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THE CONSTITUTION ACCORDING TO JUSTICES SCALIA AND THOMAS: ALIVE AND KICKIN'

ERIC J. SEGALL*

"I have classes of little kids who come to the court, and they recite very proudly what they've been taught, 'The Constitution is a living document.' It isn't a living document! It's dead. Dead, dead, dead!"

Justice Antonin Scalia¹

No one expects Supreme Court Justices to be completely consistent across the vast range of emotionally charged and controversial constitutional law issues they are called upon to decide. Moreover, some Justices, such as Stevens, O'Connor, and Breyer, reject grand theories of interpretation and favor a one-case-at-a-time approach to judging. Nevertheless, when Supreme Court Justices express strong preferences about proper and improper methods of constitutional interpretation, their opinions should be at least reasonably consistent with those positions.

Justices Scalia and Thomas have boldly and frequently made the case that they resolve constitutional law cases with a strong emphasis on the text and original meaning of the language of the Constitution.² Although their ideologies have nuanced differences (such as their use of precedent and what evidence counts towards original meaning), both Justices in their opinions and in their off-the-Court writings proclaim that judges should leave their personal values out of constitutional interpretation and only overturn the decisions of more accountable political officials when

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1. Ushma Patel, *Scalia Favors 'Enduring,' Not Living, Constitution, News at Princeton*, PRINCETON UNIV. (Dec. 11, 2012, 1:00 PM), <https://www.princeton.edu/main/news/archive/S35/52/39O50/index.xml?section=featured>.

2. See Eric J. Segall, *Justice Thomas and Affirmative Action: Bad Faith, Confusion, or Both*, 3 WAKE FOREST L. REV. ONLINE 11 (2013), available at <http://wakeforestlawreview.com/justice-thomas-and-affirmative-action-bad-faith-confusion-or-both> (stating that Justice Thomas "often claims that fidelity to original intent and constitutional text is the most important element of constitutional interpretation," and additionally "claims that the best way for a judge to keep his personal views out of his judicial decisions is through rigid adherence to the text and history of the Constitution"); *Scalia Defends Originalism as Best Methodology for Judging Law*, UNIV. OF VA. SCH. OF LAW (Apr. 20, 2010), http://www.law.virginia.edu/html/news/2010_spr/scalia.htm (stating that "[o]riginalism suggests that the Constitution has a static meaning," and that originalism is "to know the original meaning of constitutional provisions").

required to by clear text or history.³ Both Justices, however, have consistently engaged in aggressive acts of judicial review based on personal preferences rather than text or history. It would take a book to catalog the many examples where Scalia and Thomas have rather obviously veered from their alleged disdain for the “Living Constitution,” but the cases below are representative and reflect broad rules of constitutional law adopted by these two Justices that prohibit elected officials from implementing important legislative objectives.

Justice Thomas wrote a concurring opinion in the Court’s latest campaign finance case arguing that virtually *all* laws that limit the spending of money on or for political campaigns are unconstitutional under the First Amendment.⁴ Although Scalia did not join that opinion, he too has voted to strike down almost every campaign finance law that he has been called upon to judge while sitting on the Court.⁵ In addition, both Justices have said they would prohibit Congress, the President, and every level of state and local government from employing any and all racial preferences.⁶ Both Justices would also prevent Congress from using state governments to help implement federal laws enacted pursuant to Congress’s enumerated powers,⁷ and they would stop most plaintiffs from suing any state for money damages because of the doctrine of sovereign immunity.⁸ In none of these examples, which cut a huge swath through constitutional law, and which significantly alter the ways both federal and state governments do business, did Justices Scalia or Thomas make persuasive arguments from either text or history. Thus, contrary to what

3. See Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389–90 (2000) (quoting Justice Scalia’s statement in *Michael H. v. Gerald D.* regarding judicial decisionmaking, stating that “[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.” (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989))).

4. *McCutcheon v. Fed. Election Comm’n*, No. 12-536, 2014 WL 1301866, at *28 (U.S. Apr. 2, 2014) (Thomas, J., concurring).

5. *Id.* at *1; see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring); *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 483 (2007) (Scalia, J., concurring); *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring).

6. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239–41 (1995) (Scalia & Thomas, JJ., concurring).

7. *Printz v. United States*, 521 U.S. 898, 923–24 (1997).

8. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67–69 (1996).

Justices Scalia and Thomas would have you believe, for them, the Constitution is very much alive and kicking up a storm.

CAMPAIGN FINANCE REFORM

Concluding that spending money on political campaigns is political speech,⁹ both Justices Scalia and Thomas have consistently voted to strike down state and federal laws regulating the effects of money on our election system. Neither one, however, has ever made a serious effort to harmonize these strong exercises of judicial review with the text or original meaning of the First Amendment.

