Justice Scalia’s Legacy:
A Look Back to Discern What May Lie Ahead

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Justice Antonin Scalia (1936-2016)
Justice Scalia’s Impact

• Statutory Interpretation

• Criminal Procedure

• Class Actions & Arbitration

• Administrative Law

• Separation of Powers, Federalism, and Structural Aspects of the Constitution

• Equal Protection and Civil/Individual Rights

• First Amendment

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• Impact on the AAPI Community
Statutory Interpretation and Justice Scalia’s Textualist Approach
Justice Scalia’s Method of Statutory Interpretation

• A statutory provision should be interpreted according to the plain meaning of its words.

• Textualism is not “strict constructionism” or a hyper-literalism.

• Context matters in illuminating what the words mean.

• Canons of interpretation provide useful clues in determining the meaning of a statute.

• Judges should not look to legislative intent or purposes – as opposed to the words of statute – to determine the meaning of a statute.
  – Legislative intent is not enacted into law, cannot be readily discerned, and is subject to judicial manipulation.
Three Cases to Illustrate


Illustration of these Principles

• *Smith v. United States* (1993) (6-3; O’Connor, J.)

  – Section 924(c)(1) of Title 18 of the U.S. Code mandates a sentence enhancement for any defendant who “during and in relation to any crime of violence or drug trafficking crime … uses … a firearm.”

  – The majority held that the exchange of guns for narcotics constitutes “use” of a firearm.
Illustration of these Principles

- Scalia, J., dissenting

  - “To use an instrumentality ordinarily means to use it for its intended purpose.”

  - “When someone asks, ‘Do you use a cane?’, he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of ‘using a firearm’ is to speak of using it for its distinctive purpose, i.e., as a weapon.”
Illustration of these Principles

• “To be sure, ‘one can use a firearm in a number of ways,’ . . . including as an article of exchange, just as one can ‘use’ a cane as a hall decoration—but that is not the ordinary meaning of ‘using’ the one or the other. The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used.”

• It would, indeed, be ‘both reasonable and normal to say that petitioner ‘used’ his MAC-10 in his drug trafficking offense by trading it for cocaine.’ [] It would also be reasonable and normal to say that he ‘used’ it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, ‘use’ is assuredly a verb one could select.”
Illustration of these Principles

• “But that says nothing about whether the *ordinary* meaning of the phrase ‘uses a firearm’ embraces such extraordinary employments. It is unquestionably *not* reasonable and normal, I think, to say simply ‘do not use firearms’ when one means to prohibit selling or scratching with them.”
Illustration of these Principles

- *PGA Tour, Inc. v. Martin* (2001) (7-2; Stevens, J.)

  - Title III of the ADA prescribes that: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”
Illustration of these Principles

• *PGA Tour, Inc. v. Martin* (2001)

  “Discrimination” is defined in Title III to mean: “[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages, or accommodations.”
Illustration of these Principles

• *PGA Tour, Inc. v. Martin* (2001)

  – The majority held that the Americans with Disabilities Act prohibited the PGA Tour from denying Casey Martin, a golfer who suffered from a circulatory disorder that atrophied his right leg, equal access to its tours on the basis of his disability.

  – The majority also held that allowing Casey to use a golf cart to play on the PGA Tour would *not* “fundamentally alter the nature” of golf, and thus the PGA Tour was compelled to make such accommodation.
Illustration of these Principles

• Scalia, J., dissenting

  – “In my view today’s opinion exercises a benevolent compassion that the law does not place it within our power to impose.”

  – Title III’s “public accommodations” provision prohibits discrimination on the basis of disability with respect to customers who seek to use services of public accommodations (e.g., hotels, restaurants).

  – The majority assumed this understanding, but concluded that Casey Martin is a customer of the PGA Tour. Justice Scalia disagreed.
Illustration of these Principles

• “[The majority’s conclusion] seems to me quite incredible. The PGA TOUR is a professional sporting event, staged for the entertainment of a live and TV audience, the receipts from whom (the TV audience’s admission price is paid by advertisers) pay the expenses of the tour, including the cash prizes for the winning golfers. The professional golfers on the tour are no more ‘enjoying’ (the statutory term) the entertainment that the tour provides, or the facilities of the golf courses on which it is held, than professional baseball players ‘enjoy’ the baseball games in which they play or the facilities of Yankee Stadium.”

