

BEYOND THE TEXT: JUSTICE SCALIA’S ORIGINALISM IN PRACTICE

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INTRODUCTION	1945
I. EXTRATEXTUAL ASPECTS OF JUSTICE SCALIA’S ORIGINALISM ..	1946
A. <i>Structural Reasoning</i>	1947
B. <i>English Legal Tradition</i>	1952
C. <i>Post-Ratification History</i>	1957
D. <i>New Technology</i>	1962
II. UNDERDEVELOPED ASPECTS OF JUSTICE SCALIA’S ORIGINALISM	1964
A. <i>Framers’ Intent</i>	1964
B. <i>The Fourteenth Amendment</i>	1967
C. <i>The Burden of Proof</i>	1970
D. <i>Precedent</i>	1973
CONCLUSION	1974

INTRODUCTION

This Essay considers the late Justice Antonin Scalia’s contributions to constitutional originalism as a practical methodology. Justice Scalia was the leading judicial theorist and advocate of originalism of his era,¹ and his legacy has widely been assessed in those terms.² He was also, along with Justice Clarence Thomas, the leading judicial practitioner of originalism of his era.

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1 See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

2 See, e.g., Jamal Greene, *The Supreme Court, 2015 Term—Essay: The Age of Scalia*, 130 HARV. L. REV. 144 (2016); Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. FORUM 24 (2016).

This latter role has received less comprehensive attention. Although there are of course countless articles analyzing and critiquing his originalist methodology in particular cases, or seeking to demonstrate that certain of his opinions are inconsistent with his theoretical commitments, relatively few articles have surveyed the full range of his constitutional opinions to extract the practical components of his originalist methodology.

This Essay seeks to contribute to a descriptive account of Justice Scalia's originalist methodology as reflected in his judicial opinions. Its aim is not comprehensive, for that is likely beyond the scope of any single article. Rather, its goal is to identify central and perhaps unexpected components of Scalia's approach as well as to identify areas where his methodology remained undeveloped. To this end, it describes four prominent aspects of his use of originalism to decide cases—some of which may be surprising to originalist scholars. In particular, it discusses ways in which Scalia went beyond the conventional originalist focus on the Constitution's words and phrases and direct evidence of the ways they were used at the time of enactment. It further identifies four areas central to practical applications of originalism where Scalia did not fully develop his approach.

I. EXTRATEXTUAL ASPECTS OF JUSTICE SCALIA'S ORIGINALISM

In the conventional account, Justice Scalia was a “public meaning” originalist who “identifie[d] the Constitution with the meaning of its words to a reasonable person at the time of enactment.”³ As such, he would be expected to focus primarily on the Constitution's text and historical evidence—such as dictionaries and ordinary usage—of how its words were defined and used at the relevant time. Undoubtedly his opinions did that; they are replete with references to the words of the Constitution and the meanings of those words.⁴ But Scalia's opinions went substantially beyond the Constitution's words, sometimes in ways that may be surprising to originalist theorists and practitioners.

This Part focuses on four such ways. First, Scalia used structural reasoning and background assumptions to find specific rules in very general text. Second, he made extensive use of the Constitution's English-law background, which he thought formed a crucial key to the Constitution's meaning. Third, he used post-ratification practice—including practice surprisingly remote from the time of enactment—to give meaning to ambiguous clauses. Fourth, he appeared to accept that new constitutional rules could arise with new technologies. Scalia consistently reaffirmed that none of these sources could override unambiguous text, but he was forthright in admitting that constitutional text standing alone was very often ambiguous.⁵

3 Greene, *supra* note 2, at 154–55.

4 See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2595–600, 2606–08 (2014) (Scalia, J., concurring in the judgment); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

5 See Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989) (“Many, if not most, of the provisions of the Constitution do not make sense except

A. *Structural Reasoning*

One surprising element of Justice Scalia's originalism in practice is its embrace of structural reasoning to develop specific rules from implications of general text. Three areas stand out: his decisions on federalism, state sovereign immunity, and standing. They have much in common. All ultimately rest on textual provisions, but the text is too general in itself (even taking into account evidence of common usage) to provide the specific rules Scalia identified. Scalia's move from general text to specific limitations on federal power depended on conclusions about structural imperatives implied by the Constitution's original design.⁶

These decisions have been sharply criticized as contrary to Scalia's self-proclaimed originalist methodology.⁷ They are, however, too important to his constitutional jurisprudence to be treated as aberrations; rather than being contrary to his methodology, they *are* his methodology. They may be criticized for being insufficiently textualist, but that is a recognition that his methodology was not as textualist as commentators often supposed.

Take state immunity first. Justice Scalia identified a background founding-era assumption that states would be immune from suit without their consent, to which he accorded constitutional status. This broad rule cannot be derived from the text of the Eleventh Amendment (the constitutional text's only direct reference to immunity).⁸ But critics who accused Scalia of misreading the Eleventh Amendment missed the point: he did not attribute the immunity rule primarily to the Amendment. As he explained, the Amend-

as they are given meaning by the historical background in which they were adopted. For example, the phrase 'due process of law' would have meant something quite different to a sixteenth-century Tahitian from what it in fact meant to an eighteenth-century American. One needs to know what the word 'property' means to know what it means to be 'deprived of life, liberty, or property, without due process of law.' In this way, the unwritten Constitution encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless." (footnotes omitted) (quoting U.S. CONST. amend. V)).

6 See Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1089–90 (1997) (noting "the Court's willingness to supplement text, precedent, and history with inferences derived from related constitutional provisions, the overall structure of the Constitution, and the principles that animated its framing," with specific reference to decisions on state sovereign immunity and federalism); see also Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1337–40 (1992) (similarly describing standing law as derived from structural reasoning).

7 See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000); Eric J. Segall, *Will the Real Justice Scalia Please Stand Up?*, 50 WAKE FOREST L. REV. ONLINE 101 (2015).

8 The Eleventh Amendment's text provides only that federal jurisdiction does not extend to suits against a state by a citizen of another state. See U.S. CONST. amend. XI. The Court's state immunity cases hold also that federal jurisdiction does not extend to suits against a state by citizens of that state and by noncitizens, see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890), and that Congress cannot force states to waive immunity in their own courts, see *Alden v. Maine*, 527 U.S. 706 (1999).

ment was evidence that the background immunity rule existed, had constitutional status, and was not superseded by the grants of federal court jurisdiction in Article III: “[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact.”⁹ The critics’ error was a natural one if they assumed Scalia was a strict textualist whose methodology required him to rest his rule on a specific textual direction. The key to understanding the state immunity decisions is to see that his originalism was not exclusively text-based.

Although Justice Scalia’s conclusion on state immunity begins with the background common-law rule of sovereign immunity, that is only a partial explanation. A background assumption of sovereign immunity would not necessarily translate into a constitutional rule of state immunity.¹⁰ In particular, it might not translate into a rule that Congress could not eliminate state immunity in the exercise of its enumerated powers. The constitutionalization of the background common-law rule depends on a structural imperative that the states would not have accepted the Constitution without protection for their preexisting sovereignty, including their immunity.¹¹ In Scalia’s

9 *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also, e.g., Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011) (referring to the “structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III’s jurisdictional grant,” as confirmed by the Eleventh Amendment); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (stating that the Eleventh Amendment “repudiated the central premise of *Chisholm* that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union”). On the relationship of the Eleventh Amendment to immunity, *see generally* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2009). A further complication is that the Court’s cases recognize an exception to immunity where an exception is implicit in the plan of the Convention—that is, the scope of immunity is established and limited both by background assumptions and by structural imperatives. *See, e.g.,* *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–26 (1934). Again, this sounds inconsistent with Justice Scalia’s view if one thinks of him as a pure textualist, but it is consistent with an originalist approach that incorporates both background assumptions and structural reasoning.

10 It would more easily translate into a rule of federal sovereign immunity, as Justice Scalia also believed it did. *See generally* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012) (describing how some constitutional background assumptions become constitutionalized and others do not).

11 Perhaps the sharpest departure from a textualist approach in this area is *Alden v. Maine*, 527 U.S. 706 (1999), holding that the Constitution precluded Congress from eliminating state sovereign immunity in state courts (per Justice Kennedy, with Justice Scalia providing the fifth vote). *See* Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1602–03 (2000) (concluding that “[i]t is hard to see how a textualist could view *Alden* as anything other than a disaster” and that the opinion instead “focuses on the original understanding of overall structure rather than particular constitutional provisions”). Although Justice Scalia did not write the opinion, there is no reason to

word, it was a “presupposition” implied by the founding-era status of the states. But that background assumption gains constitutional force largely independent of text.¹² Rather, the constitutionalization of the background assumption is necessary to preserve the federal structure embedded in the Constitution. In this sense it is more closely associated with Charles Black’s idea of structural reasoning than with textualism.¹³

Thus, although Scalia was criticized for being nonoriginalist in these decisions, a better way to put it is that he was not (purely) textualist. Rather, he adopted constitutional structure and background assumptions into his originalist methodology. Calling these decisions nonoriginalist is a misnomer: they are based on Scalia’s reading of a founding-era background assumption of constitutionalized state immunity arising from (a) the fact that states had preexisting immunity and (b) the conclusion that states would not have voluntarily relinquished it. That is entirely originalist—just not textualist.¹⁴

Justice Scalia’s principal federalism decision, *Printz v. United States*,¹⁵ is similarly originalist but nontextual. In *Printz* the constitutional rule—that Congress cannot command state executives to enforce federal law—did not arise from constitutionalization of a background legal tradition (as for immunity), but it similarly depended on assumptions about the structural relationship between the states and the federal government at the time of the founding. After conceding (perhaps too quickly) that the Constitution’s text did not speak to the issue, Scalia principally relied on structural reasoning to reach his conclusion.¹⁶ In particular, allowing Congress to direct state execu-

think he disagreed with its reasoning, as it rests on the same structural imperative as do the cases finding state immunity in federal court. As to the particular constitutional provision involved, for Justice Scalia presumably it was Congress’s power to legislate as necessary and proper to support its other powers; the structural imperative would not accept denial of immunity as necessary and proper.

