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PREFACE

This book represents an attempt to articulate the contours of Justice Antonin Scalia's understanding of constitutional and statutory interpretation and the role of the Court. I rely heavily on Scalia's majority opinions, concurring opinions, and dissents written during his nineteen years of service on the Supreme Court. Numbering over 600, Scalia's opinions are carefully wrought, passionately argued, highly principled, and filled with well-turned phrases. They reveal him to be an eloquent defender of a text-and-tradition approach—an "original-meaning" jurisprudence that accords primacy to the text of the Constitution or the statute being interpreted and that declares it to be the duty of the judge to apply that text when it is clear or the specific legal tradition flowing from that text (i.e., what it meant to the society that adopted it) when it is not.

My intention in this book is to understand Scalia as he understands himself. My focus is on his arguments and words. By a careful analysis primarily of his Supreme Court opinions (but also of his Court of Appeal opinions for the D.C. Circuit, his major law review articles as a law professor and judge, and his provocative essay entitled "Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in *A Matter of Interpretation*[1]), I attempt to state affirmatively his understanding of such key structural arrangements as separation of powers and federalism and such key constitutional provisions as the Commerce Clause of Article I, § 8; the Suspension Clause of Article I, § 9; the Take Care Clause of Article II, § 3; the judicial power as spelled out in Article III, § 2; the Due Process Clauses of the Fifth and Fourteenth Amendments; the Free Speech and Free Press Clauses and the Religion Clauses of the First Amendment; the criminal procedural provisions of Amendments Four through Eight; the protection of state sovereign immunity in the Eleventh Amendment; the Equal Protection Clause of § 1 of the Fourteenth Amendment; and Congress's enforcement powers as granted in § 5 of the Fourteenth Amendment.

I concentrate primarily on the opinions that Scalia himself has written. Although he insists that, to his knowledge, he has never joined an opinion in which he has not agreed with both the holding and the reasoning of that opinion,[2] a book that addresses all the opinions he has joined would no longer be a book on Scalia but on the overall work of the Rehnquist Court. For the same reason, I

do not focus particularly on the extensive legal literature that Scalia's tenure on the Court has generated; for the most part, that literature explores Scalia's views on particular trees rather than his understanding of the forest as a whole.

It would be fair to say that this book is a generally sympathetic account of Scalia's original-meaning jurisprudence. Since his appointment to the Supreme Court, he has been remarkably consistent in his approach to questions of constitutional and statutory interpretation, and his opinions have provided considerable instruction on what it means to be a principled and intelligent textualist. Scalia has occasionally drifted from his text-and-tradition moorings on such important matters as state sovereign immunity, Congress's power under § 5 of the Fourteenth Amendment, the incorporation doctrine, and retroactive application of criminal procedural guarantees; when he has done so, I am quick to point this out. In fact, I find that his defense of both constitutional structure and constitutional liberties is invariably most ardent when most textually based. These occasional departures, however, serve only to highlight his overall consistency of approach and to remind the reader of the jurisprudential commitments of one of the Court's most intellectually able justices.

I wish to acknowledge my gratitude to Judge Susan A. Ehrlich of the Arizona Court of Appeals and Professor R. Shep Melnick of Boston College for their careful reading of the entire manuscript and for their valuable substantive and stylistic recommendations, which have made it a much better book; to the Earhart Foundation for its financial support; to Claremont McKenna College for a faculty research grant and time off to complete the manuscript; to my wife, Professor Constance Rossum of the University of LaVerne, for her encouragement and thoughtful editorial suggestions; and to Joan Sherman, copyeditor; Susan McRory, senior production editor; Susan Schott, assistant director and marketing manager; and Fred Woodward, director, who have made my association with the University Press of Kansas so pleasant and rewarding.

Ralph A. Rossum
Claremont, California
July 25, 2005

Notes

1. Antonin Scalia, A *Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997).
2. Personal interview with Justice Antonin Scalia, Washington, D.C., June 11, 2003.

Chapter One

Introduction

On June 17, 1986, Antonin Scalia—at the time a judge on the U.S. Court of Appeals for the District of Columbia Circuit—was nominated by President Ronald Reagan to serve as an associate justice of the U.S. Supreme Court. On September 17 (Constitution Day), he was confirmed by the Senate by a vote of ninety-eight to zero, and he took his seat nine days later. During his subsequent years on the high bench, the gregarious, poker-playing, opera-loving former University of Chicago law professor has emerged as the Court's most outspoken, intellectually interesting, high-profile, and colorful member.