• “To be sure, professional ballplayers participate in the games, and use the ballfields, but no one in his right mind would think that they are customers of the American League or of Yankee Stadium. They are themselves the entertainment that the customers pay to watch. And professional golfers are no different.”
Illustration of these Principles

• On the point about whether permitting Casey to use a golf cart would “fundamentally alter the nature” of golf, Justice Scalia criticized the majority’s opining on what the fundamental nature, or “the essence,” of golf is.

• “[The rules] are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be ‘nonessential’ if the rulemaker (here the PGA TOUR) deems it to be essential.”
Illustration of these Principles

• “If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf—and if one assumes the correctness of all the other wrong turns the Court has made to get to this point—then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government’s power ‘[t]o regulate Commerce with foreign Nations, and among the several States,’ to decide What Is Golf.”
Illustration of these Principles

• “I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a ‘fundamental’ aspect of golf.”
Illustration of these Principles


  - The Court held that tax credits are available under the Affordable Care Act through both state-created and federally-created insurance exchanges despite language in the Act stating that the amount of the tax credit depends on whether a taxpayer has enrolled in an insurance plan through “an Exchange established by the State.”

  - With “a view to [its] place in the overall statutory scheme,” the phrase “established by the State” is ambiguous “when read in context.”

  - The Court concluded that reliance on context was appropriate despite acknowledging that “[r]eliance on context and structure in statutory interpretation is a ‘subtle business, calling for great wariness lest what professes to be mere rendering becomes creation . . . .’”
Illustration of these Principles

• Scalia, J., dissenting

  “I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.”

  “Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today’s interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that ‘Exchange established by the State’ means ‘Exchange established by the State or the Federal Government’?”
Scalia’s Textualism in the Future

• Scalia’s textualism has affected, and will continue to affect, how the Court decides statutory interpretation cases.

• See, e.g., *Lockhart v. United States* (2016) (6-2; Sotomayor, J.) (relying on the “last antecedent rule” in concluding that the phrase “involving a minor or ward” refers solely to the last antecedent in a federal law subjecting defendants convicted of possessing child pornography to a 10-year mandatory minimum sentence if they have “a prior conviction . . . relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward”)

• On the Justice’s influence, Justice Kagan has stated:
  – “We’re all textualists now.”
  – “His views on interpreting texts have changed the way all of us think and talk about the law.”
Criminal Procedure
Justice Scalia’s Major Contributions to Criminal Procedure

• **Sixth Amendment**  
  – Confrontation Clause  
  – Right to Trial by Jury

• **Fourth Amendment**  
  – Defining what constitutes a “search”

• **Fifth Amendment**  
  – Right Against Self-Incrimination
The Sixth Amendment:
Right of Confrontation and Right to Trial by Jury

• Right of Confrontation

• Right to Trial by Jury (Sentencing)
The Sixth Amendment
Right of Confrontation

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”
Key Takeaways

• The Supreme Court unanimously held (Scalia, J.) that “[w]here testimonial evidence is at issue . . . the Sixth Amendment [Confrontation Clause] demands what the common law required: unavailability and a prior opportunity for cross-examination.”

• The Court overruled Ohio v. Roberts, 448 U.S. 56 (1980), which permitted the introduction of hearsay statements made by unavailable declarants as long as the statements had “adequate indicia of reliability.”

• The “reliability test” announced in Ohio v. Roberts departed from the historical principles undergirding the Confrontation Clause.
Justice Scalia’s Historical Reasoning

- The text of the Sixth Amendment standing alone did not resolve the case because “witnesses against” could plausibly be read to mean those who “actually testify at trial,” “those whose statements are offered at trial,” or “something in-between.”