12 See Sachs, *supra* note 10, at 1868–75 (discussing state immunity).

13 See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); see also Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 973–74 (2008) (criticizing structural arguments on textualist grounds).

14 Michael Rappaport argues that the immunity decisions can be defended on textualist grounds based on the Constitution’s use of the word “state” (meaning a sovereign entity that would necessarily have sovereign attributes such as immunity). See Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 869–74 (1999). Notably, however, Justice Scalia did not feel the need to make this textualist argument. To be clear, the point here is not that Scalia was necessarily correct; it is only that he was following an originalist methodology.

15 521 U.S. 898 (1997).

16 See *id.* at 918 (basing the decision on the “essential postulate[s]” of the “structure of the Constitution” (alteration in original) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934))). As discussed below, Justice Scalia also relied on the fact that early Congresses did not command enforcement by state authorities. See *infra* Section I.C. He also relied on the Court’s prior opinion in *New York v. United States*, 505 U.S. 144 (1992) (per Justice O’Connor), which he joined and which is similarly structural rather than tex-

tives would undermine federalism by breaking down the separation between the state and national governments and would undermine the separation of powers by circumventing the President's control of federal law execution.¹⁷ Thus the result, though not specifically directed by the Constitution's text, was necessary to preserve the Constitution's design.¹⁸

Justice Scalia's apparent comfort with nontextualist reasoning in *Printz* is especially notable because there is a textualist basis for the *Printz* rule, which Scalia himself developed later in the opinion in response to the dissent. Congress must have an enumerated power for its law; because the law commanding state enforcement is not a direct regulation of interstate commerce, the law must be "necessary and proper" to effectuate the regulation of interstate commerce, and arguably the original meaning of this phrase would not have been understood to grant a power so disruptive of state sovereignty.¹⁹ This approach still depends on the structural imperative, but it at least gives a textual foundation for the outcome. Scalia's decision not to lead with or emphasize this argument suggests that he did not see constitutional text as the sole touchstone of originalist analysis.

Scalia's standing decisions—notably *Lujan*²⁰—also depend on originalist structural reasoning to animate general textual provisions. As Scalia noted, standing ultimately rests on the text: Article III's vesting of "[t]he judicial Power" in the federal courts and its description of federal jurisdiction as encompassing "Cases" and "Controversies."²¹ Scalia further observed, consistent with conventional originalist principles, that the original meaning of those phrases depended on the founding generation's understanding of judicial power.²² But he did little to demonstrate that the original meaning of those phrases imposed the specific requirements outlined in *Lujan* (or in a number of other standing decisions). Rather, the impetus behind *Lujan* was structural. In Scalia's view, standing doctrine protects the basic separation of powers by assuring that courts do not take on too great a supervisory role over governmental operations and thus act in ways contrary to founding-era

tual. See *Printz*, 521 U.S. at 924. For contrary historical arguments, see Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104 (2013), and Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

17 See *Printz*, 521 U.S. at 922–23, 928.

18 See *id.* at 918–23; see also Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1419–20 (2008) (discussing *Printz* in these structural terms).

19 See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297–326, 330–33 (1993) (discussing original meaning of "necessary and proper"); see also *Printz*, 521 U.S. at 923–24 (making this argument and citing the Lawson/Granger article); Rappaport, *supra* note 14 (finding a similar textual basis for *Printz*).

20 *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (concluding that standing requires concrete, individualized injury and that Congress cannot alter that requirement by statute).

21 *Id.* at 559 (alteration in original) (quoting U.S. CONST. art. III, §§ 1, 2).

22 See *id.* at 559–60.

assumptions about the judicial role.²³ However, those founding-era assumptions are derived largely from conjectures based on constitutional structure rather than specific practices of founding-era commentary.

Scalia's nontextualist structural reasoning can also be found in individual rights cases, especially regarding the Takings Clause. In *Nollan v. California Coastal Commission*,²⁴ Justice Scalia concluded that the state could not, as a condition of issuing a development permit, require the property owner to grant a public easement across the affected land. As a purely textual matter, arguably no property was "taken" in this case, as the property owner had no right to the development and was free (literally and practically) to forgo the development and thus avoid granting the easement. Scalia's opinion argued, however, that allowing the government to extract such a concession made the Constitution's guarantee of private property illusory.²⁵ This conclusion in turn must rest on the structural proposition that specific rights guarantees imply additional rights protections to assure that the textual rights do not become a nullity.²⁶

These points should not be read to deny Scalia's fundamentally text-based approach. The Constitution's text is typically the starting point in

23 See *id.* ("[T]he Constitution's central mechanism of separation of powers depends largely upon common understandings of what activities are appropriate to legislatures, to executives, and to courts."); see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2694–95 (2015) (Scalia, J., dissenting) (referring to "history and judicial tradition" as determinative of whether a case is suitable for judicial resolution but without setting forth specific founding-era evidence); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) ("We have always taken [Article III] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process. Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all." (citation omitted)). In these and related cases, Justice Scalia did not examine historical practices in detail. The foundation of these cases was the structural imperatives of separation of powers. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); see also Reynolds, *supra* note 6, at 1340 ("But [standing] does not come from the text at all, or from the popularly described version of the original understanding in which we are merely concerned about the meaning of words at the time of the Framing. In fact, it cuts somewhat against the text, and makes sense *only* if Article III is interpreted in light of a much larger idea concerning the proper role of courts in a democratic society, an idea that does not appear in the text of the Constitution but is somehow extracted from various structural characteristics of the document.").

24 483 U.S. 825 (1987). Justice Scalia's takings clause opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which has been widely criticized as inconsistent with originalism, see, e.g., Greene, *supra* note 2, at 158 n.101, might also be understood as derived from an imperative to protect the textually granted right to property. It may, however, be better understood as resting on precedent. See *infra* Section II.D.

25 See *Nollan*, 483 U.S. at 839.

26 See Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248 (2012) (describing "auxiliary protections [that] ensure that the core right is genuinely protected by creating a buffer zone that prevents officious government actors from stripping the right of real meaning through regulations that indirectly—but perhaps fatally—burden its exercise").

Scalia's opinions, and where constitutional text spoke directly to the issue presented in the case, he insisted that the text be applied as written.²⁷ It is hard to identify a case where Scalia reached a conclusion contrary to the text's express command. Rather, Scalia's application of nontextual assumptions came in cases where the text was ambiguous or where the text itself had no direct bearing on the case. Further, Scalia insisted—consistent with his textualist orientation—that constitutional text should be enforced if clear even in ways not anticipated by the founding-era generation.²⁸ Nonetheless, the areas identified above—federalism, standing, state immunity, and takings—illustrate his perhaps surprising willingness to go beyond the text and direct evidence of its meaning to employ structural reasoning based on implications from founding-era assumptions. Each area is somewhat distinct. The standing cases use structural reasoning to give meaning to general text. *Nolan* implies an extratextual right to protect a textual right. *Printz* uses structural reasoning to develop a rule Scalia acknowledged was not found in the text. And the immunity cases, the most aggressive example, use background assumptions and structural reasoning to overcome what may appear to be the most natural reading of the text.

Critics insist on seeing these outcomes as inconsistencies, but it is an uncharitable assessment of Justice Scalia's methodology to regard such important lines of decisions as aberrations rather than core aspects of his approach. These lines of decisions are instead better regarded as evidence that Scalia's methodology was less strictly text-based than commonly supposed (and indeed perhaps less strictly text-based than he sometimes acknowledged in his theoretical discussions). This does not mean, however, that Scalia was not an originalist in these decisions. They are all based on structural assumptions and implications he derived from the founding era and the Constitution's original design. Thus they show, not that Scalia was an inconsistent originalist, but that he was a structuralist as well as a textualist in his originalism.

B. *English Legal Tradition*

As discussed above, Justice Scalia believed constitutional text often could not be understood without reference to its context. As this Section highlights, a key aspect of context for him was the Constitution's English-law background. His methodology assumed substantial continuity between the

27 See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (Scalia, J., concurring in the judgment) (invoking a textual reading of the Recess Appointments Clause); *id.* at 2600 ("The historical practice of the political branches is, of course, irrelevant when the Constitution is clear."); *Maryland v. Craig*, 497 U.S. 836, 860–70 (1990) (Scalia, J., dissenting) (invoking a textual reading of the Confrontation Clause).