"On a bench lined with solemn gray figures" who often sit "as silently as pigeons on a railing," Scalia has been described as standing out "like a talking parrot."[1] He relishes the cut and thrust of debate and has institutionalized the practice of hiring, and then carefully listening to, a "counter-clerk" with liberal views at odds with his own and those of his other three clerks as a means of sharpening his thinking.[2] With a distinctly aggressive style of questioning that is by turns testy, confrontational, provocative, and witty, he frequently asks questions during oral argument that are at once intellectually demanding and laced with impish humor. On one occasion, he told a flustered attorney who was frantically searching his brief for information that Scalia had requested, "Just shout 'Bingo' when you find it." On another occasion, he told an attorney who was all too eager to reserve the remainder of his time for reply, "You've got to be kidding."

He is an equally colorful and incisive writer of opinions that are carefully wrought, powerfully argued, highly principled, and filled with well-turned phrases. He has penned many memorable lines; what follows are only four examples, each of which provides insight into his textualist approach and understanding of the role of the Supreme Court:

> The Court transforms the meaning of § 2, not because the ordinary meaning is irrational, or inconsistent with other parts of the statute, but because it does not fit the Court's conception of what Congress must have had in mind. When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but

> we poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning.[3]

> 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.[4]

> [N]o government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.[5]

> Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue.[6]

Scalia is an eloquent defender of textualism—an "original-meaning" interpretive approach that accords primacy to the text and tradition of the document being interpreted and that declares that the duty of the judge is to apply the textual language of the Constitution or statute when it is clear and to apply the specific legal tradition flowing from that text (i.e., what it meant to the society that adopted it) when it is not.[7] He is an equally fierce critic of judicial activism and what he terms the "Living Constitution"—an interpretative approach asserting that the meaning of a law "grows and changes from age to age, in order to meet the needs of a changing society" and that it is appropriate for the judge to "determine those needs and 'find' that changing law."[8] Scalia's majority, concurring, and dissenting opinions—now numbering over 600[9]—are uniformly reflective of his textualist jurisprudence concerning how the Constitution, statutory law, and administrative regulations are to be interpreted. They have also had a profound impact on the overall work product of the Supreme Court. Ronald Dworkin, professor of law at New York University and professor of jurisprudence at Oxford University and a critic of Scalia, admits that, as a result of Scalia's persuasive and persistent arguments, "we are all originalists now." Mark Tushnet of the Georgetown University Law Center concurs: "Before Scalia, until the late '80s, the justices would issue a ruling and say, 'Here is why our opinion makes sense,' and then

support it with some law and history. But now everyone is much more conscious about looking at what the text says—and quite often less conscious about how that might fit into a social or practical context."[10]

Scalia's Pre-Judicial Life

Antonin ("Nino" to his family and friends) Scalia was born on March 11, 1936, in Trenton, New Jersey, the only child of S. Eugene Scalia and Catherine Panaro Scalia. His father, who was born in Sicily and emigrated to the United States as a young man, was a professor of Romance languages. His mother, born to Italian immigrant parents, was a schoolteacher. The appointment of Antonin Scalia, the first justice of Italian heritage, was proclaimed by many as an example of the fulfillment of the American dream.

When Scalia was five years old, his father joined the faculty of Brooklyn College, and his family moved to Elmhurst, a section of Queens, New York. He initially attended public schools in Queens and later St. Francis Xavier, a military prep school in Manhattan, from which he graduated as valedictorian. It is a reflection of how much things have changed in American society over the past half century that he was able, without complaint or alarm, to carry his military rifle with him daily on a crowded subway as he traveled back and forth between his home in Queens and his school in Manhattan.[11]

Scalia's academic success continued at Georgetown University, from which he received his AB summa cum laude in history and graduated as valedictorian in 1957. Scalia went on to Harvard Law School, where he served as notes editor of the *Harvard Law Review* and from which he received his LLB magna cum laude in 1960. After graduation, he traveled in Europe for a year as a Sheldon Fellow of Harvard.

