces anyone to change speech, and is indistinguishable in all relevant respects from the subsidy upheld in *Rust v. Sullivan*.”).

¹¹⁶ See *Frisby v. Schultz*, 487 U.S. 474, 491 (1988) (upholding targeted picketing ordinance).

¹¹⁷ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882, 889 (1992) (upholding mandatory abortion disclosure provision).

¹¹⁸ See *Legal Servs. Corp*, 531 U.S. at 553–54 (Scalia, J., dissenting).

constitutional rights. I also want to provide some context regarding the dynamic intersection of constitutional rights and the effects of that intersection on constitutional interpretation.

A. Rights Speech and Rights Discourse

As I have written elsewhere, communications about or concerning the recognition, scope, or enforcement of constitutional rights can collectively be referred to as “rights speech.”¹¹⁹ In terms of First Amendment values, rights speech occupies a special position. It is a form of political speech that is central to self-governance, the search for truth, and individual autonomy.¹²⁰ The liberty to discuss and debate formal limits on government—constitutional rights - is central to American democracy, to understandings of liberty, and to individual self-fulfillment.

First Amendment rights to communicate about, and receive information regarding, constitutional rights facilitate not only freedom of speech, but also the exercise of non-speech constitutional rights. Speakers who are free to protest the denial of rights, to publish information about rights, and to receive information concerning rights, are more effectively able to exercise those rights.

Rights speech is prevalent in American political and cultural discourse. Abortion speech is a type, or form of, rights speech. The abortion clinic cases discussed in Part I all involved restrictions on communications about, or concerning, abortion. Public protest and sidewalk counseling are traditional, and easily recognizable, forms of rights speech. However, rights speech takes many forms and occurs in a variety of different contexts.¹²¹ It is conveyed in print and online publications, in everyday conversations, on billboards, through symbolic acts, by means of associations and assemblies, through lobbying, and by the filing of lawsuits.

Rights speech also occurs in other less visible and non-traditional contexts. During consultations with clients and

¹¹⁹ See generally Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014).

¹²⁰ *Id.* at 4.

¹²¹ See *id.*

patients, licensed professionals sometimes communicate about, or concerning, constitutional rights¹²² Lawyers communicate advice to clients concerning potential constitutional claims. Physicians consult with patients about a range of matters that relate to or concern the exercise of constitutional rights – i.e., contraception, abortion, arms possession, adoption and other family concerns, and end of life matters.

In these contexts, the discussion may or may not focus on rights as legal constructs. Professionals and clients do not tend to use the formal language of rights. Lawyers and physicians do not generally engage in seminar-like discourses with their clients about abortion or other constitutional rights. Indeed, during most consultations they may not mention constitutional provisions, or precedents, at all. However, professional-client communications may nonetheless concern or touch upon the status, enforcement, or exercise of a constitutional right. A physician's examination of a broken ankle is not the same as a consultation concerning the health effects or availability of contraception or abortion services. Only the latter consultation touches upon or concerns a constitutional right. For that reason, we may rightly view laws that restrict or compel physician-patient communications in that context as raising not just medical but also constitutional concerns.

Some examples will help to identify rights speech and take measure of both its frequency and regulation. Consider the following laws and regulations:

- State laws banning physicians from asking patients about firearms possession;¹²³
- State bar rules that treat certain communications opposing transgender equality as a form of prohibited harassment;¹²⁴

¹²² See generally Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L. J. 1290 (2016).

¹²³ See *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, 814 F.3d 1159, 1201–02 (11th Cir. 2015) (upholding Florida's Firearms' Owners Privacy Act).

¹²⁴ See *Revised Resolution Rule 8.4: Misconduct*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf (last visited October 15, 2016) (proposing extended protection for transgendered individuals and including gender identity under protected groups).

- Laws that prohibit local authorities from using state funds for the purpose of lobbying the state legislature to impose gun controls;¹²⁵
- State-mandated scripts requiring physicians to inform patients that abortion has certain negative health effects on the mother or will terminate a human life;¹²⁶
- Laws that authorize public funding of health care services on the condition that recipients not advocate or discuss abortion;¹²⁷
- Local ordinances requiring that crisis pregnancy centers discuss the availability of abortion as a viable alternative to childbirth;¹²⁸ and
- State programs authorizing the issuance of specialty pro-life, but not pro-choice, license plates.¹²⁹

In these examples, governments directly regulate, or seek to influence, communications about, or concerning, the Second Amendment, abortion, equal protection, and other constitutional rights. In other contexts, governments may apply ostensibly content-neutral regulations in a manner that disparately impacts or influences communications about or concerning constitutional rights. For example, imagine a municipal signage ordinance that, as applied, bans the display of

¹²⁵ See KAN. STAT. ANN. § 75-6705 (West 2014) (prohibiting local officials from using state funds to lobby for or against gun control at the state level).

¹²⁶ See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012) (rejecting compelled speech claim brought by physicians); *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 794 F. Supp. 2d 892, 916, 918 (S.D. Ind. 2011) (upholding requirement that physicians inform abortion patients that “human physical life begins when a human ovum is fertilized by a human sperm”).

¹²⁷ See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

¹²⁸ See *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 249–50 (2d Cir. 2014) (invalidating pregnancy center services disclosure provision under strict and intermediate scrutiny); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt. (Greater Balt. Ctr. I)*, 683 F.3d 539, 555 (4th Cir. 2012) (invalidating mandatory pregnancy center disclosures under strict scrutiny). *But see* *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 182 (N.D. 1986) (upholding mandatory disclosures).

¹²⁹ *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 866 (7th Cir. 2008) (finding that Illinois prohibition of pro-choice license plates but not pro-life ones—the former of which connotes a stance on abortion—was reasonable because “[t]o the extent that messages on specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion”).

a billboard communicating opposition to the government's use of eminent domain.¹³⁰ Or consider municipal rules that impose restrictions on "political" speech in public transit and other venues, a practice that may significantly impact the ability of speakers to communicate about constitutional rights.