In the landmark *Citizens United* case, Justice Scalia did spend some time trying to show that the Founding Fathers might have deemed corporations to have free speech rights, though he also concluded that, even if the framers did not, corporations play a different role today than in yesteryear (a great example of the living Constitution approach).¹⁰ But Scalia did not make any effort in *Citizens United*, or anywhere else, to demonstrate that anyone living in 1791 would have privileged corporate political speech over legislative efforts to combat corruption.

Last term, in *McCutcheon v. FEC*, Justice Thomas repeated his familiar refrain that the Founding Fathers thought that political speech was vitally important and needed special protection under the First Amendment. Fair enough, but that determination tells us nothing about whether the people alive in 1791 would have equated the writing of a campaign check by a person in Virginia to a politician in California as the equivalent of constitutionally protected political speech. Of course, even if writing a check is the equivalent of political speech pursuant to the original meaning of the First Amendment, the question remains whether such speech can be regulated to further the vital governmental interest in preventing corruption. Neither Justice has ever addressed that key issue as a historical matter, though Lawrence Lessig has, and concluded that the Framers' view of corruption would have been broad enough to justify most campaign finance laws.¹¹ Scalia and Thomas have not addressed that historical analysis.

9. See *McCutcheon*, 2014 WL 1301866, at *28–29 (Thomas, J., concurring); *Citizens United*, 558 U.S. at 385–93 (Scalia, J., concurring).

10. “Even if we thought it proper to apply the dissent’s approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion.” *Citizens United*, 558 U.S. at 387 (Scalia, J., concurring).

11. Lawrence Lessig, *Originalists Making It Up Again: McCutcheon and ‘Corruption’*,

Striking down state and federal campaign finance laws has significant effects on our representative democracy. Yet, neither Scalia nor Thomas has ever provided significant historical analysis of the issue. I am not criticizing that failure as a matter of constitutional interpretation (I am no originalist), but it does shine a bright light on their often harsh critiques of the importance of text and history in other cases, such as the Court's abortion¹² and same-sex marriage¹³ cases, where they argue passionately against finding new (living) principles to limit legislative choices.

AFFIRMATIVE ACTION

Pursuant to a "color-blind" reading of the equal protection clause of the Fourteenth Amendment, Justices Scalia and Thomas would prohibit state and federal governments, as well as all public universities, from using any racial criteria or preferences to remedy the formalized, legal racial discrimination (and slavery and segregation), that marked our country for most of its history.¹⁴ Neither Justice has ever shown that the text or history of that Amendment justifies such a far-reaching legal conclusion.

The Fourteenth Amendment prohibits the government from denying to any person the "equal protection of the laws."¹⁵ It is certainly plausible to read the word "equal" to prohibit any and all racial preferences, even those designed to foster racial equality. However, it is *equally* plausible to read the words "equal" and "laws" to justify race-based remedies that further the equality promised by the Fourteenth Amendment but sabotaged by almost 100 years of segregation, Jim Crow, and other governmental institutions designed for the express purpose of denying equality to African-Americans (such as the federal government backing billions of dollars of private mortgages from the 1940's to the early 1960's with well over ninety percent going to white families).¹⁶ In other words, the words "equal" and "laws" can be easily (perhaps even more persuasively)

THE DAILY BEAST.COM (Apr. 2, 2014), <http://www.thedailybeast.com/articles/2014/04/02/originalists-making-it-up-again-mccutcheon-and-corruption.html>.

12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part, dissenting in part) (concluding that abortion is not constitutionally protected "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed").

13. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Scalia, J., dissenting).

14. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239–41 (1995) (Scalia & Thomas, JJ., concurring).

15. U.S. CONST. amend. XIV, § 1.

16. *See* ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* 97 (2012).

interpreted to embrace, not prohibit, race-based measures enacted to *prevent* the kind of caste society the Fourteenth Amendment was supposed to abolish.

Because the text is ambiguous, both Justices would normally say turn to history. An historical analysis, however, certainly does not favor a color-blind interpretation of the Fourteenth Amendment. When it was ratified, schools were officially segregated in the District of Columbia,¹⁷ and there were federal laws giving benefits to blacks and only blacks.¹⁸ Incredibly, neither Justice Scalia nor Justice Thomas has ever addressed this specific history or even the original meaning of the Fourteenth Amendment as applied to limited racial preferences. Moreover, not long after the Amendment was ratified, the Supreme Court embraced an interpretation of “equal” that was as far from colorblind as possible when it upheld a Louisiana law requiring the separation of the races on public transportation.¹⁹

Given the national importance of this issue, and how if there were five votes supporting the rule these Justices favor, most public universities would have to significantly restructure their admissions programs, we would expect either Justice Scalia or Thomas to provide an historical justification for their invalidation of all racial preferences. But, for whatever reason, they have not.²⁰

17. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 551 (1998) (“Although by 1869 a few citizens had begun to agitate for integrated schools, Congress spurned all such suggestions and allowed school segregation to continue in the District until the Supreme Court held it unconstitutional in 1954.”) (footnote omitted).

18. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (“From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.”).

19. See *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ. of Topeka*, Kan., 347 U.S. 483 (1954) (holding that a state law requiring black and white railway passengers to be separated did not violate either the Thirteenth or Fourteenth Amendment).

20. Justice Thomas has discussed the speeches of Fredrick Douglass given well after the Fourteenth Amendment was enacted. But, not only does this evidence not shine a light on the original meaning of the Amendment, Justice Thomas mischaracterizes and misquotes Mr. Douglas. See Segall, *supra* note 2 (stating that “Justice Thomas took Douglass out of context, omitted relevant parts of the very quote he relied on for his color-blind argument, and failed to review much of Douglass’s life work, some of which strongly leads to the opposite conclusions about affirmative action asserted by Justice Thomas”).

COMMANDEERING

Pursuant to the Tenth Amendment, the federal government is limited to those powers that are enumerated in the Constitution, and even those powers are subject to other Constitutional provisions.²¹ Thus, pursuant to the Commerce Clause,²² Congress could regulate shipping newspapers across state lines for profit, but the First Amendment would render unconstitutional a law favoring Republican newspapers over Democratic newspapers. Assuming no other *textual* constitutional limitation, however, federal laws enacted pursuant to an enumerated power are the supreme law of the land under Article VI.²³

Despite the text of both Article VI and the Tenth Amendment, however, the Court in the 1990s held that when Congress exercises enumerated powers under Article I, it may not require states to assist in the implementation of federal law.²⁴ In these cases, Congress directed the states to clean up radioactive waste and to help conduct background checks on gun purchasers. In both cases, the Court struck down the federal laws.

In both of these cases, the Justices unanimously agreed there was no textual limitation on Congress commandeering the states to assist with the execution of federal law. In light of that fact, one would think an “originalist” jurist would rely on strong historical evidence to support such a determination. There is, however, no such evidence available.

In *New York v. United States*, Justice O’Connor presented a general overview of what the framers thought about federal and state powers but did not refer to any specific evidence helpful to this question. Instead, she simply assumed that there was a rule against commandeering as a matter of constitutional structure, implicit deductions from general historical sources, and policy concerns.

21. U.S. CONST. amend. X.

22. U.S. CONST. art. I, § 8, cl. 3.

23. U.S. CONST. art. VI, cl. 2.

24. *New York v. United States*, 505 U.S. 144, 149 (1992) (“[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.”); *Printz v. United States*, 521 U.S. 898, 935 (1997) (“Congress cannot circumvent that [the rule of *New York*] by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”).

In *Printz v. United States*, after saying that that “there is no constitutional text speaking to this precise question,”²⁵ Justice Scalia did turn to specific historical materials directly on point. Unfortunately, those materials led more to the conclusion Scalia did not favor—that Congress could, when exercising its enumerated powers, require the states to help implement federal laws—than the conclusion Scalia actually adopted.

Alexander Hamilton addressed the commandeering issue in the Federalist papers and wrote that “the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws.”²⁶ Scalia’s response to this piece of historical evidence was singularly unpersuasive. He suggested that if this quote meant what it seems to say about the commandeering issue, then states would have to help implement federal law even when not asked, an absurd result.²⁷ Of course, no one, not the federal government nor the dissenting Justices nor any scholar made this, as Scalia says, absurd argument.

Scalia also suggested that Hamilton’s rule would be inconsistent with the Court’s holding in *New York*, a truly circular argument given that many believe *New York* was wrongly decided. Justice Stevens was far more persuasive when he pointed out, “it is hard to imagine a more unequivocal statement that state judicial and executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers.”²⁸ This one statement by Hamilton of course does not resolve the issue, but it is the most relevant history on point and should have shifted the burden of proof to those Justices who reached the contrary conclusion, at least for those judges who profess to abide by the dictates of originalism.

Despite two Supreme Court cases on the subject, neither Justice Scalia nor Justice Thomas have come up with a shred of historical evidence that would contradict the clear meaning of the Tenth Amendment that, when Congress exercises its enumerated powers, its authority is supreme unless contradicted by another textual limitation. They did come up with numerous policy arguments for their non-textual anti-commandeering rule, but those should be a last resort to Justices who believe that textual and historical analysis are the only dispositive methods of constitutional

25. *Printz*, 521 U.S. at 905.