28 See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 722 (2010) (plurality opinion) ("Where the text they adopted is clear . . . what counts is not what they envisioned but what they wrote.").

framers and their English-law heritage, particularly—though not exclusively—in the individual rights amendments.²⁹

This aspect of Scalia's approach might not seem remarkable, as Justices have traditionally referred to English legal concepts, especially as described by Blackstone, to interpret the Constitution.³⁰ But public meaning originalism's emphasis on text and founding-era meaning might suggest reluctance to place too much reliance on remote English sources. Scalia's methodology shows that he, at least, had no such reluctance; indeed, in many of his opinions the English-law background did most of the work in defining the constitutional rule.

A leading illustration (perhaps surprisingly) is his opinion in *District of Columbia v. Heller*.³¹ The *Heller* opinion contains extensive phrase-by-phrase parsing of the constitutional text,³² an approach that might lead one to describe it as highly textualist. But its ultimate conclusion—that the Second Amendment guarantees an individual right of self-defense—does not follow directly from the text itself, despite the opinion's textual exegesis. Rather, the opinion finds the connection between the right to arms and individual self-defense principally in the traditional English basis of the right to arms, particularly in the English Bill of Rights and as explained by Blackstone.³³ As Scalia recounted, the abuses of the Stuart kings of the seventeenth century

29 This assumption reflects a view, not fully defended in his opinions, that the American Revolution and the framing of the Constitution and its initial amendments were primarily preservative of existing rights and structures rather than truly revolutionary. Typically, however, his reliance on English legal tradition was coupled with evidence from the post-ratification period showing continuity. See *infra* Section I.C.

30 See, e.g., *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925) (“The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary.”); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (“The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.”); *Calder v. Bull*, 3 U.S. 386, 390–91 (1798) (Chase, J.) (“The prohibition that ‘no state shall pass any ex post facto law’ necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. . . . The expressions ‘ex post facto laws,’ are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by Legislators, Lawyers, and Authors.”); see also *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (per Stevens, J.) (relying on *Calder* and the English common-law meaning of “ex post facto” to interpret the Ex Post Facto Clause).

31 554 U.S. 570 (2008). See generally Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. Rev. 923 (2009).

32 See Solum, *supra* note 31, at 939 (“The Court examined each of the operative words and phrases in the Second Amendment, examining the semantic content of ‘the people,’ ‘keep,’ ‘bear,’ and ‘arms.’ The Court concluded its examination as follows: ‘Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.’” (quoting *Heller*, 554 U.S. at 592)).

33 See *Heller*, 554 U.S. at 592–95.

led to inclusion of a right to arms, expressly for self-defense, in the 1689 English Bill of Rights,³⁴ which in turn became an entrenched right in the eighteenth century as reflected in English legal authorities.³⁵ This right, he argued, formed the basis for the Second Amendment, which recognized a preexisting right to arms (and hence, to self-defense).³⁶

To establish the central proposition in *Heller*, Scalia relied principally on Blackstone's *Commentaries*,³⁷ which he called "the preeminent authority on English law for the founding generation."³⁸ He then quoted Blackstone's description of the right as "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence."³⁹ Scalia added citations to J.L. de Lolme's treatise on the English constitution and two more obscure sources,⁴⁰ concluding: "Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence."⁴¹

Although Scalia's opinion in *Heller* also cited and quoted sources from prerevolutionary America and (as discussed further below) post-ratification history, the English legal background is central to the opinion, establishing the link between the phrase "keep and bear arms" and individual self-defense. That is, if it is true that the Second Amendment codified a preexisting right derived from English law (a point Scalia mostly assumed) and if it is true that the preexisting English right encompassed individual self-defense (a point that remains contested as a historical matter⁴² but which Scalia thought the Court's opinion conclusively established), the opinion's conclusion has firm foundations; otherwise, it arguably does not. Thus, despite *Hel-*

34 *Id.* at 593 ("That the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." (quoting 1 W. & M., c. 2, § 7 (Eng.))).

35 *See id.* at 593–94. This account is contested on various historical grounds; the point here is not whether Justice Scalia was right, but which sources he thought were decisive. *See id.* at 666–70.

36 *Id.* at 592 (noting that the Amendment by its terms contemplated the guarantee of a preexisting right). Justice Scalia described the English history as confirming his textual analysis, but the textual analysis—especially the tie to self-defense—may appear weak without it.

37 *See generally* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

38 *Heller*, 554 U.S. at 593–94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

39 *Id.* at 594 (quoting BLACKSTONE, *supra* note 37, at *139–40).

40 *Id.* (citing GRANVILLE SHARP, TRACTS, CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA 17–18, 27 (London, Dilly et al. 3d ed. 1782); 2 J.L. DE LOLME, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION 886–87 (A.J. Stephens ed., London, Robinson & Murray 1838); and WILLIAM BLIZARD, DESULTORY REFLECTIONS ON POLICE 59–60 (London, Baker & Galabin 1785)).

41 *Id.*

42 *See id.* at 664 n.31 (Stevens, J., dissenting); *see also McDonald v. City of Chi.* 561 U.S. 742, 914–16 (2010) (Breyer, J., dissenting).

ler's reputation as a text-based opinion, it is as much driven by Scalia's assessment of the English legal background.

Scalia's reliance on the framers' English legal background appears in many other contexts, principally relating to the individual rights amendments. Examples are too numerous to comprehensively set forth, but the following are illustrative. In *Hamdi v. Rumsfeld*, he extensively discussed English law and practices to conclude that the due process clause prohibited executive detention of U.S. citizens believed to be enemy combatants.⁴³ In *Crawford v. Washington*, he extensively discussed English legal practices in determining the scope of the Confrontation Clause, after noting at the outset that the "Constitution's text does not alone resolve this case" and observing that "[t]he founding generation's immediate source of the concept [of confrontation] . . . was the common law."⁴⁴ In *Harmelin v. Michigan*, he looked to English law to define cruel and unusual punishment (specifically whether the phrase included a proportionality component).⁴⁵ In *Florida v. Jardines*, he relied on English law to establish the scope of the Fourth Amendment's protection against searches (specifically, the concept of "curtilage").⁴⁶ In *Blakely v. Washington*, he relied on the English rule requiring jury determination of facts relevant to sentencing, referring to "[o]ur Constitution and the common-law traditions it entrenches."⁴⁷ In *Montana v. Egelhoff*, he relied on English sources to conclude that voluntary intoxication is not a constitutionally protected defense in criminal cases.⁴⁸ And although Scalia's appeal to

43 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) (using English historical sources to demonstrate that "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive"); *id.* at 556 ("The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.").

44 541 U.S. 36, 42–47 (2004); *see* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005) (discussing *Crawford*); *see also* *Holland v. Illinois*, 493 U.S. 474, 481 n.1 (1990) (referring to the "well-established common law that formed the background of the Sixth Amendment").

45 501 U.S. 957 (1991) (extensively discussing the English historical background to the corresponding provision in the English Bill of Rights, while acknowledging the difficulty of applying the English understanding to the new U.S. government). For different assessments of the history, *see* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441 (2017).

46 133 S. Ct. 1409, 1414–15 (2013).

47 542 U.S. 296, 313 (2004); *see* Bibas, *supra* note 44, at 193–99 (questioning Scalia's historical conclusions in *Blakely* and related cases).

48 518 U.S. 37, 43–45 (1996) (plurality opinion); *see also, e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012) (using traditional concepts of trespass to define "unreasonable search" under the Fourth Amendment); *Minnesota v. Dickerson*, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring) (looking to English sources to answer the question about the constitutionality of "stop and frisk" procedure); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring in the judgment) (relying on English sources to determine the meaning of "due process"). In *Dickerson*, Scalia implied that lack of tradi-

English tradition is most apparent in individual rights cases,⁴⁹ it also played a role in his structural opinions. In standing cases, for example, he understood the judicial power conveyed on federal courts by Article III in terms of traditional practices of (mainly) English courts, sometimes using specific English practices to validate U.S. practices.⁵⁰

In Scalia's assessment of the English-law background, Blackstone's *Commentaries* played a prominent though not exclusive role. Most of his opinions based on English legal tradition cite Blackstone as a principal or exclusive source.⁵¹ Scalia did not express reservations about Blackstone's accuracy, and as noted above he regarded the *Commentaries* as the leading source of knowledge about English law in founding-era America. He also regularly cited the prominent English legal writers Edward Coke⁵² and Matthew Hale,⁵³ plus a scattering of others, as well as sometimes-extensive discussions of English caselaw.⁵⁴ Scalia also referred to later historians' descriptions of preframing English practices—although he seemed to rely as much (or

tion supporting the Government raised an inference of unconstitutionality, observing that while there was historical support for temporary stops of suspicious persons, "I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning." *Dickerson*, 508 U.S. at 381.

49 Appeal to English legal sources is, however, notably absent from Takings Clause and free speech opinions. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (takings); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (same); see also *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011) (free speech); *Citizens United v. FEC*, 558 U.S. 310 (2010) (Scalia, J., concurring) (same).

50 See, e.g., *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 (2000) (finding English practices "well nigh conclusive" as to standing in *qui tam* cases).