Of course, the mere fact that such regulations touch upon, or concern, a constitutional right does not necessarily mean that they violate the First Amendment or any other constitutional provision. However, each law, rule, or regulation implicates the communication of information about or concerning a constitutional right. In the above examples, governments seek to bar, restrict, or influence communications about, or concerning, a constitutional right.

Rights speech regulations can affect particular conversations regarding individual rights, some of them private. However, they also regulate speech that is part of a public discourse about constitutional rights. Through licensure, spending, management of public resources, and other means, governments regulate conversations and interactions that touch upon, concern, or implicate constitutional rights—including discussions concerning whether or not to exercise those rights and the implications of their exercise. Even seemingly private conversations, for example those between physicians and their patients, can relate to broader public concerns. Patients may take political action based on these conversations, or continue the dialogue with family or friends. As Dean Robert Post has observed, "there is no reason why public opinion might not be formed one conversation at a time."¹³¹

Discourse about constitutional rights is part of longstanding American social, political, and constitutional traditions. In our democratic process, rights discourse is the principal means of effecting constitutional change.¹³² The

¹³⁰ See *Central Radio Company, Inc. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016).

¹³¹ ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 46 (2012).

¹³² Some critics have derided what they view as Americans' obsession with constitutional rights. They view certain characteristics of rights discourse as a cancer on the body politic. In particular, critics consider "rights talk" to be a negative aspect of public discourse that, among other things, distracts Americans from the collective values of democratic life. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). However, these critics do not

American political and constitutional systems fundamentally depend upon access to information about constitutional rights and the freedom to communicate facts, thoughts, and ideas about those rights. Rights speech regulations affect these democratic processes and implicate core First Amendment values relating to self-government.

In sum, whenever government restricts or influences private speech about constitutional rights, it threatens to interfere with discourses that implicate the status, scope, or exercise of those rights. These conversations are part of a constitutional discourse that is critical to constitutional change.

B. Rights Dynamism

As the label suggests, “rights speech” regulations operate at the intersection between two constitutional rights. Elsewhere I have referred to the general process in which constitutional rights intersect with one another as “Rights Dynamism.”¹³³ In very general terms, the study of Rights Dynamism shows that, from an inception point and thereafter in perpetuity, constitutional rights frequently intersect with one another in political debate, litigation, scholarly commentary, and other settings.¹³⁴ It also demonstrates that, over time, the interpretation and enforcement of an individual right can be significantly affected by its dynamic relationships with other rights.¹³⁵

For example, as the Supreme Court indicated in *Obergefell v. Hodges*,¹³⁶ its recent marriage equality decision, the Fourteenth Amendment’s Due Process Clause and Equal Protection Clause, while distinct provisions, have illuminated and influenced one another’s central meanings over time.¹³⁷ The Court relied on the combination of *both* provisions to recognize a right to marriage

deny the importance of allowing speakers, publishers, and others to communicate information about the recognition, scope, and exercise of constitutional rights. *Id.* at 14. Their criticism goes primarily to the *mode* of conversation, rather than the fundamental right to converse freely about rights. *Id.* at 15.

¹³³ See generally Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. (forthcoming 2017).

¹³⁴ See *id.* at 13–20 (describing the process and interpretive effects of Rights Dynamism).

¹³⁵ *Id.* at 20–22.

¹³⁶ 135 S.Ct. 2584 (2015).

¹³⁷ *Id.* at 2602–03.

equality. Laurence Tribe has referred to the confluence of due process and equal protection rights in *Obergefell* as a “double helix” of constitutional protection.¹³⁸ As *Obergefell* shows, individual rights do not exist in isolation from one another, but rather are relational constructs. As a jurisprudential matter, marriage equality did not arise from thin air. It was the culmination of decades of interactions—in courts, scholarly works, and public discourses—between the due process and equal protection guarantees.

As noted, Rights Dynamism produces interpretive effects. Those effects are typically bi-directional.¹³⁹ Thus, as the Due Process Clause and Equal Protection Clause have matured together, the meanings of *both* provisions have been transformed—sometimes as a result of mutual illumination and at other times as a result of conflicts between these rights.¹⁴⁰

Owing to its capacious language, and the ubiquity of expressive activity, the Free Speech Clause has frequently intersected with other constitutional rights. These rights include the Equal Protection Clause, the Second Amendment, the Due Process Clause, the Free Exercise Clause, and the constitutional right to privacy. The First Amendment’s Free Speech Clause has both altered understandings of other rights, and has itself been transformed as a result of its interactions with those rights. For instance, while the freedom of speech has been critical to the expansion of constitutional equality rights, the scope and interpretation of free speech rights have also been significantly transformed as a result of their frequent intersection with equality rights.¹⁴¹ When rights intersect, the relationship tends to leave indelible marks on both.

The Free Speech Clause and the abortion right have long intersected with one another. Freedom of speech has been critically important to the recognition, exercise, and

¹³⁸ Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 20 (2015).

¹³⁹ See Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (discussing the relationship between due process and equal protection).

¹⁴⁰ See *id.*

¹⁴¹ See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975) (observing that there is a “principle of equal liberty of expression . . . inherent in the [F]irst [A]mendment”).

interpretation of reproductive and abortion rights. As the cases discussed in Part I show, free speech rights have sometimes facilitated and sometimes conflicted with abortion rights. By the same token, as *Casey* shows, changes to abortion rights have raised new free speech concerns. In sum, the relationship has influenced the exercise and interpretation of *both* free speech and abortion rights.

Rights Dynamism is a complex and unpredictable process. However, it is critical to understanding individual rights and constitutional liberty that we attend to the dynamic intersections between constitutional rights. In undertaking that assessment, it is also important that we look in more than one direction.