- Justice Scalia canvassed the English common law, and early decisions in state courts that shed light upon the original understanding of the common-law right of confrontation.

- After reviewing the historical background, Justice Scalia concluded that the Confrontation Clause’s text and Supreme Court precedent were consistent with these relevant historical principles.
The Importance of the Right to Confrontation

- The Confrontation Clause “*commands*, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”

- “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”

- “By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable . . . .”

• The Supreme Court (9-0; Scalia, J.) expounded on the distinction between “testimonial” and “non-testimonial” statements

  - **Testimonial:** statements made under circumstances that objectively indicate the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”
  - **Non-testimonial:** statements “made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”

• Although the Confrontation Clause provides some criminal defendants with “a windfall,” the Court cannot “vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”
Ohio v. Clark (2015)

• The Supreme Court unanimously held (Alito, J.) that hearsay statements a three-year-old victim of physical abuse made to his teachers were not testimonial. “[U]nder our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial . . . . But that does not mean that the Confrontation Clause bars every statement that satisfies the ‘primary purpose’ test.”

• Scalia, J., concurring only in the judgment
  - At common law, young children were considered incompetent to take oaths. This refuted the idea that the three-year-old spoke with the primary purpose of “invok[ing] the . . . machinery of the State” against his abuser.
  - Protested the Court’s “shoveling of fresh dirt” upon the right of confrontation. The Court treated Crawford as if it were “a matter of twiddle-dum twiddle-dee preference.”
The Sixth Amendment
Right to Trial by Jury

“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury.”

- The Supreme Court held (5-4; Stevens, J.) that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

- Scalia, J., concurring
  - Although the Sixth Amendment jury trial guarantee “has never been efficient,” the Constitution “means what it says,” not “what we think it ought to mean.”
  - A criminal justice system involving “procedural compromises, particularly in respect to sentencing” may be more efficient or even fair, but “it is not arguable that, just because one thinks it is a better system, it must be, or is even more likely to be, the system envisioned by a Constitution that guarantees trial by jury.”

- The Supreme Court held (5-4; Scalia, J.) that an “exceptional” sentence imposed by a judge who determined that a criminal defendant acted with “deliberate cruelty” (based on evidence not submitted to the jury) violated the defendant’s Sixth Amendment right to trial by jury.

- The “need to give intelligible content to the right of jury trial” is “no mere procedural formality,” but a “fundamental reservation of power in our constitutional structure.”

- Irrespective of the degree to which trial by jury “impairs the efficiency or fairness of criminal justice,” there is not “one shred of doubt” about the “Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”
The Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”
**Kyllo v. United States (2001)**

- The Supreme Court held (5-4; Scalia, J.) that where “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”

- “The question we confront today is what limits there are upon [the] power of technology to shrink the realm of guaranteed privacy.”

- Justice Scalia predicted the relevance of *Kyllo* in the digital age: “While the [thermal-imaging] technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.”

• The Supreme Court unanimously held (Scalia, J.) that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”

• The “reasonable expectation of privacy” test announced in United States v. Katz, 389 U.S. 347 (1967), did not supplant the traditional physical trespass test under the Fourth Amendment.

• The clause “in their persons, houses, papers, and effects” reflects the Fourth Amendment’s “close connection to property.”

• The “18th-century[’s] guarantee against unreasonable searches . . . must provide at a minimum the degree of protection afforded when [the Fourth Amendment] was adopted.”
The Fifth Amendment
Right Against Self-Incrimination

“No person . . . shall be compelled in any criminal case to be a witness against himself.”
Dickerson v. United States (2000)

• The Supreme Court held (7-2; Rehnquist, C.J.) that “Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.”