51 See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015); *Jardines*, 133 S.Ct. at 1415; *Dist. of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 555–58 (2004) (Scalia, J., dissenting); *Blakely*, 542 U.S. at 301; *Crawford v. Washington*, 541 U.S. 36, 43 (2004); *Egelhoff*, 518 U.S. at 43–45; *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *United States v. Williams*, 504 U.S. 36, 51 (1992); *Harmelin v. Michigan*, 501 U.S. 957, 967–75 (1991) (plurality opinion); *Holland v. Illinois*, 493 U.S. 474, 481 (1990); *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

52 See generally 1 EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND* (London, Islip 1st ed. 1628).

53 See generally MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* (London, Nutt 1713); MATTHEW HALE, *THE HISTORY OF PLEAS OF THE CROWN* (London, Nutt & Gosling 1736).

54 See, e.g., *Din*, 135 S. Ct. at 2133 (relying on Coke); *Hamdi*, 542 U.S. at 557–58 (Scalia, J., dissenting) (citing English caselaw in addition to Blackstone); *Crawford*, 541 U.S. at 42–47 (relying on Hale, English caselaw, and two eighteenth-century treatises: 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 603–04 (Thomas Leach ed., London, Whieldon 6th ed. 1787) and 1 BARON GILBERT, *THE LAW OF EVIDENCE* 216 (Capel Lofft ed., London, Strahan & Woodfall 1791)); *Vermont Agency*, 529 U.S. at 774–77 (relying principally on caselaw); *Egelhoff*, 518 U.S. at 43–45 (relying on Hale and Coke in addition to Blackstone and English caselaw); *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (relying on English statutes, 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 129 (London, Roworth 8th ed. 1824), and 1 EDWARD HYDE EAST, *A TREATISE OF THE PLEAS OF THE CROWN* 303 (London, Strahan 1803)); *Williams*, 504 U.S. at 51 (rely-

more) on historians from the nineteenth and early twentieth centuries as from modern time.⁵⁵

It is not entirely clear why Scalia thought these sources were probative. As to some of them—especially Blackstone and Coke—he emphasized that they were well known in founding-era America.⁵⁶ That is not a complete explanation even in itself, as they were probably well known only to legal and political elites. If Scalia sought the meaning to a reasonable person of the time, he must have envisioned a reasonable person with legal knowledge, or at least a person with inclination and ability to consult readily available legal sources.⁵⁷ Moreover, it is doubtful (or at least not demonstrated in Scalia's opinions) that some of the sources he used were well known in founding-era America. He may have thought that founding-era Americans were familiar with the principles of English law the sources reflected, even if not with the sources themselves; or perhaps he thought that reasonable interpreters would seek out even less familiar sources if a question arose.

Of course, as noted, Scalia was not unusual in relying on Blackstone and other evidence of the framers' English legal background. His reliance is notable in a self-described textualist, however, as it assumes a linguistic and conceptual continuity between the framing and the English-law background (something not obvious in a revolutionary context). Coming from a proponent of following the Constitution's original public meaning, Scalia's approach illustrates a close association between his version of original meaning and history (in contrast to a more purely textual approach).

C. *Post-Ratification History*

Justice Scalia's opinions made extensive use of post-ratification history. His approach here may be surprising to originalist scholars in two respects.

ing on Hale); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28–29 (1991) (Scalia, J., concurring in the judgment) (relying on Coke); *Stanford*, 492 U.S. at 368 (relying on Hale).

55 See, e.g., *Blakely*, 542 U.S. at 302 (relying on 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 55 (Boston, Little, Brown & Co. 2d ed. 1872)); *Crawford*, 541 U.S. at 42–47 (relying on 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 216–17, 228 (3d ed. 1944)); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan & Co. 1883); and 3 JOHN HENRY WIGMORE, EVIDENCE 104 (2d ed. 1923)); *Harmelin*, 501 U.S. at 967–75 (relying on 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 712 (New York, Banks, Gould & Co. 5th ed. 1847)); 2 THOMAS BABINGTON MACAULAY, HISTORY OF ENGLAND 204 (Boston, Houghton, Mifflin & Co. 1899); and STEPHEN, *supra*, at 489–90, in addition to primary sources and (less prominently) modern historians).

56 See, e.g., *Heller*, 554 U.S. at 593–94 (noting Blackstone's popularity in founding-era America); *Haslip*, 499 U.S. at 29 (Scalia, J., concurring in the judgment) (observing that "[t]he American colonists were intimately familiar with Coke" (citing RODNEY L. MOTT, DUE PROCESS OF LAW 87–90, 107 (1926); and A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 117–25 (1968))).

57 Note that this question is less perplexing to an intentionalist originalist, as Scalia demonstrated that the key sources were known to the actual drafters of the Constitution—and they were presumably known to many if not most of the actual ratifiers as well.

First, Scalia was highly influenced by actions of the First Congress and the first executive administration. In *McCreary County v. American Civil Liberties Union of Kentucky*, for example, he invoked numerous early instances of religiously based federal government activity to argue that the Establishment Clause does not prevent government recognition of religious beliefs.⁵⁸ Responding to criticism from Justice Stevens, he continued:

It is no answer . . . to say that the understanding that these official and quasi-official actions reflect was not “enshrined in the Constitution’s text.” The Establishment Clause . . . *was* enshrined in the Constitution’s text, and these official actions show *what it meant*. There were doubtless some who thought it should have a broader meaning, but those views were plainly rejected. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?⁵⁹

Although *McCreary* is likely Scalia’s strongest statement, it is not unusual among his opinions in its heavy reliance on early post-ratification practices.⁶⁰

This is not a consensus position, even among originalist scholars. The First Congress and the early executive branch might have had institutional reasons to disregard constitutional constraints or simply may have acted without sufficient attention to the Constitution. In addition, some originalist the-

58 545 U.S. 844, 886–87 (2005) (Scalia, J., dissenting) (citing among others George Washington’s version of the presidential oath and Washington’s Thanksgiving Proclamation, the opening of Supreme Court sessions under John Marshall, and the practice and legislation of the First Congress).

59 *Id.* at 896–97 (citations omitted) (quoting *Van Orden v. Perry*, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting)). This use of post-ratification history is distinct from evidence showing specifically how people in the post-ratification period actually read particular constitutional language. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2607–09 (2014) (Scalia, J., concurring in the judgment) (discussing specific interpretations of the Recess Appointments Clause by Attorney General Edmund Randolph, Attorney General Charles Lee, and others).

60 See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) (“When it comes to determining the meaning of a vague constitutional provision—such as ‘due process of law’ or ‘equal protection of the laws’—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.”); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 n.7 (1999) (relying on statutes of the First Congress); *Clinton v. City of N.Y.*, 524 U.S. 417, 466–67 (1998) (Scalia, J., concurring in part and dissenting in part) (relying on 1790, 1791, and 1803 appropriations statutes to allow delegation of spending decisions to the President); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 372 (1995) (Scalia, J., dissenting) (finding originalism “simple of application when government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted”); *Harmelin*, 501 U.S. at 981 (observing that “[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means” and relying on the 1790 Crimes Act to show the lack of a proportionality requirement in the Eighth Amendment); *Holland v. Illinois*, 493 U.S. 474, 481 (1990) (relying on a 1790 statute as reflecting the constitutionality of preemptory challenges).

ory emphasizes the distinction between original meaning and “original expected applications” (that is, what results the framers expected the Constitution’s text to produce).⁶¹ Originalist scholars and practitioners thus might be reluctant to place heavy weight on post-ratification sources. Scalia apparently did not share those concerns.

Scalia approached post-ratification history somewhat differently depending on whether the challenged government practice had been common in the founding era. If the practice had been ordinary and uncontested in the post-ratification period, he regarded that finding as essentially conclusive of the practice’s constitutionality (as in *McCreary*).⁶² He typically qualified his reliance on post-ratification practice by saying it could not overcome unambiguous text.⁶³ However, there appear to be few examples of Scalia actually finding text sufficiently unambiguous in this respect.⁶⁴

Where a challenged practice was not common in the post-ratification period, Scalia’s assessments were more mixed. As he explained in *McIntyre v. Ohio Elections Commission*, if a practice was not used in the post-ratification period, that might be because people generally thought it unconstitutional, but it might also be because they thought it inappropriate on policy grounds, or because it simply did not occur to them.⁶⁵ As a result, he sometimes avoided reliance on post-ratification evidence, instead either upholding the modern practice or invalidating it on other grounds such as precedent. Nonetheless, Scalia not infrequently cited the absence of a practice in post-

61 Greene, *supra* note 2, at 155–56, 165 (discussing this issue with reference to Scalia’s views). Professor Greene says that Scalia “accepted this distinction [between original meaning and original expected applications] but did not appear to accept its implications.” *Id.* (footnote omitted). I would say, rather, that Scalia did not think it had substantial practical implications because he thought the original applications were highly (almost conclusively) probative of original meaning. See Steven D. Smith, *The Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 223, 239–40 (Grant Huscroft & Bradley W. Miller eds., 2011) (defending the significance of original expected applications).

62 See authorities cited *supra* note 54.

63 See *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) (“[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”).