While at Harvard, Scalia had met and become engaged to Maureen McCarthy, an English major at Radcliffe College and the daughter of a Massachusetts physician. They were married on September 10, 1960, and have nine children: Ann Forrest, Eugene, John Francis, Catherine Elisabeth, Mary Clare, Paul David, Matthew, Christopher James, and Margaret Jane. Their marriage has been strengthened by their deep faith in Roman Catholicism.[12]

Scalia began his legal career in 1961 as an associate of the law firm of Jones, Day, Cockley & Reavis in Cleveland, Ohio. A highly unusual scene during his interview for the position provides a window into his personality. James T. Lynn, a former partner at the firm, told the *New York Times* at the time of Scalia's nomination to the Supreme Court that, at a party held for potential recruits at Lynn's home, Scalia immediately made an impression upon eight or so senior partners by engaging them in an all-night debate on Sunday blue laws, which Scalia passionately

defended and they all opposed. Lynn said: "He enjoyed taking a position with respect to an issue that was complicated to defend. It didn't bother him at all that here he was with these top partners in the firm."[13]

He was admitted to the Ohio Bar in 1962 and worked at Jones, Day in a number of different areas of law, including real estate, corporate finance, labor, and antitrust. Five years later, he left to become a professor of law at the University of Virginia. In 1971, he began a distinguished career in government service when he took leave from his academic post to serve as general counsel for the Office of Telecommunications Policy in the administration of President Richard Nixon. There, he successfully negotiated a major agreement among industry groups that provided the framework for the growth of cable television in the United States. From 1972 to 1974, he served as chairman of the Administrative Conference of the United States, an independent agency charged with the task of improving the effectiveness and efficiency of administrative processes in the federal government. In 1974, he was nominated by President Nixon to be assistant attorney general for the Office of Legal Counsel. Although the Watergate scandal forced Nixon to resign, Scalia was nonetheless confirmed by the Senate and remained in this position, as legal adviser to the president and the attorney general, under President Gerald Ford, who assigned him the task of determining the legal ownership of Nixon's tapes and documents. Scalia decided in favor of Nixon, concluding that Nixon had a property right in his presidential papers; however, the Supreme Court soon ruled against this conclusion. It was in this position that Scalia began to think more deeply about and articulate his understanding of the constitutional dimensions of the presidency in a scheme of separated powers—an understanding later reflected in his opinions in *Morrison v. Olson*,[14] *Lujan v. Defenders of Wildlife*,[15] and *Printz v. United States*.[16]

With Jimmy Carter's election as president, Scalia left government service to work as a resident scholar at the American Enterprise Institute. He also taught briefly at the Georgetown University Law Center before joining the faculty of the University of Chicago Law School. He stayed at Chicago from 1977 to 1982, leaving only to spend a year as a visiting professor of law at Stanford University. While teaching at Chicago, he also served as chairman of the American Bar Association (ABA) Section of Administrative Law from 1981 to 1982; he was also named chairman of the ABA Conference of Section Chairmen, a recognition by his peers of his leadership abilities. While at Chicago, he cofounded, with Murray Weidenbaum, *Regulation* magazine and served as its founding coeditor from 1977 to 1982. What is particularly noteworthy about Scalia's background prior to his service on the bench is his extensive experience in the practice of law, the teaching of law, "inside the Beltway" Washington politics, and ABA politics. When he became a judge, he knew how law is practiced, taught, and used for corporate, political, and constitutional objectives.

In 1982, Scalia received another chance to return to public service. In July, President Reagan appointed him to the U.S. Court of Appeals for the District of Columbia Circuit, widely considered second in importance only to the Supreme Court. He was confirmed uneventfully in early August. At the time, he was described by the *New York Times* as a "politically conservative academic with impeccable scholarly credentials" and "a reputation for exceptional intellectual ability"[17] and by the *Washington Post* as having "been a co-editor of *Regulation*, a publication that keeps a critical eye on government rulemaking for the American Enterprise Institute, a conservative think tank. Scalia's area of expertise is administrative law, which deals with interpretation of federal regulations, and constitutional law."[18]

Scalia's Appellate Jurisprudence

Once on the bench, Scalia developed the reputation of being a well-prepared, amiable colleague who worked hard and thoroughly enjoyed using oral argument as a vehicle for debating questions of law. During his four years on the D.C. Circuit, he wrote 121 signed opinions: 91 majority opinions, 5 concurring opinions, 18 dissents, and 7 opinions concurring in part and dissenting in part. Since the bulk of that court's caseload involves review of complex federal regulations made by government agencies whose meanings are vigorously contested by affected parties, it is not surprising that in 103 of these opinions, he addressed various aspects of administrative law; 7, however, touched on freedom of speech and the press, 6 on criminal procedure, and 5 on questions of racial discrimination and equal protection.