III. JUSTICE SCALIA'S ABORTION SPEECH LEGACY

This final Part assesses Justice Scalia's abortion speech legacy, from the perspective of Part II's observations regarding rights speech, rights discourse, and Rights Dynamism. Justice Scalia's opinions and votes in abortion speech cases produced a mixed and somewhat complicated legacy. Although he highlighted the importance of abortion speech and abortion discourse to democratic deliberation, Justice Scalia's conceptions of rights speech and rights discourse were narrow and incomplete. Similarly, although Justice Scalia was an astute observer of the dynamic intersection between freedom of speech and abortion, his understanding of that dynamic was myopic. He focused narrowly on a subset of the effects produced by the interaction of freedom of speech and abortion rights—namely, what he viewed as the suppression of anti-abortion speech—without considering other important aspects of the relationship. The explanation for these shortcomings could relate, in part, to Justice Scalia's narrow and traditional conception of public speech rights, and his views regarding the government's powers to license and control certain speakers. However, it seems likely that Justice Scalia's opinions and votes were also influenced by his opposition to the abortion right. His strong opposition to *Roe* was a complicating factor in Justice Scalia's abortion speech legacy.

A. Abortion Speech and Abortion Discourse

For defenders of strong public free speech protections, there is much to admire in Justice Scalia's separate abortion clinic opinions. Justice Scalia (1) argued for recognition and protection of abortion speech as political speech, (2) insisted on neutrality and objectivity in the enactment and review of speech restrictions, (3) emphasized the need to preserve speakers' access to traditional public fora, (4) emphatically rejected the notion that audiences have a right or interest in avoiding unwanted speech in those places, and (5) criticized broad injunctions as dangerous prior restraints on speech.¹⁴²

Justice Scalia generally characterized abortion clinic protesters and sidewalk counselors as participants in public discourse about the morality and legality of abortion.¹⁴³ He emphasized that clinic protesters and others assembled at or near abortion clinics were addressing a matter of utmost public concern—the moral and legal validity of abortion—through traditional methods of public dissent.¹⁴⁴ Accordingly, Justice Scalia viewed injunctions and laws limiting abortion protests and sidewalk counseling as efforts to stifle political speech.¹⁴⁵

The notion that anti-abortion protesters and others were engaged in legitimate public discourse about abortion may seem a rather obvious point. But others, including some in the Court's majority, appeared to treat protesters and counselors as potential or actual threats to public order. In contrast, Justice Scalia treated them as political speakers. He connected the speakers and their message to core First Amendment values. For instance, he characterized the ability to communicate about or concerning

¹⁴² See discussion *supra* Part I.A.

¹⁴³ See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 786–90 (1994) (Scalia, J., concurring in part and dissenting in part) (depicting abortion protest as a peaceful and non-disruptive event).

¹⁴⁴ See *Hill*, 530 U.S. at 742 (Scalia, J., dissenting) (“[T]he Court today continues and expands its assault upon [abortion opponents’] individual right to persuade women contemplating abortion that what they are doing is wrong.”).

¹⁴⁵ See *id.* (Scalia, J., dissenting) (observing that the Court would have invalidated the restriction “in an instant” if the speakers were anti-war protesters or others discussing matters of public concern).

the recognition, scope, or exercise of abortion rights as “antecedent to . . . the survival of self-government.”¹⁴⁶

Treating anti-abortion protesters and sidewalk counselors as discussants rather than miscreants changed how the Court viewed these speakers. Although it did not change the results in the first three clinic cases, by the time *McCullen* was decided, Justice Scalia’s perspective was clearly represented in the Court’s description of the speakers involved:

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call “sidewalk counseling,” which involves offering information about alternatives to abortion and help pursuing those options.¹⁴⁷

* * * * *

Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations.¹⁴⁸

Thus, at least in the clinic context, Justice Scalia recognized the speech at issue as abortion speech, and related it to a broader public discourse about abortion. His efforts in this regard appear to have paid some dividends. The majority in *McCullen* treated the speech of sidewalk counselors as part of a reasoned discourse about abortion.

In public discourse about matters of public concern, including constitutional rights, Justice Scalia emphasized that

¹⁴⁶ *Id.* at 763 (Scalia, J., dissenting). See generally Zick, *Rights Speech*, *supra* note 119.

¹⁴⁷ *McCullen*, 134 S. Ct. at 2527.

¹⁴⁸ *Id.* at 2537.

government must not discriminate for or against private viewpoints.¹⁴⁹ In his abortion clinic free speech opinions, Justice Scalia repeatedly emphasized the importance of governmental neutrality.¹⁵⁰ He criticized colleagues for what he viewed as their evident bias against anti-abortion speakers and speech.¹⁵¹ Justice Kennedy, who sometimes shared Justice Scalia's concerns regarding restrictions on abortion speech, expressed the matter this way in his separate dissent in *Hill*:

The liberty of a society is measured in part by what its citizens are free to discuss among themselves. Colorado's scheme of disfavored-speech zones on public streets and sidewalks, and the Court's opinion validating them, are antithetical to our entire First Amendment tradition. To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment.¹⁵²

Justices Scalia and Kennedy were not alone in voicing such concerns. A number of scholars, some of whom supported abortion rights, agreed that the Court had erred in upholding the Colorado law and had erred in adopting an abortion-protective free speech position.¹⁵³

¹⁴⁹ See *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

¹⁵⁰ See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in part and dissenting in part) (accusing the Court of upholding an injunction targeting anti-abortion speech); *Hill*, 530 U.S. at 742–48 (Scalia, J., dissenting) (arguing that the Colorado law restricting certain unwanted approaches outside abortion clinics was content-based).

¹⁵¹ See *Hill*, 530 U.S. at 750 (Scalia, J., dissenting) (criticizing the Court's "relentlessly pro-abortion jurisprudence").

¹⁵² *Id.* at 768 (Kennedy, J., dissenting).