64 One example is the Equal Protection Clause’s application to race discrimination. See *id.* at 95 n.1 (observing in dicta that the Equal Protection Clause “leaves no room for doubt that laws treating people differently because of their race are invalid” and therefore that traditional practices such as segregation are nonetheless unconstitutional); see also *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring in the judgment) (rejecting the majority’s use of post-ratification practice on the grounds that the text was unambiguous). It is also possible that Scalia thought the First Amendment’s free speech protection, at least as applied to invalidate viewpoint-based prohibitions of political speech, was unambiguous and thus could not be overturned by post-ratification practice. Typically he did not explore post- (or pre-) ratification practices in these cases. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 385 (2010) (Scalia, J., concurring) (defending the application of the First Amendment to speech by corporate entities by reference to text alone).

65 *McIntyre*, 514 U.S. at 374 (Scalia, J., dissenting).

ratification history as evidence of its unconstitutionality—sometimes coupled with evidence that the framers had rejected the practice as unconstitutional,⁶⁶ but sometimes merely on the speculation that if the practice had been thought constitutional it would have been employed.⁶⁷

A second notable aspect of Scalia's practice in this area is that he extended his assessment of post-ratification history far beyond the time of enactment—for example, in the case of the original Constitution and the Bill of Rights, far into the nineteenth century. As Scalia commented in *Heller*, “examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification . . . is a critical tool of constitutional interpretation.”⁶⁸ Implementing this approach in *Heller*, Scalia cited as probative post-ratification commentators not just St. George Tucker (1803) but also William Rawle (1825), Joseph Story (1833/1840), Lysander Spooner (1845), Joel Tiffany (1849), and Charles Sumner (1859).⁶⁹ The opinion in *Heller* similarly invoked state court judicial opinions, the earliest from 1820 with most from the 1840s and 1850s.⁷⁰ The opinion then went on to cite and discuss commentary and legislative actions occurring after the Civil War, but with this caveat:

Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number

66 See, e.g., *Hamdi v. Rumseld*, 542 U.S. 507, 556–58 (2004) (Scalia, J., dissenting) (finding that the Due Process Clause precluded executive detention without trial based on pre- and post-ratification practice combined with evidence of founding-era beliefs about what procedures were essential to detention); *Crawford v. Washington*, 541 U.S. 36, 42–47 (2004) (finding that the Confrontation Clause barred use of evidence obtained without opportunity to confront, and relying on the absence of use of such evidence combined with accounts of the framers' opposition to such evidence).

67 See, e.g., *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring in part) (relying on Congress's failure to exercise a power as evidence that power was thought unconstitutional); *Printz v. United States*, 521 U.S. 898, 918 (1997) (finding Congress's direction of state executive officers to be unconstitutional in part on the grounds that early Congresses did not issue directives to state executive officers, and speculating that so attractive a power would have been used if thought constitutional); see also *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (observing that “[t]he purpose of the [Fourth Amendment] provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable,’” and speculating that the framers would not have tolerated the extent of frisking without probable cause allowed by the Court).

68 *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

69 *Id.* at 606–10.

70 *Id.* at 610–14.

of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.⁷¹

This passage thus implies that pre-Civil War materials—even from the 1840s and 1850s—are strong evidence of original meaning, while even more remote materials can be weaker evidence.

Other Scalia opinions confirm that this extended view of post-ratification history was not isolated to *Heller*. In *Harmelin*, for example, his opinion relied on “early commentary on the [Cruel and Unusual Punishments] Clause” including that of James Bayard (1840), Benjamin Oliver (1832), James Kent (1827), and Joseph Story (1833),⁷² as well as state constitutions from 1802, 1816, 1819, 1842, 1861/63, and 1868.⁷³ The *Harmelin* opinion went on to say: “Perhaps the most persuasive evidence of what ‘cruel and unusual’ meant, however, is found in early judicial constructions of the Eighth Amendment and its state counterparts.”⁷⁴ The opinion then cited only two pre-Civil War cases (from 1823 and 1824), plus an array of post-Civil War cases.⁷⁵ Thus, for Scalia, “early” in this context did not mean “immediately after ratification.”

Again, this approach lacks consensus support among originalist scholars. Many might doubt that views expressed more than ten or twenty years after

71 *Id.* at 614; *see id.* at 614–19 (examining authorities as late as 1890, with extensive discussion and quotation from Thomas Cooley’s 1868 treatise); *see also* *United States v. Gaudin*, 515 U.S. 506, 517–18 (1995) (entertaining the argument that the late nineteenth century might show an exception to the requirement of jury determination of all elements of a perjury conviction, but rejecting it as not proven by the historical record); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 95 (Boston, Little, Brown & Co. 1868)); *United States v. Williams*, 504 U.S. 36, 53–54 (1992) (relying on judicial opinions from the 1850s to establish the role of the grand jury).

72 *Harmelin v. Michigan*, 501 U.S. 957, 981–82 (1991) (plurality opinion); *see also, e.g.*, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment) (relying on Tucker, Kent, and Story).

73 *Harmelin*, 501 U.S. at 982.

74 *Id.*

75 *Id.* *Harmelin*, like many of Scalia’s individual rights cases, involved the Eighth Amendment as applied to the states by the Fourteenth Amendment, so arguably the post-Civil War cases are more relevant as being close in time to the enactment of the latter. However, the opinion reads throughout as an interpretation of the Amendment as adopted in 1791. *See infra* Section II.B (discussing Scalia’s underdeveloped view of incorporation); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 555–58 (2004) (Scalia, J., dissenting) (relying on Story and Cooley); *Crawford v. Washington*, 541 U.S. 36, 49–50 (2004) (relying on judicial opinions from the 1830s and 1840s as well as legal treatises from 1868 and 1872); *Clinton v. City of N.Y.*, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part) (citing delegations from the Civil War and the early twentieth century in support of the conclusion that Congress could delegate spending decisions to the President, observing that these have “never seriously been questioned”); *Plaut*, 514 U.S. at 224 (relying on judicial opinions from 1824 and 1825 to interpret the scope of the judicial power).

ratification are probative of original meaning.⁷⁶ In light of Scalia's approach, originalist scholars might want to rethink their tendency to limit post-ratification history regarding the meaning of the original Constitution to the early nineteenth century.

Scalia went even further in his dissent in *McIntyre*, conceding a lack of early practice but relying on practice from 1890 through the present and concluding that:

Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. . . .

. . . . Where the meaning of a constitutional text (such as "the freedom of speech") is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine.⁷⁷

McIntyre thus indicates that even a relatively recent practice could be evidence of the original meaning of ambiguous text.⁷⁸ This is decidedly contrary to the conventional approaches of originalist scholarship—to the extent that some have labeled it not originalist at all.⁷⁹ One might say instead, however, that it is a further demonstration of Scalia's willingness to go beyond text and direct evidence of textual meaning in seeking the original meaning of the Constitution.

D. *New Technology*

Justice Scalia also indicated willingness to go beyond the Constitution's text in adapting it to changed technology. Like most originalists, he did not

76 See, e.g., Michael D. Ramsey, *The President's Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 190 (2007) (expressing some hesitation in considering evidence from as late as 1819 to establish original meaning).

77 *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375, 378 (1995) (Scalia, J., dissenting).

78 Cf., e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) (relying on a tradition "that dates back to the beginning of the Republic").

79 See Prakash, *supra* note 2, at 26; *id.* at 28 (criticizing Scalia for giving tradition "significant, independent weight"). It is true that Scalia sometimes seemed to regard long-standing practice as establishing constitutional rules independent of original meaning. See, e.g., *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348–49 (1999) (Scalia, J., concurring in part) (relying in part on practices up to 1950 and reaching conclusion based on "text and tradition"); *Clinton*, 524 U.S. at 467 (Scalia, J., dissenting) (relying in part on practice as late as the mid-twentieth century). Thus it may sometimes be difficult to separate Scalia's reliance on post-ratification sources as evidence of original meaning and Scalia's reliance on post-ratification sources as evidence of traditional practice. However, as the quote from *McIntyre* indicates, there is a risk of overstating the extent to which Scalia used tradition as an independent source of interpretive authority; rather, he had a very broad view of what traditions might be indicative of original meaning.

read the Constitution's words to refer only to technology actually existing at the time of enactment. As he observed in *Heller*:

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. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, 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.⁸⁰

This step seems consistent with a largely textualist approach, for it is not common to read any text in the narrow manner suggested; a statute restricting the speed cars can be driven is not limited to cars existing at the time the statute is passed. Texts conventionally assume that new technologies can be fit into categories that the text establishes.

However, Scalia on occasion seemed to take this common originalist approach one step further. In *Kyllo v. United States*,⁸¹ he found that police use of modern technology to measure heat emitted from the defendant's house was a search for Fourth Amendment purposes (thus requiring probable cause), even though the police did not enter the defendant's property. Scalia acknowledged that this result departed from what he regarded as the traditional tie between the Fourth Amendment protections and common-law trespass⁸² but concluded:

[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.⁸³

Unlike *Heller*, the *Kyllo* approach does not fit the new technology into a category defined by the text. Scalia admitted that under the original meaning, observations made from a public street did not implicate the Fourth Amendment. Rather, the level of privacy “that existed when the Fourth Amendment was adopted” required creation of a *new* category (unduly intru-

80 *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (citations omitted).