His appellate opinions plainly revealed his view of the role of the federal judiciary and displayed his consistent adherence to the principles of judicial restraint. They sketched the outlines of the textualist jurisprudence that he would fully elaborate once he was on the Supreme Court.

Scalia on Standing

The "cases and controversies" language of Article III of the U.S. Constitution prevents federal courts from becoming "forums for the ventilation of public grievances" by requiring that legal questions be presented to the courts only "in a concrete factual context."[19] For a party to be able to invoke judicial authority, i.e., to have "standing," it must show, at a minimum, that it personally suffered some actual or threatened injury from the defendant's conduct. In one of his first cases after his appointment, *Community Nutrition Institute v. Block*,[20] Scalia showed his keen interest in keeping the constitutional standards for standing high; he dissented from that part of the majority opinion that conferred standing on three individual consumers of milk who were concerned about the price of fluid milk and

who were seeking to challenge the manner in which reconstituted milk was regulated under milk-market orders adopted pursuant to the Agricultural Marketing Agreement Act (AMAA). He declared that he did not believe that a "class as generalized as the one here (viz., all consumers of fluid milk products—which cannot exclude many of the nation's households) can be found" to have standing;[21] they had only a "generalized grievance" about how the Department of Agriculture, through its implementation of the AMAA, was shifting costs from milk producers to milk handlers and therefore ultimately to milk consumers. For Scalia, it was inappropriate for the Court to address this kind of generalized harm grievance; as he declared, "Governmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many." Then introducing an argument upon which he would elaborate at length once he was on the Supreme Court,[22] he continued, "Thus, for such matters it is less likely that Congress intended the creation of private attorneys general to supplement, through the courts, the President's primary responsibility to 'take care that the laws be faithfully executed.' "[23]

Scalia's ability to connect the question of standing to the principle of separation of powers was evident in *Moore v. U.S. House of Representatives*,[24] in which eighteen members of the House of Representatives for the Ninety-seventh Congress sued the House and Senate in the District Court for the District of Columbia seeking a declaratory judgment that the Tax Equity and Fiscal Responsibility Act of 1982 was unconstitutional because it originated in the Senate in contravention of the Origination Clause of the U.S. Constitution.[25] The district court dismissed the complaint on the ground that the legislators lacked standing. They appealed to the D.C. Circuit, which held that, although the appellants did in fact have standing to sue, they would nevertheless be denied declaratory relief for their claim under the doctrine of remedial discretion, a doctrine that "permits the court to exercise judicial self-restraint in particular matters intruding upon a coordinate branch of government."[26] Scalia concurred only in the judgment because, as he said, "while agreeing that we should abstain from deciding this dispute, I view that abstention to be the result not of our discretion but of constitutional command. As the District Court correctly found, these plaintiffs have no standing to press their grievance before this Branch."[27]

Scalia formulated what he regarded as "the only test of congressional standing that is both consistent with our constitutional traditions and susceptible of principled application (*i.e.*, an application undistorted by the *ad-hoc* ery of 'remedial discretion')." That test has "as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch

disputes through the system of checks and balances brings forth a result that harms private rights, it is no part of our constitutional province, which is 'solely, to decide on the rights of individuals.'" That principle, he continued, "is reduced to meaninglessness, and the system of checks and balances replaced by a system of judicial refereeship, if the officers of the political branches are deemed to have a personal, 'private' interest in the powers that have been conferred upon them (whether specifically or vaguely) by Constitution or statute." For Scalia, standing required something more: "Unless those powers have been denied in such fashion as to produce a *governmental result* that harms some entity or individual who brings the matter before us, we have no constitutional power to interfere."[28]

In *United Presbyterian Church v. Reagan*,[29] Scalia wrote a unanimous opinion affirming a district court's dismissal of a suit for lack of standing brought by various political and religious organizations challenging the legality of a number of features of President Reagan's Executive Order No. 12333, entitled "United States Intelligence Activities." The organizations asserted that the order violated the principle of separation of powers because it was promulgated without congressional authorization and that various of its provisions on their face violated their First Amendment rights of freedom of speech, political belief, association, and free exercise of religion, despite the fact that the order prescribed that nothing contained in it "shall be construed to authorize any activity in violation of the Constitution or statutes of the United States." The plaintiffs claimed they had standing to challenge this order because it caused them to suffer the "harm of a chilling effect,"[30] in that they were likely to refrain from engaging in various constitutionally protected activities out of fear that such activities would cause them to be targeted for surveillance under the order.