• Scalia, J., dissenting
  - What made Miranda “unacceptable as a matter of straightforward constitutional interpretation in the Marbury tradition—is its palatable hostility toward the act of confession per se, rather than toward what the Constitution abhors, compelled confession.”
  - The idea that “this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful ‘prophylactic’ restrictions upon Congress and the States” amounts to “an immense and frightening anti-democratic power.”
The Future of Constitutional Criminal Procedure

• Justice Scalia’s use of original meaning: the Fourth Amendment versus the Sixth Amendment

• The long-term viability of Justice Scalia’s Confrontation Clause jurisprudence
  – Will Justice Scalia’s own “primary purpose” test ultimately lead to Crawford’s demise?
Class Actions
Justice Scalia’s Major Contributions to Class Action Law


– *AT&T Mobility LLC v. Concepcion* (2011) (Scalia, J.)

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

• Writing for the Court, Justice Scalia reversed the lower court’s certification of a class action of 1.6 million former and current Wal-Mart employees because the individual plaintiffs’ claims varied, thus lacking commonality.

• Over a million women sought class certification to bring discrimination claims. However, the Court concluded that given the individual discretion store managers had over employment decisions, the plaintiffs did not meet the class certification criteria set out by FRCP 23(a)(2).

• “Once a plaintiff establishes a pattern or practice of discrimination a district court must usually conduct ‘additional proceedings . . . to determine the scope of individual relief.’ The company can then raise individual affirmative defenses and demonstrate that its action was lawful. The Ninth Circuit erred in trying to replace such proceedings with Trial by Formula.” (citations omitted)(emphasis added)
Holding (continued)

• “Without some glue holding the alleged reasons for all those decisions together it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored.”

• Justice Scalia noted that FRCP 23(a)(2) commonality is not satisfied by simply asking the same question or claiming a violation of the same law. Rather the “common contention . . . must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”
Comcast Corp. v. Behrend (2013)

• Justice Scalia’s majority opinion (5-4) held that class certification is not appropriate under FRCP 23(b)(3) without adequate evidence that damages can be measured on a class-wide basis. Otherwise the court “risks inaccurate decisionmaking.”

• FRCP 23(b)(3) asks whether “questions of law or fact common to class members predominate over any question affecting only individual members . . . .” (emphasis added)

• The Court of Appeals was required to hear arguments challenging plaintiffs’ damages model, even if it involved the merits.

• “Questions of individual damage calculations will inevitably overwhelm questions common to the class.”
The Federal Arbitration Act (FAA)

  – States do not have the power to limit the right to sue as a class because class action lawsuits are controlled by Federal Rule 23.

• **AT&T Mobility LLC v. Concepcion (2011) (5-4)**
  – The Federal Arbitration Act (FAA) preempts state laws which invalidated contractual prohibitions on class-wide arbitration.

• **American Express Co. v. Italian Colors Restaurant (2013) (5-3)**
  – The Court applied *Concepcion* to a federal-court challenge, refusing to override an arbitration clause requiring arbitration on an individual basis, notwithstanding plaintiffs’ argument that not overriding the arbitration clause would “foreclose” plaintiffs’ ability to “effectively vindicate[e]” their claims under the Sherman Act.
  – “Truth to tell, our decision in [*Concepcion*] all but resolves this case.”
Class Actions: The Path Forward

• With Justice Scalia’s passing, the future of the law of class actions has become unclear. Recent cases hint at the changing landscape:

  – *Tyson Foods* (6-2; Kennedy, J.) The court upheld use of the statistical averages, extrapolation, and representative evidence in this overtime class and collective action because the **underlying substantive law** allowed for the use of such evidence in a case like this.

  – *Spokeo* (6-2; Alito, J.) The Court vacated and instructed the Ninth Circuit to re-evaluate whether the plaintiff had standing, holding that “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing” and that “the injury-in-fact requirement requires a plaintiff to allege an injury that is both ‘concrete and particularized.’” (emphasis added).” (citations omitted). *Cf. Lujan v. Defenders of Wildlife* (1992) (Scalia, J.).