¹⁵³ See, e.g., Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 199 (2001) (arguing that "the majority fell head over heels for the seductive Colorado statute"); Laurence Tribe, Response, *Professor Michael W. McConnell's Response*, 28 PEPPERDINE L. REV. 747, 750 (2001) ("I

In the clinic cases, Justice Scalia also emphasized the need to preserve access to public places for expressive activities. He made two points in that regard. The first was that the protesters and counselors sought access to public streets, sidewalks, and other areas where the First Amendment protected free speech and other expressive rights.¹⁵⁴ He insisted that courts had a duty of “special care” to preserve speech rights in public places.¹⁵⁵

Justice Scalia’s second point was that owing to their proximity to abortion clinics, it was vitally important to the speakers that they have access to public areas in the vicinity—including places near the entrances to the clinics. Abortion clinics are obviously places where women seek access to health care and recourse to a recognized constitutional right to choose whether to bear a child. However, in expressive terms, abortion clinics are hotly contested places.¹⁵⁶ For some, the clinics are sites of murder or infanticide. For some anti-abortion speakers, abortion clinics are highly symbolic locations that magnify the moral and legal concerns relating to abortion and abortion rights.

In Justice Scalia’s view, the potent symbolism and proximity of the clinics to the act of abortion were reasons to protect and preserve abortion speech in public places, not restrict it. In the clinic context, Justice Scalia insisted that preserving access to public areas near abortion clinics was essential to permitting anti-abortion protesters and sidewalk counselors to attempt to persuade women not to exercise the abortion right.¹⁵⁷ As he observed, “the most effective place, if not the only place, where that persuasion can occur is outside the entrances to abortion clinics.”¹⁵⁸

Justice Scalia also repeatedly dismissed the notion that audiences in public places—including women seeking access to

don’t think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.”).

¹⁵⁴ See *Madsen*, 512 U.S. at 786–90 (Scalia, J., concurring in part and dissenting in part) (emphasizing public forum point).

¹⁵⁵ *Schenck*, 519 U.S. at 391 (Scalia, J., concurring in part and dissenting in part).

¹⁵⁶ See ZICK, SPEECH OUT OF DOORS, *supra* note 22, at ch. 4 (examining “contested” nature of certain places).

¹⁵⁷ See *Hill*, 530 U.S. at 763 (Scalia, J., dissenting) (describing sidewalks outside abortion clinics as “a forum of last resort for those who oppose abortion”).

¹⁵⁸ *Id.*

abortion services—had a “right to privacy” or a recognizable interest in avoiding unwanted anti-abortion speech.¹⁵⁹ In public places, he argued, governments could not protect audiences from speech because it produces offense or causes audience members to second-guess their own beliefs or commitments.¹⁶⁰ Indeed, Justice Scalia argued that access was particularly important at contested clinic spaces, where, again, speakers had their last and best chance to persuade women not to obtain an abortion.

Justice Scalia’s insistence on preserving access to public places and vigorous, sometimes uncomfortable, abortion discourse in those places also appears to have paid dividends. In *McCullen*, the majority emphasized the “virtue” that on public streets and sidewalks audiences cannot simply tune speakers out if they are offended.¹⁶¹ The Court also affirmed the importance of maintaining content neutrality in these places.¹⁶² Finally, although it did not specifically address the notion that government had a valid interest in—or that audiences had a cognizable right to—protection from unwanted speech in public, the Court’s holding and reasoning undermine such a claim.

Finally, a critical aspect of Justice Scalia’s legacy regarding abortion speech—and free speech more generally—was his reminder that injunctions targeting speakers or particular speech pose special First Amendment dangers. Justice Scalia overstated his claim that the Court had failed to follow settled precedent with regard to the standard of review for such injunctions. Contrary to his argument, that issue was not settled when *Madsen* and *Schenck* were decided.¹⁶³ However, Justice Scalia reminded readers that the injunctions had been specifically sought by those with a special interest in suppressing

¹⁵⁹ See *Schenck*, 519 U.S. at 386 (Scalia, J., concurring in part and dissenting in part) (rejecting argument that women have a “right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics”); *Hill*, 530 U.S. at 750–54 (Scalia, J., dissenting) (rejecting the argument that the state had a valid interest in protecting women from unwanted speech).

¹⁶⁰ See *McCullen*, 134 S. Ct. at 2548–49 (Scalia, J., concurring) (“The obvious purpose of the Massachusetts Reproductive Health Care Facilities Act is to ‘protect’ prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks.”).

¹⁶¹ *Id.* at 2529.

¹⁶² *Id.*

¹⁶³ See Farber, *supra* note 9, at 31 (noting that the Court had not settled on a standard).

anti-abortion expression.¹⁶⁴ More generally, Justice Scalia warned of the suppressive power of civil injunctions. He argued that these aspects of speech injunctions warranted skeptical (strict) judicial review.¹⁶⁵

In these several respects, Justice Scalia's opinions in the abortion clinic cases recognized and sought to preserve abortion speech and abortion discourse. He sounded important alarms concerning protecting political discourse, preserving access to public places, maintaining content neutrality, and reviewing speech injunctions with care.

However, as discussed in Part II, rights speech and rights discourse take a variety of forms. Although Justice Scalia devoted considerable energy to defending the speech of anti-abortion protesters and sidewalk counselors at or near abortion clinics, his conception of rights speech and rights discourse did not extend to the full panoply of abortion communications in other contexts and places. Indeed, in non-clinic cases, Justice Scalia's insistence on protecting abortion speech and abortion discourse either dissipated or disappeared altogether.

In *Frisby*, for example, Justice Scalia joined an opinion that upheld a prohibition on the targeted protesting of an abortion provider's home.¹⁶⁶ As in the clinic cases, the targeted protest ban in *Frisby* applied to speakers on public streets and sidewalks.¹⁶⁷ Further, the broad ordinance, which the Court interpreted to ban only "targeted" activities, was enacted in response to the activities of anti-abortion protesters.¹⁶⁸ *Frisby* thus seemed like a good candidate for the sort of searching free speech inquiry Justice Scalia would later undertake in the abortion clinic cases. However, unlike some of his colleagues, Justice Scalia did not write separately nor raise any concerns regarding the breadth of the ordinance, its content-neutrality, or the prospect that the town was seeking to silence abortion speech. Indeed, Justice Scalia raised no free speech objection to the ordinance.