Scalia agreed with the district court that the plaintiffs' "alleged grievances [were] insufficient to satisfy the injury-in-fact standing requirement imposed by Article III of the Constitution."[31] He noted that the problem with their attempt to rely upon the harm of a "chilling effect" to establish standing was that "they have not adequately averred that any specific action is threatened or even contemplated against them." Harm cannot be merely speculative. As he wrote, "It must be borne in mind that this order does not *direct* intelligence-gathering activities against all persons who could conceivably come within its scope, but merely *authorizes* them." He drove the point home with an analogy: "To give these plaintiffs standing on the basis of threatened injury would be to acknowledge, for example, that all churches would have standing to challenge a statute which provides that search warrants may be sought for church property if there is reason to believe that felons have taken refuge there. That is not the law."[32]

Scalia's last major circuit court discussion of standing was in his dissent in *Center for Auto Safety v. National Highway Traffic Safety Administration* [*NHTSA*].[33]

The Center for Auto Safety and three other nonprofit consumer organizations working to promote energy conservation challenged the 1985 and 1986 model years' mandatory fuel economy standards for light trucks set by the NHTSA pursuant to the Energy Policy and Conservation Act of 1975. They alleged that the NHTSA had violated the act's requirement that the agency designate standards at "the maximum feasible average fuel economy level" and that it had instead given impermissible weight to shifts in consumer demand toward larger, less fuel-efficient trucks. The threshold question was, of course, standing. What specific harm had they suffered by the NHTSA's standards? The majority of the panel had no difficulty whatsoever providing an answer: "[T]he petitioners plainly have standing to bring this action in a representative capacity for members of their organizations. Their members have suffered injury-in-fact because the vehicles available for purchase will likely be less fuel efficient than if the fuel economy standards were more demanding. This injury can be traced to NHTSA's rulemaking and is likely to be redressed by a favorable decision. Thus, all of Article III's requirements for standing are met."[34]

Scalia began his dissent by declaring that "[i]f the injuries hypothesized by the interest groups suing in the present cases are sufficient, it is difficult to imagine a contemplated public benefit under any law which cannot—simply by believing in it ardently enough—be made the basis for judicial intrusion into the business of the political branches." He described the majority's decision not as "judicial vindication of private rights" but rather "judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied."[35] He rejected as insufficient for Article III purposes the "petitioners' bald assertion, unsupported by concrete factual allegations, that unidentified members of their organizations may be unable to purchase unidentified types of fuel-efficient light trucks or light-truck model options"; the complainants were not alleging facts establishing that they would suffer "a concrete, palpable, and distinct injury."[36] He also addressed another element of standing that he would later emphasize once on the Supreme Court: redressability.[37] He observed that a court order to the NHTSA requiring the agency to raise the mandatory fuel economy standard for light trucks would not necessarily redress the plaintiffs' "alleged inability to purchase unidentified types of light trucks or light-truck model options" because the light truck manufacturers might prefer to "pay noncompliance fines (and perhaps to pass them through to customers) rather than take drastic measures to comply with the standard."[38]

Judicial Deference to Administrative Discretion

The fact that a party may have standing to obtain judicial review of agency action does not assure that the courts will provide review. Under the Administrative Pro-

cedure Act (APA), although final agency action is generally subject to judicial review, it is not when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[39] Scalia's appellate decisions displayed his emerging textualism and his refusal to read statutes as providing judicial review when they did not. These opinions showed his aversion to judicial policymaking; his understanding that it was the constitutional duty of the executive branch, and not the courts, to enforce the law; and his conviction that, absent clear textual language to the contrary, the courts should defer to agency action.