  – *DirecTV* (6-3; Breyer, J.) The Court made clear that States remain subject to the Supreme Court’s FAA precedents preempting state-law attempts at interfering with the enforceability of class action waivers.
Administrative Law
Justice Scalia’s Major Contributions to Administrative Law

- *United States v. Mead Corp.* (2001) (Scalia, J., dissenting)
United States v. Mead Corp. (2001)

• Majority (8-1; Souter, J.): “We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

• Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

• The Customs ruling at issue here [stating that “day planners” that Mead sought to import were subject to a tariff] fails to qualify, although the possibility that it deserves some deference under Skidmore leads us to vacate and remand.”
United States v. Mead Corp. (2001)

• Justice Scalia in dissent: “The doctrine of *Chevron*—that all *authoritative* agency interpretations of statutes they are charged with administering deserve deference—was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches. When, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved.”

• “The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test.”

• “There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law.”
City of Arlington v. FCC (2013)

• Must a court defer under *Chevron* to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s jurisdiction? The Court said yes.

• The Communications Act requires state or local governments to act on applications for wireless network towers and antennas “within a reasonable period of time after the request is duly filed.”

• The FCC issued a ruling that “a reasonable period of time” is presumptively 90 days to process a collocation application (that is, an application to place a new antenna on an existing tower) and 150 days to process all other applications.

• State and local governments challenged the FCC’s authority to interpret the “reasonable period of time” provision in the Act. The Fifth Circuit deferred to the FCC’s interpretation under *Chevron*. 
City of Arlington v. FCC (2013)

- Justice Scalia for the Court (6-3): “The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency’s ‘jurisdiction.’ Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between ‘jurisdictional’ and ‘nonjurisdictional’ interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.”

- “Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as ‘jurisdictional.’”
“The false dichotomy between ‘jurisdictional’ and ‘nonjurisdictional’ agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the ‘jurisdictional’ card in every case.”
Perez v. Mortgage Bankers Ass’n (2015)

• The Department of Labor issued various interpretive rulings regarding whether mortgage loan officers were exempt from the FLSA’s minimum wage and maximum hour requirements.

• In 1999 and 2001, the DOL issued interpretive rulings that such officers were not exempt. Then in 2006, the DOL issued an interpretive ruling, pursuant to a 2004 regulation, saying that such officers were exempt. Then in 2010, the DOL changed its interpretive ruling again, saying that such officers were exempt.

• None of the interpretive rulings was issued pursuant to notice-and-comment rulemaking.

• The D.C. Circuit held that the 2010 interpretive ruling was not validly issued because, according to circuit precedent, a ruling that announces a substantively different interpretation of the regulation must be accompanied by notice-and-comment procedures.
Perez v. Mortgage Bankers Ass’n (2015)

- The Court (Sotomayor, J.) unanimously held that such a requirement was contrary to the plain text of the Administrative Procedure Act, which states that the notice-and-comment requirement (applicable to regulations) did not apply to interpretive rules.

- Justice Scalia agreed with this conclusion, but would have approached this case differently by overruling Auer and Seminole Rock – cases that afforded deference to agency interpretations of regulations.

- The problem that the D.C. Circuit sought to address – an interpretive ruling that effectively alters a regulation without notice and comment – exists because of the deference given to interpretive rulings pursuant to Auer.
Perez v. Mortgage Bankers Ass’n (2015)

• In Justice Scalia’s view, whether *Chevron* deference applies to an agency action does not depend on the procedures that the agency employs. *See Mead.*

• But for the Justice, deference should not be accorded to an agency’s interpretation of its own regulations. Why? The power to make a rule and interpret the same should not be left in the same hands.

  – *See Decker v. Northwest Environmental Defense Center* (2013) (8-0; Kennedy, J.) (giving *Auer* deference to the EPA’s interpretation of one of its Clean Water Act implementing regulations because the interpretation was “reasonable” and there was no evidence that it was “a change from prior practice or a *post hoc* justification adopted in response to litigation”).

• Is there some tension with *City of Arlington v. FCC*?
Separation of Powers, Federalism, and Structural Aspects of the Constitution
Separation of Powers, Federalism and Structural Aspects of the Constitution

• Executive Power

• Standing

• Commerce Clause
  – *Gonzales v. Raich* (2005) (Scalia, J., concurring)

• Federalism
Morrison v. Olson (1988)

- The Supreme Court held (7-1; Rehnquist, C.J.) that provisions in the Ethics in Government Act of 1978 allowing a special division of the D.C. Circuit to appoint “independent counsel” to investigate and prosecute certain high-ranking government officials did not violate separation of powers.