¹⁶⁴ See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757 (1994) (Scalia, J., concurring in part and dissenting in part).

¹⁶⁵ See *id.*

¹⁶⁶ See discussion *supra* notes 77-79 and accompanying text.

¹⁶⁷ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)

¹⁶⁸ See *id.* at 476 (noting that "the picketing generated substantial controversy and numerous complaints.").

Nor, apparently, did Justice Scalia consider mandatory physician abortion disclosures to be a threat to abortion speech or abortion discourse. Recall that the *Casey* joint opinion acknowledged that the First Amendment was “implicated” by enforcement of such measures, but concluded that the state’s licensure power justified the mandated disclosures.¹⁶⁹ Justice Scalia did not indicate whether he shared this view. However, in his *Casey* opinion, Justice Scalia concluded that the state was required only to demonstrate a *rational basis* for these and other abortion regulations.¹⁷⁰ He also joined an opinion authored by Chief Justice Rehnquist, which repudiated precedents invalidating mandatory disclosures on due process grounds.¹⁷¹ There is no indication in either opinion that Justice Scalia saw mandatory abortion disclosures as abortion speech regulations or considered physician-patient consultations to be part of the broader abortion discourse.

In fact, the Free Speech Clause is more prominently “implicated” in this context than the Court or Justice Scalia acknowledged. As one commentator has observed, *Casey* articulated a framework by which the State could “structure the woman’s decisionmaking process” and “open up the expressive channels of speech to the pregnant woman while she is engaged in deliberation about her choice.”¹⁷² In *Casey*, the Court was effectively “granting leeway to the government to voice its own opposition to abortion” in the context of physician-patient conversations.¹⁷³ Since *Casey*, many governments have enacted measures that structure conversations between women and their physicians regarding abortion.¹⁷⁴ Some have imposed detailed scripts that physicians are compelled to deliver to patients.¹⁷⁵

¹⁶⁹ *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833, 884 (1992).

¹⁷⁰ *See id.* at 981 (Scalia, J., concurring in part and dissenting in part) (stating that he would uphold the law “in its entirety” under rational basis standard).

¹⁷¹ *See id.* at 966 (Rehnquist, C.J., dissenting in part).

¹⁷² Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 802 (1996).

¹⁷³ *Id.* at 791.

¹⁷⁴ *See generally* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1334 (2014) (analyzing compelled abortion disclosure laws).

¹⁷⁵ *See, e.g.*, S.D. CODIFIED LAWS § 34-23A-10.1(1)(b)-(c) (2011) (requiring that abortion providers tell patients that abortion will “terminate the life of a whole, separate, unique, living human being” and that “the pregnant woman has an existing relationship with that unborn human being”); *see also* § 34-23A-10.1(1)(e)(ii) (requiring

Others require that an ultrasound be displayed to the woman and that doctors provide a detailed description of the image (including information about limbs, vital organs, position in the uterus, etc.).¹⁷⁶

Several commentators have argued that these laws violate the free speech rights of physicians and patients.¹⁷⁷ Courts have generally rejected this argument, in part on the ground that *Casey* upheld Pennsylvania's mandatory abortion disclosure provisions.¹⁷⁸ The Supreme Court has said precious little about the free speech rights of physicians and other professionals. Thus far, it has failed to articulate a coherent or complete doctrine of professional speech.

This has left the unfortunate (from a free speech perspective) impression that governments are generally free to structure, mandate, and influence conversations between professionals and their clients or patients—even when those conversations relate specifically to constitutional rights and other matters of public concern. As discussed in Part II, professional-client interactions often include rights speech—they touch upon or concern the exercise of constitutional rights. More generally, as one commentator has observed, “[p]rofessional speech serves to educate the citizenry, is integral to the workings of self-

a doctor to explain “all known medical risks” of abortion, including the “increased risk of suicide ideation and suicide”).

¹⁷⁶ *E.g.*, LA. STAT. ANN. § 40:1299.35.2(D)(2)(a) (2012); N.C. GEN. STAT. ANN. § 90-21.85(a)(2), (a)(4) (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(C)-(D) (West 2011).

¹⁷⁷ See Corbin, *supra* note 174, at 1334 (2014); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2389 (2013); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 959–62 (2007); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 399–400 (2008); Zick, *Professional Rights Speech*, *supra* note 120.

¹⁷⁸ For results in script cases, see *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds II)*, 686 F.3d 889, 906 (8th Cir. 2012) (en banc); *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds I)*, 530 F.3d 724, 738 (8th Cir. 2008) (en banc) (vacating preliminary injunction); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 916, 918 (S.D. Ind. 2011) (upholding requirement that physicians inform abortion patients that “human physical life begins when a human ovum is fertilized by a human sperm.”). For results in display cases, see *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012) (rejecting compelled speech claim brought by physicians); *Rounds I*, 530 F.3d at 735; *Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014) (invalidating North Carolina ultrasound narration law on compulsory speech grounds).

government, and may even itself form part of a lesson in democracy.”¹⁷⁹ Physicians and other professionals are not similarly situated to soapbox orators; they operate within highly regulated institutions and are subject to standard of care and other professional regulations. However, within these institutions they sometimes engage in rights speech, and their conversations connect to broader discourses about matters of public concern—including constitutional rights. Like his colleagues, Justice Scalia missed an opportunity in *Casey* to carefully assess the First Amendment implications of mandated abortion speech.

Finally, Justice Scalia joined the majority opinion in *Rust*, which prohibited project-funded physicians from mentioning abortion in consultations with their patients.¹⁸⁰ The funding condition in *Rust* directly suppressed abortion speech, specifically counseling or advocacy regarding the exercise of the abortion right. Justice Scalia nevertheless joined the majority opinion, concluding either that the funding condition did not amount to viewpoint-based discrimination or, if it did, that the federal government was entitled to discriminate against pro-abortion speech in the context of a funding program. So long as the government held the purse strings, Justice Scalia appeared to accept that it was entitled to reject any abortion speech that was inconsistent with its own principles or programs.