26. THE FEDERALIST NO. 27, at 223 (Alexander Hamilton) (John C. Hamilton ed., 1885).

27. *Printz*, 521 U.S. at 899.

28. *Id.* at 947–48 (Stevens, J., dissenting).

interpretation. Perhaps this anti-commandeering holding is the best normative rule governing the relationship between state and federal power, but it is a living, breathing rule nonetheless.

THE ELEVENTH AMENDMENT

There is perhaps no better example of how Justices Scalia and Thomas ignore clear text and relevant history when it suits their purposes than their interpretations of the Eleventh Amendment, which provides:

[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State.²⁹

The Eleventh Amendment quite obviously bars any suit, whether for damages or an injunction, against a state by citizens of “another” state. Both Justices Scalia and Thomas, however, have interpreted this language to bar lawsuits by citizens of a state against their home state.³⁰ In other words, they have taken the word “another” and twisted it to mean “the same.” They engaged in this fancy word play despite the beliefs of four modern Justices that the Amendment only bars suits against states by citizens of a different state, consistent with the clear text.³¹ Obviously, they must have been convinced by some pretty clear history to so distort unambiguous text.

In Justice Scalia’s only discussion of this issue, he relies not on the original meaning of the Eleventh Amendment to support the twisted reading but instead on *Hans v. Louisiana*,³² a case decided by the Supreme Court in 1890 (ninety-five years after the amendment was ratified), which adopted that bizarre reading of the Eleventh Amendment with little analysis. Of course, Justice Scalia has not allowed *stare decisis* concerns to block other votes to overturn important precedents, but that is not even the main point. The only Justice (Souter) who has ever embarked on a detailed analysis of the original meaning of the text of the Eleventh Amendment, and the reasons why *Hans* decided the case in the counter-textual way it did, has demonstrated that there is no evidence that the people who ratified the Eleventh Amendment would have interpreted it to

29. U.S. CONST. amend. XI (emphasis added).

30. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54–57 (1996).

31. *Id.* at 100–02 (Souter, J., dissenting).

32. 134 U.S. 1 (1890).

block federal question lawsuits against states brought by citizens of other states.³³ He also argued that the framers would never have associated the doctrine of sovereign immunity with federal question lawsuits against the states because in such cases, the federal government, not the states, is the “sovereign.” Neither Scalia nor Thomas has responded to Justice Souter’s treatise-like discussion of this issue, nor have they put forward persuasive evidence suggesting the Eleventh Amendment was intended only as one form of sovereign immunity (among other non-textual pre-constitutional principles) protecting the states from lawsuits.

When Justices who say they are committed to text and history change the meaning of a clear word like “another” to the word “same,” affecting numerous civil rights statutes and other federal laws making it much more difficult for Congress to hold states accountable in federal court for violations of federal law, the burden of proof surely is on those Justices to justify their departure from their own doctrinal philosophy—a burden they have not met. Maybe our country is better off if states cannot be sued by citizens of other states for money damages in federal court, just as maybe the anti-commandeering rule adopted in *New York* and *Printz* may strike the proper balance between state and federal powers, but the justifications for these limitations on congressional power have been based on policy concerns, not on text or history. For Justices Scalia and Thomas, as is true for all Supreme Court Justices, these policy concerns should be fair game when trying to apply the majestic phrases in the Constitution to modern problems. What is not fair, however, is for these Justices to sternly lecture us (and other Justices), about the importance of sticking to text and history when they, whenever they deem it important enough, also stray from those principles.

CONCLUSION

Justices Scalia and Thomas have voted for broad rules limiting congressional power to enact campaign finance reform, to commandeer state legislatures and executives to help implement federal law, and to allow lawsuits against the states for money damages by citizens of other states. They also have adopted a rule that would prohibit any governmental official anytime and anywhere from using racial preferences to help foster greater racial equality. They have consistently failed,

33. *Seminole Tribe of Fla.*, 517 U.S. at 110 (Souter, J., dissenting) (“The history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen–State Diversity Clauses.”).

however, to justify these broad rules from a textual or historical perspective, and to adequately address historical evidence supporting different conclusions than those they reach. They may be good rules, and they may promote better relationships between the state and federal governments, and among the races, but if so, that is true because the Justices have made the old Constitution, and what it meant to those who ratified it, a new, flexible, and breathing document. It turns out that, in the hands of Justices Scalia and Thomas, the Constitution is not “dead, dead dead,” but very much alive and kickin.’