- Scalia, J., dissenting
  - Governmental investigation and prosecution of crimes constitute the exercise of “a quintessentially executive function.” The Act violates Article I by depriving the President of the exclusive control over the exercise of that power.
  - “The Framers . . . viewed the principle of separation of powers as the absolutely central guarantee of a just Government.”
  - Criticized the “folly of the new system of standardless judicial allocation of powers” adopted by the majority.
**Lujan v. Defenders of Wildlife (1992)**

- The Supreme Court held (6-3; Scalia, J.) that a group of environmental organizations lacked standing to challenge a rule promulgated under the Endangered Species Act because they failed to satisfy two of the three elements of the constitutional “core” of standing—“injury in fact” and “redressability.”

- Congress may not, in a “citizen-suit” provision, confer “upon all persons . . . an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law.”

- The bar against generalized grievances exists because “[v]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive,” not the judicial branch.
Gonzales v. Raich (2005)

• The Court held (6-3; Stevens, J.) that the Commerce Clause gave Congress the power to criminalize the local growing and use of marijuana, even if the state allows for medical uses.

• Scalia, J., concurring
  – Justice Scalia wrote separately, concurring in the judgment due to his reading of the Necessary and Proper Clause: “Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market ‘could be undercut’ if those activities were excepted from its general scheme of regulation.” (citations omitted). Compare United States v. Lopez, 541 U.S. 549 (1995); United States v. Morrison, 529 U.S. 298 (2000).
Printz v. United States (1997)
Holding

• Justice Scalia, writing for the Court (5-4), extended what has been called the anti-commandeering doctrine to executive officials, limiting Congress’s power to enlist State executive officers to carry out federal firearms regulations.

• Justice Scalia relied heavily on originalist reasoning in reaching his conclusion. “Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite approach.”
Takeaways

• Justice Scalia’s brand of originalism, and its continuing effect on federalism and other areas of the law, may be exhibited most clearly in *Printz*. Even the dissenters advanced originalist arguments in that case.

• For example Justice Souter argued that the dissent's “conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.” He went on to write, before discussing *The Federalist Papers* and the ratification debates in great detail, “Indeed, the historical materials strongly suggest that the founders intended to enhance the capacity of the Federal Government by empowering it…”

• *Printz* continues to be important in cases involving federalism and other structural aspects of the Constitution:
  – *N.F.I.B v. Sebelius*, 132 S.Ct. 2566 (2012)(Roberts, C.J.)(“But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of the government as established by the Constitution.”)(citing *Printz*, 521 U.S. 898, 924).
Equal Protection and Civil/Individual Rights Under the Constitution
Justice Scalia’s Major Contributions to Equal Protection and Civil/Individual Rights Under the Constitution


• *Troxel v. Granville* (2000) (Scalia, J., dissenting)

• *United States v. Virginia* (1996) (Scalia, J., dissenting)

- Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage.

- Does the Due Process Clause require that the biological father be given parental rights over that child?

- Justice Scalia, writing for a plurality, says no: “In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”

- It was Michael H.’s (the biological father’s) burden to establish that his asserted right “is so deeply embedded within our traditions as to be a fundamental right.” Michael H. failed to meet his burden.

• The separate opinions in this case stake out the contrasting views about how the Court ought to enforce “new” constitutional rights that are asserted—a division that we still see today, and will continue to see.

• Justice Brennan in dissent stated: “In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies. Even if we can agree, therefore, that ‘family’ and ‘parenthood’ are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, ‘liberty’ must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.”