81 533 U.S. 27 (2001).

82 *Id.* at 32–34; *see United States v. Jones*, 132 S. Ct. 945 (2012) (using the historical concept of trespass to find the placement of a GPS receiver on the defendant's car to be a search).

83 *Kyllo*, 533 U.S. at 34–35 (citation omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

sive observations made from the public street).⁸⁴ This approach may be hard to reconcile with a textualist originalist methodology; it is more akin to the outcome in *Nollan* (discussed above)⁸⁵ in which Scalia seemingly went beyond the text when necessary to protect rights contained in the text.

II. UNDERDEVELOPED ASPECTS OF JUSTICE SCALIA'S ORIGINALISM

This Part turns to four respects in which Justice Scalia's originalist methodology appears underdeveloped from a practical perspective. First, he was unclear on the relevance of framers' intent. Second, he made only limited use of sources relating to the original meaning of the reconstruction amendments. Third, he did not indicate how clear the Constitution needed to be to overcome an act of the political branches or the states. And fourth, he did not fully explain how originalism should interact with precedent.

A. Framers' Intent

Justice Scalia is strongly associated with his well-known focus on text over purpose in statutory interpretation⁸⁶ and his insistence on original meaning over original intent in constitutional interpretation.⁸⁷ As Scalia explained: "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."⁸⁸ This, however, is a theoretical statement about the ultimate touchstone of interpretation; it leaves unanswered the relevance of framers' intent to determining original meaning.

84 *Id.*; see Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 Miss. L.J. 1085 (2012) (discussing *Kyllo* as a flexible form of originalism); see also *Riley v. California*, 134 S. Ct. 2473 (2014) (Justice Scalia joining without comment Chief Justice Roberts's opinion holding the search of a cell phone incident to arrest ordinarily requires a warrant, based on the extent of personal data typically stored on cell phones). It may be that *Kyllo* uniquely depends on the open-ended wording of the Fourth Amendment's "unreasonable searches" phrase; it may also be hard to separate the originalist aspects of *Kyllo* from the effect of precedent, which had already gone (in Scalia's view) beyond the original meaning. See *Kyllo*, 533 U.S. at 32–33 (discussing *Katz v. United States*, 389 U.S. 347 (1967)).

85 See *supra* Section I.A.

86 See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610 (2012). But see Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129 (2008) (suggesting that in statutory interpretation Scalia was not as textualist as he claimed to be).

87 See SCALIA, *supra* note 1; Greene, *supra* note 2, at 154–55 (describing Scalia as "an early proponent of what has come to be known as original meaning originalism, a form of textualism that identifies the Constitution with the meaning of its words to a reasonable person at the time of enactment"); cf. Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013) (arguing for an intent-based version of originalism).

88 SCALIA, *supra* note 1, at 38.

Scalia's opinions do not do much to answer that question. Consider, for example, his treatment of a key disputed element of originalist evidence: the debates at the 1787 Constitutional Convention.⁸⁹ A principal objection to using the debates is that they were secret at the time, and so not available to the ratifying public (and hence not useful to establish *public* meaning); relatedly, while they may be evidence of the framers' purpose in including certain provisions in the Constitution, Scalia's originalist theory rejected the framers' purposes as the touchstone of constitutional meaning. One might suppose that Scalia—famously opposed to using legislative history in statutory interpretation—would similarly oppose using the “legislative history” of the Constitution.⁹⁰

Scalia's opinions do not reveal a firm view of the Convention debates. His opinions contain no substantial objection to using the debates (in contrast to his repeated objections to statutory legislative history) and he did cite them occasionally.⁹¹ However, compared (for example) to his use of *The Federalist* and other public records of the ratification debates,⁹² his use of the debates seems light, especially in comparison to much originalist scholarship.⁹³ I have been able to identify only eight Scalia opinions citing the Convention debates in support of a substantial argument; only three of them are from his last fifteen years on the Court.⁹⁴ Whether this suggests Scalia was

89 See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003) (discussing the debate over use of the Convention debates); Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707 (2012) (assessing objections to use of Convention records); John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753 (2012) (same).

90 See William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

91 See Kesavan & Paulsen, *supra* note 89, at 1119 n.22 (arguing that Scalia endorsed the debates as evidence of public meaning and listing cases—as of 2003—in which Scalia cited the Convention records).

92 See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 821–24 (2007) (discussing use of *The Federalist Papers* as evidence of original meaning by originalists such as Scalia); Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 481–85 (same for state ratification debates); see also, e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015) (relying on *The Federalist* Nos. 33 and 44 plus ratification debates to establish public meaning); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991) (Scalia, J., concurring in part and concurring in the judgment) (relying on multiple numbers of *The Federalist*); John F. Manning, *Textualism and the Role of the Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998) (reconciling the use of *The Federalist* in an original public meaning approach).

93 See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 279–87 (2001) (relying on the Convention debates in assessing the original meaning of the executive power).

94 *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258 (2013) (quoting Madison's comment regarding voter qualifications); *Arizona v. United States*, 132 S. Ct.

rethinking the significance of the debates is difficult to assess. At least, however, one can say that Scalia did not have a categorical rule against using the Convention debates, and his opinions do not appear to express any theoretical concerns about their relevance. Nonetheless, the course of the Convention and the discussions within it do not play as central a role in his opinions as they do in some originalist scholarship.

One may speculate that this limited use is consistent with Scalia's broader commitments. On one hand, a categorical rule against use of the debates might be difficult to defend. The debates are evidence of how educated people of the founding era (who happened to be framers) used language and what background assumptions they held. They are no less indicative on this point because they were kept secret—the point of using them to guide interpretation is not that they influenced others, but that they are evidence of common use and understanding.⁹⁵ Further, because the Constitution is a communicative document, one would ordinarily expect that the framers would choose language in order to communicate their design of government, and so they would choose language having the common meaning they intended to express. Thus the debates can provide some indirect evidence of public meaning. On the other hand, because Scalia was overtly committed to the idea of public meaning rather than intent as his touchstone, it should not be surprising that he deemphasized the Convention. However, this remains speculation, and it is unclear how Scalia would prioritize evidence from the Convention if it conflicted with other originalist evidence.⁹⁶

Scalia's opinions are ambiguous regarding framers' intent more broadly. When he criticized other Justices for relying on framers' intent, it typically was not clear whether he thought reliance on framers' intent was misplaced as a general matter or whether he thought only that the evidence in the particular case was not probative. For example, in *Citizens United*, Justice Stevens

2492, 2522 (2012) (Scalia, J., concurring in part and dissenting in part) (discussing the Convention's view of preemption); *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (quoting Madison's comment on gerrymandering); *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting Madison's comment on commandeering states); *Edmond v. United States*, 520 U.S. 651, 660 (1997) (quoting Hamilton's comment on appointments); *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (discussing the Convention's rejection of a divided executive); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (citing Wilson's comment on the Full Faith and Credit Clause); *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting) (discussing Convention comments on judicial power). Kesavan and Paulsen also point out that Scalia commonly joined opinions of other Justices that cited the Convention debates without reservation. Kesavan & Paulsen, *supra* note 89, at 1119 n.22. That practice continued in subsequent years. See, e.g., *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (2009) (Breyer, J., joined by Scalia, J.) (citing debates); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 384 (2006) (Thomas, J., dissenting, joined by Scalia, J.) (citing debates); *United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 859 (1996) (Thomas, J., joined by Scalia, J.) (citing debates).

95 See Kesavan & Paulsen, *supra* note 89.

96 It seems clear that he would (as with other evidence) not allow it to overcome unambiguous text.

argued that the framers distrusted corporations and thus likely would not have extended free speech protections to corporate speech.⁹⁷ Scalia responded sharply in concurrence, principally on three grounds: that the text of the First Amendment was unambiguous in making no such distinction; that Justice Stevens showed nothing to connect abstract distrust of corporations with a specific desire not to protect corporate speech; and that Stevens's evidence of distrust was weak.⁹⁸ Whether this criticism was ultimately founded on a generalized rejection of framers' intent as probative evidence is unclear, although Scalia did not specifically say it was. His response to Justice Stevens is equally consistent with a view that evidence of framers' intent could be probative but in the particular case it was not.

In sum, it is clear from Scalia's theoretical writings that he rejected framers' intent as the ultimate touchstone of constitutional inquiry. But it is much less clear what he thought that meant in practice. One can easily hold the view that framers' intent can be probative of public meaning while accepting that the two are theoretically distinct and that the latter controls. Whether Scalia held this view, and how probative he thought intent could be, remains underdeveloped in his opinions.

B. *The Fourteenth Amendment*

In contrast to Justice Scalia's extensive use of founding-era materials, his use of historical materials surrounding the enactment of the post-Civil War amendments may seem thin. To take one example for which he was sharply criticized, Scalia concluded unequivocally that the Equal Protection Clause banned preferential treatment of racial minorities.⁹⁹ However, he appeared to base this conclusion (so far as his opinions went) chiefly on the text of the Clause, with little examination of the Clause's enactment or linguistic context.¹⁰⁰ Probably (though he did not say this directly in his opinions) Scalia did not examine the context of the Equal Protection Clause because he found the text on its face to establish a rule of colorblindness.¹⁰¹ However,

97 *Citizens United v. FEC*, 558 U.S. 310, 426–27 (2010) (Stevens, J., concurring in part and dissenting in part).