Gott v. Walters involved the first of the APA's two exceptions to judicial review.[40] This case involved certain methodologies used by the Veterans Administration (VA) to help resolve claims of injury from exposure to radiation during military service. The complaint was that the methodologies were promulgated and adopted without complying with the rule-making procedures and publication requirements of the APA. Scalia wrote the majority opinion that instructed the district court to dismiss the case for lack of jurisdiction, finding that the APA's general language on judicial review did not apply because the veterans' benefits statute clearly stated: "[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."[41] In light of that language, he held that the courts were barred from considering the appellee's complaint.[42]

Judge Patricia Wald dissented; she could not "believe that [the statute] was intended to allow the VA to defy with impunity the traditional, government-wide constraints on agency action."[43] Scalia responded that what was "truly incomprehensible to the dissent" was not "the nonreviewability of rules" but rather "the whole concept of a system of administrative justice, even in a field of government benefits, without general judicial supervision." However, he said, that concept was "precisely what the veterans' benefit laws enacted, plainly rejecting the judicialization, and even the lawyerization, of this field." His conclusion revealed both this commitment to a textualist reading of statutes and his sense of the proper role of the judiciary: "[O]ur function in cases such as this is not to devise plausible ways of depriving statutory language of its apparent meaning, but rather to give honest effect to the 'fairly discernible' intent of Congress to preclude judicial review."[44]

Chaney v. Heckler involved the APA's second exception to judicial review of agency action,[45] namely, action "committed to agency discretion by law." The case dealt with what Scalia termed "the implausible result" that the Food and Drug Administration (FDA) was required to exercise its enforcement power to ensure that states only used drugs that are "safe and effective" for human execution.[46]

The plaintiffs were eight prison inmates under sentence of death in Texas and Oklahoma who filed suit in U.S. District Court for the District of Columbia, claiming that the FDA had arbitrarily and capriciously refused to prevent the use of drugs not proven safe and effective as a means of human execution. Their petition to the FDA asserted that use of barbiturates and paralytics as capital punishment devices, without prior FDA approval, violated the "new drug" and "misbranding" provisions of the Food, Drug, and Cosmetics Act.[47] In response, the FDA asserted that its jurisdiction did not extend to the regulation of state-sanctioned use of lethal injections and that, even if it did, the FDA would, as a matter of its inherent enforcement discretion, undertake no investigatory or regulatory activity. The district court granted summary judgment against the plaintiffs' challenge to the FDA's refusal to act. On appeal, the D.C. Circuit reversed, finding that "the FDA arbitrarily and capriciously refused to exercise its regulatory jurisdiction."[48]

Scalia dissented, declaring that "[g]enerally speaking, enforcement priorities are not the business of this Branch, but of the Executive—to whom, and not to the courts, the Constitution confides the responsibility to 'take Care that the Laws be faithfully executed.'" For him, "[p]reserving that sound allocation of responsibility was one of the purposes, and has been perhaps the primary application, of that provision of the Administrative Procedure Act which excludes from judicial review 'agency action . . . committed to agency discretion by law.'"[49] He complained that his colleagues' determination that there existed a "general presumption of reviewability" of the FDA's enforcement decisions "distort[ed] the law and usurp[ed] the authority of the Executive Branch." They distorted the law by rendering "quite literally meaningless" the APA's express exclusion of judicial review in those cases in which "agency action is committed to agency discretion by law" by having that language turn on "such pragmatic considerations as whether judicial supervision is necessary to safeguard plaintiffs' interests, whether judicial review will unnecessarily impede the agency in effectively carrying out its congressionally assigned role, and whether the issues are appropriate for judicial review." These pragmatic considerations, he continued, could be summarized as follows: "[W]e intervene when we think it a good idea."[50] And they "usurped the authority of the Executive Branch" by assuming that judges are "the only public officials endowed with intelligence and worthy of trust" and by ignoring that "our system of laws has committed the relative evaluation of public health concerns to others."[51] He concluded by criticizing his colleagues for inappropriately interjecting themselves into the debate over capital punishment. The Court majority attributed the FDA's refusal to exercise enforcement discretion to its wish not to become "embroiled in an issue so morally and constitutionally troubling as the death penalty."[52] Scalia suggested a different reason: "[T]he agency was properly refusing to permit its powers and the laws it is charged with enforcing from being

wrongfully enlisted in a cause that has less to do with assuring safe and effective drugs than with preventing the states' constitutionally permissible imposition of capital punishment." He declared that the court "should have done the same. It is our embroilment, rather than the FDA's abstention, that is remarkable."[53]