Although *Rust* did not acknowledge as much, funding power significantly enhances government’s ability to influence abortion speech and abortion discourse. *Rust* allows governments, as a condition of funding, to restrict or compel communications about abortion. The spending power can also be used in other ways to influence abortion discourse. For instance, cutting off funding for Planned Parenthood will affect not only the delivery of medical services but also lobbying and other forms of advocacy. Laws and regulations may prohibit the use of federal funds for the purpose of litigating abortion cases.¹⁸¹

¹⁷⁹ Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Institutions*, 147 U. PA. L. REV. 771, 815 (1999).

¹⁸⁰ See *supra* notes 96-108 and accompanying text.

¹⁸¹ See Legal Services Corporation Act (LSCA) § 1007(b)(8), 42 U.S.C. § 2996f(b) (2012).

Even state funding of specialty license plates can implicate abortion discourse, as, for example, when the state authorizes or refuses to authorize abortion-related messages.¹⁸² In each of these contexts, abortion speech and abortion discourse are at least indirectly restricted. Nevertheless, all indications are that Justice Scalia's conceptions of abortion speech and abortion discourse did not extend to these contexts.

Taken together, *Frisby*, *Casey*, and *Rust* show that Justice Scalia's recognition of, and support for, abortion speech and abortion discourse was rather limited and contextual. Of course, there are many possible explanations for this contingent recognition and support. The simplest one is that Justice Scalia's objection to the Court's recognition of the abortion right led him to dissent from any restrictions on anti-abortion speech and to support restrictions on pro-abortion communications.

In *Casey* and *Rust*, Justice Scalia seemed not at all concerned that *pro*-abortion advocacy, counseling, or consultation was being suppressed or restricted. He might have upheld even state-mandated anti-abortion *ideological* statements—under the theory that the state was entitled to use private speakers to dissuade women from exercising the abortion right and to communicate its own position respecting abortion. One also wonders how Justice Scalia would have dealt with local ordinances and laws compelling so-called “crisis pregnancy centers,” which tend to operate as pro-life organizations, to tell their patients that abortion and contraception services are not a viable and legitimate option for pregnant women.¹⁸³ Some courts have invalidated these compulsory disclosures on the ground that they compel abortion speech.¹⁸⁴ Municipal laws do not

¹⁸² See *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 866 (7th Cir. 2008) (stating that state could ban subject of abortion entirely from license plates); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 972–73 (9th Cir. 2008) (holding that agency violated rights of anti-abortion group by denying pro-life plate); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006) (holding that “Choose Life” plates constituted government speech); *ACLU of N.C. v. Conti*, 912 F. Supp. 2d 363, 375 (E.D.N.C. 2012) (invalidating North Carolina law that allowed pro-life but not pro-choice plates).

¹⁸³ See Corbin, *supra* note 174, at 1339–43 (discussing measures compelling pregnancy centers to convey information about abortion services).

¹⁸⁴ See *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249–50 (2nd Cir. 2014) (invalidating pregnancy center services disclosure provision under strict and intermediate scrutiny); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539, 555 (4th Cir. 2012) (invalidating mandatory

require similar disclosures and disclaimers regarding childbirth and adoption services by abortion providers.¹⁸⁵ Would Justice Scalia have recognized that abortion speech was present in *these* cases and insisted on content neutrality?

While I do not think we can eliminate the Justice's own anti-abortion bias as an explanation for many of his opinions or votes, that explanation is not wholly satisfying. For one thing, *Frisby* complicates the bias narrative. There are several possible explanations for Justice Scalia's decision to join the majority in *Frisby* and uphold the restriction on targeted picketing outside the abortion provider's home. The case predated the abortion clinic cases, in which Justice Scalia purported to identify a *pattern* of bias against anti-abortion speech. Further, the fact that the ordinance was facially content-neutral may have satisfied Justice Scalia that no effort to silence abortion protesters was afoot. Or perhaps Justice Scalia credited the town's representations that the ordinance would not be applied to a single picketer, and thus would not broadly restrict anti-abortion speech on residential streets and sidewalks.¹⁸⁶ Both of these possible explanations are inconsistent with the skepticism Justice Scalia displayed in cases like *Madsen* and *Schenck*.

However, it seems more likely that Justice Scalia's vote in *Frisby* reflected his view that areas near residences, even if they were traditional public fora, were simply not *appropriate* venues for abortion speech and abortion discourse. In the later clinic cases, Justice Scalia drew a sharp distinction between privacy rights in the home and in public places, distinguishing *Frisby* on that ground.¹⁸⁷ On this basis, some abortion speech was not entitled to recognition and certain types of abortion discourse were not worthy of protection.

pregnancy center disclosures under strict scrutiny); *Centro Tepeyac v. Montgomery Cnty.*, 683 F.3d 591, 594 (4th Cir. 2012), *aff'd en banc*, 722 F.3d 184 (4th Cir. 2013). *But see* *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 182 (N.D. 1986), (upholding mandatory disclosures under commercial speech standard).

¹⁸⁵ *See* *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 294 (4th Cir. 2013) (Wilkinson, J., dissenting) (observing that pregnancy center ordinance "compels groups that oppose abortion to utter a government-authored message without requiring any comparable disclosure—or indeed any disclosure at all—from abortion providers.").

¹⁸⁶ *See id.* at 482 (interpreting ordinance to cover only "targeted" residential picketing).

¹⁸⁷ *See Hill*, 530 U.S. at 753 (Scalia, J., dissenting) (arguing that the Court "today elevates the abortion clinic to the status of the home.").