- Justice Scalia’s response: “It seems to us that reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a ‘liberty’ of sorts without contracting an equivalent ‘liberty’ on the other side. Such a happy choice is rarely available. Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa. If Michael has a ‘freedom not to conform’ (whatever that means), Gerald must equivalently have a ‘freedom to conform.’ One of them will pay a price for asserting that ‘freedom’—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two ‘freedoms,’ but leaves that to the people of California. Justice Brennan’s approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.”
The Court held (6-3; O’Connor, J.) that a Washington statute that permitted a court to order visitation rights for any person (in this case – grandparents) when visitation may serve the best interests of the child, violated the substantive due process rights of the mother.

Scalia, J., dissenting

“[W]hile I would think it entirely compatible with the commitment to representative democracy . . . to argue . . . that the State has no power to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”

• “Judicial vindication of ‘parental rights’ under a Constitution that does not even mention them requires . . . not only a judicially crafted definition of parents, but also—unless, as no one believes, the parental rights are to be absolute—judicially approved assessments of ‘harm to the child’ and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.”
**United States v. Virginia (1996)**

- The Court held (7-1; Ginsburg, J.) that Virginia violated the Equal Protection Clause in maintaining a military college for males.

- Equal Protection analysis is conducted, under current jurisprudence, using one of three tests—rational basis, intermediate scrutiny, or strict scrutiny.

- Scalia, J., dissenting

  - “Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that ‘equal protection’ our society has always accorded in the past. But in my view the function of this Court is to *preserve* our society’s values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees.”

• “For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.

• The all-male constitution of VMI comes squarely within such a governing tradition. . . . In other words, the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.”
The First Amendment
Justice Scalia’s Major Contributions to First Amendment Jurisprudence

• *Austin v. Michigan Chamber of Commerce* (1990) (Scalia, J., dissenting)

• *Employment Division v. Smith* (1990) (Scalia, J.)

Austin v. Michigan Chamber of Commerce (1990)

- The Court held (6-3; Marshall, J.) in Austin, which was later overruled by Citizens United, that political speech by corporations could be restricted because “state law grants [corporations] special advantages” and this “unique state-conferred corporate structure . . . facilitates the amassing of large treasuries” (or in other words, in the majority’s view, facilitates a substantial risk of corruption).

- Scalia, J., dissenting

  - The state’s conferral of “special advantages” cannot possibly be the reason for denying First Amendment rights to a corporation—individuals are also given all sorts of special advantages, from tax breaks to cash subsidies, but no one says that their expenditures for political causes can be restricted; nor should the mere fact of a corporation’s “large treasury” place limits on the corporation’s expenditures, unless one thinks the state could prohibit men and women whose net worth is above a certain figure from endorsing political candidates.
• Justice Scalia also describes the majority’s effort “to make one valid proposition out of two invalid ones”:

  – “When the vessel labeled ‘corruption’ begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship ‘special privilege’; and when that in turn begins to go down, it returns to ‘corruption.’ Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.”
**Employment Division v. Smith (1990)**

- The Court held (6-3; Scalia, J.) in *Employment Division v. Smith*, which was later superseded by statute, that the Free Exercise Clause permits states to deny unemployment benefits to individuals discharged from their jobs because of sacramental peyote use.

- In response to the argument that “‘prohibiting the free exercise [of religion]’ includes requiring any individual to observe a *generally applicable law* that requires (or forbids) the performance of an act that his religious belief forbids (or requires),” Justice Scalia concluded that “[a]s a textual matter, we do not think the words [of the Free Exercise Clause] must be given that meaning.”

- Moreover, the “record of more than a century of our free exercise jurisprudence contradicts” the proposition that “an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”

• Writing for the Court, Justice Scalia stated that a city ordinance that criminalized the placing of a symbol or object on public or private property for the purpose of arousing anger on the basis of “race, color, creed, religion, or gender” was invalid under the First Amendment.

• Describing the statute, Justice Scalia wrote: “Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”

• The ordinance, Justice Scalia, said, “goes even beyond mere content discrimination, to actual viewpoint discrimination.”