Scalia's Opposition to the Use of Legislative History

Scalia's appellate opinions also revealed another aspect of his emerging textualist jurisprudence: his opposition to the use of legislative history to ascertain legislative intent. For example, in his concurring opinion in *Hirschey v. Federal Energy Regulatory Commission* [*FERC*],[54] he seized on a footnote in the majority opinion that referred to a statement in a House committee report that the 1985 amendments to the Equal Access to Justice Act (EAJA) "ratified" an earlier D.C. Circuit decision concerning the granting of attorney's fees under EAJA, and he launched into an attack on the use of such evidence, according it "the weight of an equivalently unreasoned law review article." He would have accorded it "authoritative" weight only if he had found it "reasonable" to assume that the views expressed in the report were "reflected in the law which *Congress* adopted." But, he continued, "I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill."[55] He stressed to his colleagues that the time had come for them "to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription." Scalia was doubly concerned that, in the instant case, the committee report dealt not with the meaning of statutory language drafted by the committee itself but rather with language drafted by an earlier Congress that was simply "reenacted, *unamended*" in the 1985 law. For him, the question before the court should have been resolved "not on the basis of what the committee report said, but on the basis of what we judge to be the most rational reconciliation of the relevant provisions of law Congress had adopted." Even then, the court might not have reconciled them as he would, but he would at least have "had the comfort . . . of thinking that the court was wrong for the right reason."[56]

For Scalia, the use of legislative history can "mask the underlying choices made by the judge in construing a statute" and can confer "a false impression that elected representatives actually considered and intended the result reached by the judge."[57] It can also upset delicate legislative compromises that "are best found" in the actual language of the statute."[58] Scalia underscored the importance of this last point in his dissent in *Illinois Commerce Commission v. Interstate Commerce Commission* [*ICC*], in which the majority held that the Staggers Rail Act

of 1980 authorized the ICC to preempt the regulation of intrastate railroad rates. The court did so in large part because of a statement in the conference report that declared that "the Act preempts state authority over rail rates, classifications, rules and practices."[59] But as Scalia pointed out, the Staggers Act was filled with language indicating that "pro- and anti-preemption legislators" had reached a "compromise between . . . total federal preemption and . . . continued deferral to traditional state regulation of intrastate carriage."[60] By relying on legislative history and giving the conference report more weight than the actual language of the statute, Scalia declared that the majority had engaged in a "betrayal of that compromise."[61] And for him, betrayals of this kind threaten the very integrity of the legislative process. As he well understood, given his extensive knowledge of Washington politics, compromise is essential to the legislative process, and yet, "[l]egislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored."[62]

In the Veterans Administration case, *Gott v. Walters*, Scalia also addressed the use of what he considered to be a still more problematic form of legislative history: a form that "has become known (with a disappointing lack of sense for the paradoxical) as 'subsequent legislative history'—i.e., legislative 'history' that postdates the statute in question."[63] In her dissent, Judge Wald argued for judicial review in part because of statements made by a senator during debate over a subsequent veterans' benefit law, indicating that, in the senator's estimation, the statute at issue in *Gott* had already granted judicial review.[64] Scalia responded that reliance on such after-the-fact remarks would allow advocates of judicial review "to achieve the result they were unable to obtain through the legislative process."[65]

Scalia's Narrow Reading of Freedom of Speech and Press

Scalia's circuit appellate opinions concerning freedom of speech and press revealed a judge who was guided only by the text and "historical practices" permitted by the First Amendment,[66] opposed to the "constitutional evolution" of its provisions, and convinced that the solutions to the "modern problems it poses" were "better sought through democratic change than through judicial pronouncement."[67] One of his very first appellate opinions was his dissent in *Community for Creative Non-Violence* [*CCNV*] *v. Watt*,[68] in which the D.C. Circuit held, in a six-to-five en banc decision, that a general ban on camping in the memorial core area parks of the District of Columbia could not be invoked to prevent camping that constituted an integral and expressive part of a demonstration otherwise protected by the First Amendment. CCNV sought a permit to conduct a round-the-clock demonstration, commencing on the first day of winter, on the Mall and in Lafayette Park in Washington, D.C., in order to impress upon the Reagan administration, the Congress,

and the public the plight of the poor and the homeless. The National Park Service granted CCNV permits to set up symbolic campsites and to maintain a twenty-four-hour presence there but denied the participants a permit to sleep at the campsites, based on its anticamping regulations. CCNV sued; it claimed, and a majority on the D.C. Circuit agreed, that this prohibition struck at the core message the demonstrators wished to convey—that homeless people had no permanent place to sleep—and represented an unconstitutional restriction on their freedom of expression. Scalia filed a spirited dissent, denying "that sleeping is or can ever be speech for First Amendment purposes."[69] He found the majority decision to "endanger the great right of free speech by making it ridiculous and obnoxious, more than the Park Service regulation in question menaces free speech by proscribing sleep."[70]