98 *Id.* at 385–93 (Scalia, J., concurring); *see also, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 589–90 (2008) (similarly criticizing the dissent's use of intent evidence).

99 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment).

100 *See, e.g., id.* at 521 (embracing without further originalist analysis the proposition that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens” (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); *see* Greene, *supra* note 2, at 163 (criticizing Scalia's position in *Croson* and noting that “[i]t is not obvious how the words of the Fourteenth Amendment would have been understood in relation to affirmative action plans of the sort at issue in *Croson*”).

101 *See* *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (explaining that the unambiguous meaning of the Equal Protection Clause banned differential treatment on the basis of race, specifically endorsing the outcome in *Brown v. Board of Education*). It is less clear that the Clause expressly establishes a “colorblindness” rule applicable to cases such as *Croson* (especially without further explanation), even if it

his willingness to reach this conclusion without examining context contrasts with his extensive use of historical context when interpreting the original Constitution and the Bill of Rights.¹⁰² For example, in contrast to his frequent use of *The Federalist* and other evidence from the 1787–1788 ratification debates, he made very limited use of the drafting and ratifying materials of the Fourteenth Amendment.¹⁰³

Scalia's opinions also do not fully develop an interpretive approach to the rights provisions contained in the original Bill of Rights amendments and incorporated against the states by the Fourteenth Amendment.¹⁰⁴ Scalia accepted incorporation through the Fourteenth Amendment's Due Process Clause as a matter of precedent, as he confirmed in *McDonald v. City of Chicago*,¹⁰⁵ and he aggressively applied various incorporated provisions of the first eight amendments to invalidate state laws and practices. In doing so, he often appeared to assume that rights provisions in the first eight amendments had the same meaning applied against the federal government as they did when applied against the states.¹⁰⁶ As he put it cryptically and without further explanation in *McCreary*: "The notion that incorporation empties the incorporated provisions of their original meaning has no support in either

does unambiguously require the result in *Brown*. See Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013) (discussing originalist arguments for the "colorblind" reading).

102 See *supra* Section I.C (discussing Justice Scalia's use of founding-era materials).

103 See generally Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012) (criticizing originalists including Scalia for the failure to explore Fourteenth Amendment history). Scalia did use evidence of traditional practices to determine the scope of the Fourteenth Amendment's Due Process Clause, consistent with his general approach to post-ratification evidence as discussed in Section I.C, *supra*. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29–37 (1991) (Scalia, J., concurring in the judgment) (describing historical practice of punitive damages and concluding that such a traditional practice necessarily complies with due process); *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610–14 (1990) (plurality opinion) (using traditional practices to reject a challenge to the state's assertion of personal jurisdiction). In *Connecticut v. Doehr*, Scalia stated that as to nontraditional procedures he would apply the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), presumably as a matter of precedent. 501 U.S. 1, 31 (1991) (Scalia, J., concurring in part and concurring in the judgment).

104 See Greene, *supra* note 2, at 165 (arguing that "Scalia never faced up to the implications of incorporation of the Bill of Rights for originalist practice"). I would say, somewhat less harshly, that Scalia acknowledged the issue but did not develop a consistent response to it.

105 561 U.S. 742, 791 (2010) (Scalia, J., concurring).

106 Typically, Scalia's rights opinions established the meaning of language in the Amendment as applied to the federal government and then applied that meaning, without further discussion, to the state. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 43–56 (2004) (in challenge to state procedures, establishing the meaning of the Sixth Amendment); *Harmelin v. Michigan*, 501 U.S. 957, 981–82 (1991) (plurality opinion) (in challenge to state procedures, establishing the meaning of Eighth Amendment). Often he considered nineteenth-century practice as part of his assessment of the original meaning. See *supra* Section I.C. However, these opinions generally do not advert to the possibility of evolving meaning.

reason or precedent.”¹⁰⁷ But in some cases, he seemed to acknowledge the possibility of changed meaning, saying (equally cryptically) in *McIntyre*: “I would, however, want further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution.”¹⁰⁸

Originalist theory suggests a strong basis for thinking that the meaning of incorporated provisions might differ from the meaning of the same provisions in the original Bill of Rights amendments. It is possible that the understanding of a right might change between 1791 and 1868. As a result, even if the enactors of the Fourteenth Amendment thought they were incorporating a right contained in the Bill of Rights, they might have understood themselves to be incorporating a different version of that right. In an example offered by Michael Rappaport, it might be the case that the original Takings Clause in the Fifth Amendment did not restrict regulatory takings (because, for example, founding-era Americans had little experience with regulatory takings), but that by 1868 Americans had come to think of takings as including regulatory takings.¹⁰⁹ In that situation, arguably the right to just compensation incorporated against the states should include compensation for regulatory takings even though the right guaranteed against the federal government does not.

Scalia's position here seems unclear and underdeveloped. One possibility is that Scalia did not recognize incorporation as a matter of original meaning and accepted it only as a matter of precedent.¹¹⁰ In that situation, he might think himself free to adopt a rule of parallel meaning between original and incorporated provisions as a matter of precedent, convenience, and sim-

107 *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 898 (2005) (Scalia, J., dissenting) (discussing application of the Establishment Clause to state practice).

108 *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (in a case regarding the prohibition of anonymous campaign speech by a state, discounting Justice Thomas's evidence that anonymous campaign speech was common in the eighteenth century); see also *Montana v. Egelhoff*, 518 U.S. 37, 46–47 (1996) (plurality opinion) (considering the claimant's argument that a traditional procedure at the time of the founding had been abandoned by 1868 but finding it questionable on the historical record); *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring) (acknowledging that “even if a ‘frisk’ prior to arrest would have been considered impermissible in 1791, perhaps it was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted”).

109 See Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008); accord Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) (making a similar argument regarding the Free Exercise Clause).

110 See *Albright v. Oliver*, 510 U.S. 266, 275–76 (1994) (Scalia, J., concurring) (apparently accepting the incorporation of substantive rights from the Bill of Rights through the Due Process Clause only as a matter of precedent).

plcity.¹¹¹ A second possibility is that he thought (or was willing to assume absent contrary evidence) that the original meaning of the Fourteenth Amendment was to incorporate the original meaning of the Bill of Rights amendments, regardless of what its framers thought about the scope of particular rights.¹¹² Finally, his idea of continuity in law¹¹³ may have led him to believe (or to assume absent contrary evidence) that the scope of the incorporated rights did not evolve between 1791 and 1868. In any event, given the centrality of incorporated provisions in constitutional law generally and in Justice Scalia's leading opinions in particular, his failure to articulate and defend a methodological approach seems open to criticism.

C. *The Burden of Proof*

Justice Scalia's opinions often celebrated democracy and chided courts that interfered with decisions of the political branches;¹¹⁴ yet his opinions also often called for holding actions of the political branches unconstitutional. This is not necessarily a contradiction; as Scalia explained, he favored democracy bounded by the Constitution.¹¹⁵ But that is not a complete explanation. A posture of restraint toward political-branch decisionmaking suggests some caution in overruling political-branch decisions in the name of the Constitution when the Constitution is not completely clear (and, as noted earlier, Scalia acknowledged that the Constitution was often not completely clear).¹¹⁶ But how much caution? To apply a methodology that frequently overrode political-branch decisions—as Justice Scalia did—seems to call for an explanation of when override is appropriate.¹¹⁷

111 Apart from (or as a supplement to) his originalism, Scalia famously had a strong commitment to clear rules. See Prakash, *supra* note 2, at 25; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

112 To the extent Justice Scalia accepted incorporation as an original matter, presumably he did so under the Privileges or Immunities Clause, a position which enjoys some originalist support. See *McDonald v. City of Chi.*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment). Justice Scalia did not adopt that view in *McDonald*, see *id.* at 791 (Scalia, J., concurring) (adopting incorporation through the Due Process Clause as a matter of precedent), and outside of court expressed doubt about incorporation as an original matter.

113 See *supra* Section I.B.

114 See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting) (referring to the "Court's threat to American democracy"); *City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) ("The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether . . . church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.").

115 See, e.g., *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting).

116 See, e.g., *supra* notes 77–78 and accompanying text.

117 See John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 918 (2016) (arguing that the Constitution's original meaning requires courts to find a "clear incompatibility between the Constitution and a statute before displacing the latter").