From this perspective, Justice Scalia's opinion in *Casey* and his vote in *Rust* may be rooted in his views regarding the scope of the state's power to license physicians and the government's power to condition funding. However, the results in those cases can also be attributed to Justice Scalia's views regarding the appropriate scope of protection for abortion speech and abortion discourse. On the public streets and sidewalks near abortion clinics, Justice Scalia vigorously argued that abortion speech and abortion discourse must be robust and wide-open and that government must refrain from discriminating against speakers or ideas. However, he did not view those restrictions as applicable outside residences, in physicians' offices, or in publicly funded programs. In these contexts, Justice Scalia failed to acknowledge that abortion speech was occurring at all, much less that broader concerns regarding abortion discourse were implicated. He was content to permit authorities to regulate the free flow of information concerning abortion and to influence the provision of information by injecting itself into the conversation.

Moreover, as some of his comments in *Casey* suggested, Justice Scalia did not view the Court itself as an appropriate audience for abortion speech or a participant in abortion discourse.¹⁸⁸ Just as he did not consider the home an appropriate target for abortion speech, Justice Scalia viewed the Court's own building, and the justices themselves, as out of bounds. Although they did not have a constitutional right or interest in avoiding unwanted political entreaties, Justice Scalia's apparent view was that the Court's members were not appropriate audiences for abortion speech—in part, of course, owing to his view that the Court should not have recognized a right to abortion in the first place.

In short, Justice Scalia appears to have had a particular conception or vision of what abortion speech and abortion discourse ought to look like. With regard to these matters, he was a *traditionalist*—a label it is not clear he would necessarily have

¹⁸⁸ See *Planned Parenthood of Pa. v. Casey*, 505 U.S. 833, 999–1000 (1992) (Scalia, J., dissenting) (expressing frustration at protests and letters concerning abortion that were directed to the Court).

rejected out of hand.¹⁸⁹ From his perspective, abortion speech and abortion discourse mattered and were worthy of protection when they occurred in traditional venues and circumstances—when protesters confronted public audiences in public places where they had a right to be present and to communicate on matters of public concern. As discussed further below, this narrow conception of abortion speech and abortion discourse also affected Justice Scalia’s perception of the dynamic intersection between freedom of speech and abortion.

B. Abortion/Speech Dynamics

As explained in Part II, individual constitutional rights are often involved in dynamic relationships with other rights. Rights intersect and interact with one another—in litigation, scholarship, lawmaking, public discourse, and other contexts. When rights interact with one another in these contexts, their interpretations and meanings can change over time. These alterations can be reflected in constitutional doctrine, as well as in broader perceptions about the relationship between the rights.

Consider the intersection between freedom of speech and the right to abortion. Expressive and reproductive rights have a long and complex relationship. Free speech and related expressive rights have intersected with contraceptive and abortion rights from the latter’s inception. Indeed, modern reproductive rights are rooted firmly in First Amendment free speech rights.¹⁹⁰

One of the frequent points of intersection between free speech and abortion rights has occurred in connection with the regulation of abortion speech. When protesters or sidewalk counselors gather at abortion clinics to express their opposition to or support for abortion, freedom of speech and abortion rights are *both* implicated. As I have argued at length elsewhere, the

¹⁸⁹ See, e.g., RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION (2006) (discussing Justice Scalia’s jurisprudential approach to various constitutional issues); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991) (examining the traditionalist aspects of Justice Scalia’s early jurisprudence).

¹⁹⁰ See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (locating a “right to privacy” in the First Amendment’s Free Speech Clause and other rights provisions, which have “penumbras, formed by emanations that help give them life and substance.”).

same is true when states compel physicians to convey information to women contemplating an abortion or condition funding on the recipient's agreement not to discuss abortion at all.¹⁹¹ In all of these encounters, freedom of speech and abortion rights are brought into direct contact with one another.

Thus, when they are reviewing restrictions on abortion speech, courts are actually engaging with both free speech and abortion rights at once. Free speech rights might affect—or might be affected by—concerns regarding the recognition or preservation of abortion rights. A court's free speech analysis might be influenced by judicial bias in favor of or against abortion rights, or by valid concerns relating to preserving access to abortion services.

At the same time, understandings of abortion rights can affect how free speech rights are interpreted in particular contexts. For example, in the context of physician consultations or funding projects, judicial decisions granting government broad authority to weigh in on the abortion issue can affect perceptions or interpretations of free speech rights in the abortion context. *Casey's* alteration of the abortion right led the Court to conclude that mandatory abortion disclosures "implicated" the Free Speech Clause, but apparently not in a manner that meaningfully constrained government from compelling physicians to communicate official messages about abortion.¹⁹²

One of the consistent themes of Justice Scalia's abortion speech jurisprudence, which he expressed in all of his abortion clinic opinions, was that the presence of the abortion right distorted First Amendment precedents, rules, and values. In these cases, Justice Scalia chided colleagues (including those on record as *opposing* abortion rights) for altering or ignoring First Amendment rules pertaining to injunctions, prior restraints, content-neutrality, overbreadth, and time, place, and manner speech regulations. In a recent comment, Daniel Farber expresses skepticism regarding these bias claims and argues that Justice Scalia overstated the extent to which the Court applied

¹⁹¹ See Zick, *Rights Speech*, *supra* note 119 (examining "professional rights speech" regulations).

¹⁹² *Casey*, 505 U.S. at 884.

exceptional First Amendment rules or doctrines in the clinic cases.¹⁹³

Whether he was right or wrong about the Court's application of precedents and doctrines, Justice Scalia highlighted an important dynamic that often affects intersecting constitutional rights. As he noted, the presence of the abortion right may have influenced how the Court interpreted protesters' and counselors' free speech rights. The abortion right was implicated—some would maintain threatened—by the actions of protesters and sidewalk counselors seeking to exercise what they claimed were First Amendment rights to speak and gather near clinic entrances. The abortion right would not be very meaningful if speakers could exercise a heckler's veto by effectively denying access to clinics or harassing women who sought their services. In that sense, abortion rights likely did influence at least some of the Court's interpretations of free speech rights in the clinic cases.