• “[F]ighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’ St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”

• “Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”
Other Areas of Jurisprudence
National Security
Justice Scalia & National Security


• Justice O’Connor, writing for the Court (8-1), held that Hamdi, a U.S. citizen captured on the battlefield in Afghanistan and detained on U.S. soil, could not be held indefinitely without due process protections to challenge his detainment. However, with limited due process, Hamdi could be held and not charged with any crime.

• Scalia, J., dissenting
  – Justice Scalia was joined by Justice Stevens in articulating a powerful restraint on executive power. Although Justice Scalia was willing to give the President broader discretion with respect to foreign nationals, the rules concerning U.S. citizens were clear. A U.S. citizen could not be held on U.S. soil without being charged with a crime. The Government had two options: release Hamdi or charge him.
  – Although Justice Scalia dissented with Justice Stevens in this case, in other national security cases he often dissented from Justice Stevens’s majority opinions. See e.g., Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (Scalia, J., dissenting).

• Justice Stevens, this time in the majority (5-3), found that deviations in the detention policy for suspected terrorists violated the Uniform Code of Military Justice and Geneva Conventions.

• Scalia, J. dissenting
  – Justice Scalia argued that under the Detainee Treatment Act, the majority was misguided in asserting its statutory jurisdiction to review the military’s detention policies regarding foreign nationals on foreign soil in Guantanamo Bay.
  – The majority’s conclusion “is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised.”

• Justice Kennedy, writing for the majority (5-4), held that terrorism suspects being held in Guantanamo had a right to challenge their detention in U.S. courts. The opinion articulated a test that could be used to guide judges in determining whether the writ of habeas corpus extends outside sovereign U.S. soil.

• Scalia, J. dissenting
  – Justice Scalia harshly criticized the Court for extending habeas protections to Guantanamo Bay, outside U.S. territory: “Today, for the first time in our Nation’s history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.”
  – “Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court had done today.”
The Second Amendment

- Justice Scalia wrote for the Court (5-4), holding that the Second Amendment applied to the District of Columbia and that a firearms regulation which required that firearms (including rifles and shotguns) be unloaded, disassembled, and bound by a trigger lock in the owner’s home was unconstitutional.

- Justice Scalia’s opinion utilized a complex mixture of different techniques, including many originalist arguments and grammatical analysis.

- See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Scalia, J., joining in Justice Alito’s opinion for the majority incorporating the Second Amendment against the States and concurring separately).
Scalia’s Views on the Constitution as It Relates to Race
Views on Race – Effect on AAPI Community

• Distinctions drawn by the government on the basis of race violate the Equal Protection Clause of the Fourteenth Amendment. Examples:

• *Adarand Constructors, Inc. v. Pena* (1995) (5-4; Scalia, J., concurring)
  – “Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual, . . . and its rejection of dispositions based on race . . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.”

• *Grutter v. Bollinger* (2003) (5-4; Scalia, J., concurring in part and dissenting in part) (“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”)
Justice Scalia’s Life

• Antonin Scalia, Associate Justice, was born in Trenton, New Jersey, on March 11, 1936.

• He married Maureen McCarthy and has nine children - Ann Forrest, Eugene, John Francis, Catherine Elisabeth, Mary Clare, Paul David, Matthew, Christopher James, and Margaret Jane.

• He received his A.B. from Georgetown University and the University of Fribourg, Switzerland, and his LL.B. from Harvard Law School, and was a Sheldon Fellow of Harvard University from 1960–1961.

• He was in private practice in Cleveland, Ohio from 1961–1967, a Professor of Law at the University of Virginia from 1967–1971, a Professor of Law at the University of Chicago from 1977–1982, and a Visiting Professor of Law at Georgetown University and Stanford University.


• He was appointed Judge of the United States Court of Appeals for the District of Columbia Circuit in 1982.

• President Reagan nominated him as an Associate Justice of the Supreme Court, and he took his seat September 26, 1986.

• Justice Scalia died on February 13, 2016.

See: http://www.supremecourt.gov/about/biographyScalia.aspx
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BUT FIRST,
JUSTICE SCALIA
WILL READ
HIS DISSENT...

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