One way to think about this is in terms of burdens of proof. Originalism will frequently not generate certain answers. Rather, there is a spectrum of likelihood—from very likely unconstitutional through evenly balanced to very likely constitutional. The question for an originalist judge is when the likelihood is sufficiently high to justify overturning a political-branch decision. One can imagine a range of answers from “fifty percent plus one” to “almost one hundred percent,” with various intermediate positions. Relatedly, if there is simply not enough evidence available to assess a particular claim, does that show that the challenged action is constitutional (placing the burden of proof on the claimant) or that it is unconstitutional (placing the burden on the government)?¹¹⁸

Scalia often wrote as if the constitutional rule involved was established with near one hundred percent certainty.¹¹⁹ But he did not always do so, and it is not clear if he thought his methodology required a high degree of certainty. In *Printz*, for example, he seemed to acknowledge difficulty, starting with the lack of a clear textual foundation, yet he found the law in question unconstitutional.¹²⁰ Similarly, other structural cases discussed above involving immunity and standing appear to find legislation unconstitutional without an unambiguous constitutional basis for doing so.¹²¹ Some other controversial cases in which he supported the government, however, may be best read as failing a high burden of proof. For example, in the free exercise cases *Smith* and *Boerne* he seemed to take the view that the claimant's position was unproven, not that the Free Exercise Clause was clear.¹²²

118 See Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143 (2017).

119 See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion) (“[T]he Eighth Amendment contains no proportionality guarantee.”).

120 See *supra* notes 15–19 and accompanying text (discussing *Printz*).

121 See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (invalidating a congressional statute overriding state sovereign immunity); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (invalidating a congressional statute providing standing to claimants who lacked concrete injury). Even if one thinks those cases are rightly decided, it is difficult to conclude that they show, in Professor McGinnis's formulation, “a clear incompatibility” between the Constitution and the invalidated statute. See McGinnis, *supra* note 117, at 918.

122 In *Smith*, Scalia's opinion said only that “[a]s a textual matter, we do not think the words must be given” the meaning the claimants sought, with the balance of the opinion showing that the claimant's outcome was not required by precedent. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878 (1990). In *Boerne*, Justice O'Connor's dissent pointed to historical evidence that *Smith* was wrongly decided as an original matter. See *City of Boerne v. Flores*, 521 U.S. 507, 548–64 (1997) (O'Connor, J., dissenting). Concurring, Justice Scalia responded that the dissent's historical evidence did not show a broader meaning of the clause. Quoting an academic study, he appeared to acknowledge (or at least did not dispute) that “constitutionally compelled exemptions [from generally applicable laws regulating conduct] were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause.” *Id.* at 537–38 (Scalia, J., concurring in part) (alteration in original) (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990)); *id.* at 544

A related question is which side has the burden of proof, claimant or government? To the extent Scalia directly addressed this aspect of the burden of proof, it is not clear that he was consistent. Two examples are illustrative. In *Harmelin*, responding to the dissent's objection that he had not shown the absence of a proportionality requirement in the Eighth Amendment, he observed: "We do not bear the burden For if the Constitution does not affirmatively contain such a restriction, the matter of proportionality is left to state constitutions or to the democratic process."¹²³ But in *Citizens United*, he charged the dissent with failing to show that corporate speech was not included within First Amendment protections:

[The dissent] never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

. . . Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on [petitioners] to bring forward statements showing that they *are*.¹²⁴

Perhaps these opinions reflect an implicit theory of burden shifting: the burden begins with the claimant (*Harmelin*), but if the text on its face appears to point to a constitutional restriction, the burden shifts to the Government to establish a different meaning (*Citizens United*). Scalia did not directly say this, though, and it may be hard to identify when constitutional text is clear enough to warrant such a shift; the *Citizens United* dissent might respond that "abridging the freedom of speech" refers to a historically contingent freedom whose application to corporations is ambiguous without further historical evidence (in the same manner that "cruel and unusual" refers

(concluding that "the dissent does nothing to undermine the conclusion" reached in *Smith*—which was not based on historical evidence but only a conclusion that the text was ambiguous). See Lawson, *supra* note 118, at 2150 ("According to Justice Scalia, how certain must one be of an interpretation before one can pronounce it correct? To my knowledge, none of his published works on interpretation addresses this question."); *id.* at 2150–53 (suggesting that Scalia may have used a "best possible reading" standard, at least in statutory cases, while pointing out limitations of this conclusion).

123 *Harmelin*, 501 U.S. at 977 n.6 (citation omitted); see also *Montana v. Egelhoff*, 518 U.S. 37, 48 (1996) (plurality opinion) (holding that the burden is on the claimant to establish that a desired procedure was "deeply rooted" at the time the Fourteenth Amendment was ratified). As discussed above, see *supra* note 122, Scalia's opinion in *Smith* also appeared to put the burden on the claimants.

124 *Citizens United v. FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring) (citation omitted); see also *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011) (requiring the Government to show "persuasive evidence" of a history of the proscription of a category of speech to defeat constitutional restriction).

to a historically contingent idea that is ambiguous without further investigation).

Thus, Justice Scalia may have had an implicit burden of proof in mind in deciding cases, but it is hard to discern from his opinions. These points are not necessarily critical (a judge cannot be expected to develop a complete applied methodology through caselaw), but they point out the need for further refinement of Scalia's methodology. The burdens of proof problem has long been recognized as an important question and has recently received new interest in originalist scholarship.¹²⁵ The key point here is that Scalia's originalism in practice does not appear to offer a well-developed view of it.

D. Precedent

Originalism, like all theories of constitutional interpretation, faces the difficulty of the treatment of prior erroneous (from its perspective) precedent. Justice Scalia's originalism in practice is sometimes hard to describe because it is hard to separate from his use of precedent. Some of his opinions that have been widely criticized as nonoriginalist may be explained by his adherence to nonoriginalist precedent.¹²⁶ Scalia contended (in theoretical writings and opinions) that he saw himself bound by precedent to a substantial degree.¹²⁷

But Scalia also aggressively overturned or sought to overturn nonoriginalist precedent. Although he sometimes implied that overruling should be exceptional, it does not appear especially exceptional in his opinions. Like most Justices, he felt little commitment to decisions from which he had dissented.¹²⁸ He also overruled or sought to overrule longstanding precedent, often without full explanation apart from its erroneousness: to pick some leading examples, *Ohio v. Roberts*,¹²⁹ *Miranda v. Arizona*,¹³⁰ *Roe v. Wade*,¹³¹ and *Solem v. Helm*.¹³² Sometimes he expressly refused to extend

125 See, e.g., Lawson, *supra* note 118; McGinnis, *supra* note 117.

126 See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

127 See, e.g., SCALIA, *supra* note 1, at 861; *McDonald v. City of Chi.*, 561 U.S. 742, 758, 791 (2010) (Scalia, J., concurring) (declining the claimant's invitation to overrule the *Slaughter-House Cases* and joining the plurality's use of the Due Process Clause to incorporate Bill of Rights guarantees "[d]espite my misgivings about substantive due process as an original matter"). On Scalia and the relationship between originalism and precedent, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

128 See, e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2545 (2014) (Scalia, J., concurring in the judgment) (calling for the overruling of *Hill v. Colorado*, 530 U.S. 703 (2000)); *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310; *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

129 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36, 57–65 (2004).

130 384 U.S. 436 (1966); see *Dickerson v. United States*, 530 U.S. 428, 461–65 (2000) (Scalia, J., dissenting) (calling for overruling).

131 410 U.S. 113 (1973); see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (calling for overruling).

precedent on the grounds that it was nonoriginalist, while not directly calling for the overruling of prior cases.¹³³ Sometimes he read prior, arguably nonoriginalist precedent extremely narrowly (though often not on the express ground that it was nonoriginalist).¹³⁴ Other times he not only applied but extended arguably nonoriginalist precedent without confronting the question whether the precedent was nonoriginalist (and whether, if so, it should be overruled, restricted, or expanded).¹³⁵

These approaches are difficult to reconcile and Scalia did not directly attempt to reconcile them. Again, he cannot be faulted for failing to explore and resolve every aspect of originalist methodology, but the precedent issue indicates another area in which originalist methodology gets little help from Justice Scalia.

CONCLUSION

In sum, this descriptive account of Justice Scalia's methodology suggests several points for future originalism. First, it encourages opening up historical inquiry, both by pushing back into the traditions of the English past and by looking forward beyond the founding generation to see patterns of implementation. Second, it encourages more extratextual structural reasoning than strict textualism would permit. These are not necessarily lessons associated with Scalia in his popular image or his theoretical writings, but they come through in his practical methodology.

In addition, this account highlights four points that Justice Scalia did not fully address and on which originalism remains divided. What is the role of framers' intent for public meaning originalism? What can originalism say about the framing of the Fourteenth Amendment? What burden of proof must be met to invalidate an act of the political branches on originalist

132 463 U.S. 277 (1983); see *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion) (calling for overruling).

133 See, e.g., *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (refusing to extend the dormant Commerce Clause balancing test).

134 See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 621–25 (2008) (applying a narrow reading of *United States v. Miller*); *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 882–90 (1990) (applying a narrow reading of *Sherbert v. Verner* and related cases).

135 See, e.g., *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011) (extending *Ex parte Young* without considering its originalist foundations); *Gonzales v. Raich*, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring in the judgment) (extending *Wickard v. Filburn* despite its questionable originalist foundations); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (extending *Bolling v. Sharpe* to impose an equal treatment obligation on the federal government with respect to racial preferences for minorities despite *Bolling's* questionable originalist foundation); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (applying precedent to conclude that a regulatory taking that deprived the landowner of all economic value of the land is per se compensable under the Takings Clause without investigating the originalist basis for precedents).

grounds? And, how should an originalist court address nonoriginalist precedent? These questions remain for the next generation of originalist practitioners and scholars.