In the clinic cases, the Court engaged in a balance that was designed to allow protesters and other speakers to exercise First Amendment rights, but also permit women to access abortion services. Insofar as the Court established new standards for reviewing injunctions, altered traditional overbreadth analysis, applied content neutrality rules more flexibly, or recognized a right to be let alone on the public sidewalks, those precedents would, as Justice Scalia argued, produce new or different understandings of First Amendment rights. These precedents would presumably apply outside the abortion clinic context. More generally, as Justice Scalia surmised, some portion of the public might misconstrue or miss the significance of these developments. As Justice Scalia put it, although they were likely to be reported to the public as abortion rights precedents, the abortion clinic cases would be printed in the "lawbooks" as free speech precedents.¹⁹⁴

First Amendment scholars, myself included, have shared Justice Scalia's basic concern that in some instances abortion rights may have influenced the Court's interpretation and

¹⁹³ See Farber, *supra* note 9, at 29–38.

¹⁹⁴ See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 815 (1994) (Scalia, J., concurring in part and dissenting in part).

application of free speech rights in ways that could damage public speech rights more generally.¹⁹⁵ However, what is missing from Justice Scalia's account of this dynamic is that it operates in more than one direction. How judges and others interpret or apply free speech rights in the clinic context can significantly impact the recognition and exercise of abortion rights too.

Recall that in the clinic cases, Justice Scalia would have invalidated *all* of the injunctive and statutory regulations on abortion speech. This rigid interpretation of free speech rules and precedents could have jeopardized basic access to abortion services. Yet Justice Scalia was not even willing to concede that preventing harassment of women seeking abortion services constituted a valid reason for restricting abortion speech. His opinions in the clinic and other cases left the distinct impression that Justice Scalia either did not appreciate how the interpretation of free speech rights might restrict or effectively nullify abortion rights, or that he was not concerned with that prospect.

Moreover, especially outside the clinic context, Justice Scalia did not consider the negative impact the Court's *abortion* jurisprudence could have on free speech doctrines and rights. *Casey's* revision of the abortion right invited states to intervene in physician-patient consultations regarding abortion—an invitation the states have enthusiastically accepted. By changing the interpretation of the Due Process Clause to permit state speech interventions short of actual coercion, the Court restricted the free speech rights of physicians and the women with whom they consult concerning abortion procedures. As noted, the Court's interpretation of abortion rights broadly affects the area of professional speech. On the "lawbooks," *Casey* can now be treated by lower courts and officials as a *free speech* precedent that limits or even nullifies professionals' free speech rights.

Similarly, *Rust's* validation of broad government power to defund abortion services and impose even viewpoint-based restrictions has narrowed private speech rights in the funding context. Even more significantly, as subsequently interpreted by the Court, *Rust* recognized a government speech exception to the

¹⁹⁵ See Zick, *Rights Speech*, *supra* note 119; Hill v. Colorado, 530 U.S. 703 (2000).

First Amendment. Under that exception, governments are not required to adhere to content neutrality rules when they are acting as speaker or communicator.¹⁹⁶ That doctrinal innovation, which originated in concerns about abortion funding, drew no objection or charge from Justice Scalia that an “abridged First Amendment” was being developed or applied.¹⁹⁷

In sum, Justice Scalia’s perception of the free speech/abortion dynamic, like his regard for abortion speech and abortion discourse, was narrow and incomplete. He saw peril to only some free speech rights, in one special abortion-related context. However, the free speech/abortion dynamic is complex and bi-directional, with effects from the intersection extending in more than one direction and into different contexts.

Again, it is not possible to state with certainty whether Justice Scalia’s narrow focus was influenced by his own preferences and biases regarding abortion rights, and if so to what extent or degree. Justice Scalia certainly made no secret of his disdain for *Roe v. Wade*. He may well have been aware of the dynamic effects on abortion and free speech rights in all these contexts, but was nonetheless undisturbed by most of them. For whatever reason, although Justice Scalia highlighted the intersection between freedom of speech and abortion, his abortion speech opinions failed to take a holistic view of that dynamic.

CONCLUSION

Among many other things, Justice Scalia will surely be remembered as a strong supporter of freedom of speech. Justice Scalia’s opinions in the abortion clinic cases exemplify this important part of his legacy. He well understood that in a democracy, constitutional change depends on a process of open and rigorous debate concerning matters of public concern—particularly the recognition, scope, and exercise of constitutional rights. In the clinic cases, Justice Scalia emphasized the political nature of anti-abortion speech. He stressed the need to preserve

¹⁹⁶ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (characterizing *Rust* as involving a program of government speech).

¹⁹⁷ *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring).

access to public places for the purpose of engaging in rights speech and rights discourse. He warned against state intermeddling, whether by judicial injunction or statute, in public discourse about abortion rights. And he strongly rejected the premise that public audiences were constitutionally or otherwise entitled to avoid abortion speech and other communications that they found offensive or unwelcome. Finally, Justice Scalia consistently challenged his colleagues to ensure that their views regarding abortion rights were not distorting the interpretation of free speech rights.

Reading Justice Scalia's abortion clinic opinions in isolation, one might get the impression that he was a consistent supporter of abortion speech, recognized the importance of abortion discourse in all contexts, and was acutely aware of the influence rights can have on one another when they come into contact. Upon closer examination, however, Justice Scalia's recognition of rights speech, conception of rights discourse, and understanding of rights dynamics were all incomplete.

Justice Scalia did not acknowledge or recognize all forms of abortion speech. He was not always and in every context a supporter of robust and wide-open abortion discourse. Rather, Justice Scalia's conception of abortion speech and abortion discourse was narrowly traditional. It extended only to public protests and other expressive activities, in certain public places, targeted to public audiences. Further, Justice Scalia's understanding of or concern with the dynamic intersection between freedom of speech and abortion rights was one-directional and myopic. Either Justice Scalia did not appreciate that freedom of speech and abortion intersected in dynamic and multi-directional ways, or he understood perfectly well that this was the case yet viewed only one aspect of that intersection as problematic.