Scalia started from the textualist premise that "speech" means "speech" and not all forms of expression. Otherwise, as he noted, it would have been unnecessary for those who drafted the First Amendment "to address 'freedom of the press' separately." For him, to confer free speech protections on all acts "conducted for the purpose of 'making a point' is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate."[71]

He readily acknowledged that there are occasions when "expressive conduct" must be protected: a law "directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." But, he insisted, the Park Service's refusal to grant a permit for camping and sleeping in D.C.'s memorial parks was not such an occasion because the Park Service's anticamping and antisleeping regulations were not directed at the communicative nature of that conduct. They proscribed camping and sleeping for a reason having nothing to do with those activities' communicative character. For Scalia, that was "the end of the matter so far as First Amendment guarantees are concerned."[72] He remarked that it was "a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding" that his statement was viewed as a "bold assertion."[73]

His next major First Amendment opinion was a dissent in the libel case of *Ollman v. Evans and Novak*.[74] Bertell Ollman, a Marxist political science professor at New York University, brought a defamation action against Rowland Evans and Robert Novak for their newspaper column criticizing him for using his faculty position to indoctrinate his students with Marxist revolutionary philosophy. The columnists quoted an unnamed political scientist who said that Ollman had "no status" within his profession and that he was "a pure and simple activist."[75] These statements led the administration at the University of Maryland to deny Ollman's

appointment as chairman of its Political Science Department. The D.C. Circuit, sitting en banc, rejected his defamation suit and voted six to five that these statements were not facts but rather protected expression of opinion under the First Amendment. Four of the six judges who voted against Ollman declined to join the court opinion by Judge Kenneth Starr and instead signed Judge Robert Bork's concurrence. In his dissent, Scalia focused his attention on that opinion.

Bork expressed concern that there had been in the preceding few years a "remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards" that was threatening "to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the First Amendment most certainly would not permit." He argued that the test for proving libel was becoming too easy to meet, and so he proposed an "evolution in doctrine" that would replace the old test with a new one[76]—one based on the "totality of circumstances" that would consider "the context in which the statement occurs" in order to "determine both its meaning and the extent to which making it actionable would burden freedom of speech or press." He acknowledged that the test he was proposing admitted "into the law an element of judicial subjectivity." But, he insisted, a totality-of-circumstances test for protecting free speech and press, with all of its attendant judicial subjectivity, was "better than no protection at all."[77] Moreover, he lashed out, any "judge who refuse[d] to see [these] new threats to an established constitutional value" and who refused to accept this "evolution in [constitutional] doctrine" was "fail[ing] in his judicial duty."[78]

Unsurprising for one opposed to the "Living Constitution" because of "its incompatibility with the whole antievolutionary purpose of a constitution,"[79] Scalia organized his dissent around Bork's call for a "continuing evolution of doctrine."[80] He argued, first of all, that there was no need for evolution in libel law; the existing test to prove libel,[81] he insisted, provided "ample protection against the entire list of horribles supposedly confronting the defenseless modern publicist."[82]

Next he argued that his colleagues should reject "the risk of judicial subjectivity present in an approach which embraces 'a continuing evolution of doctrine' " based on nothing more than "judicially perceived 'modern problems.' "[83] Scalia insisted that the identification of "modern problems" that need to be remedied is "quintessentially legislative rather than judicial business" because it is "such a subjective judgment" and depends on "personal assessments" of so many "sociological factors." The remedies should be legislative; they should "be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before."[84]

And he argued, finally, that when modern problems necessitate evolution of doctrine concerning libel law, those changes should come from the legislature rather than the courts. He used press shield laws as an example.

> The omnipresence of the modern press, the popularity of "investigative reportage," and the eagerness of many dissident groups actively to seek out press coverage, have with increasing frequency caused members of the press to be in possession of information regarding unlawful activity, necessary for the detection or prevention of crime. The [Supreme] Court was asked, as the concurrence asks us here, not to take a "wooden" or "mechanical" view of the First Amendment, and to proclaim that in modern circumstances it prevents the subpoena of such information. Of course the Court declined. And of course the problem has not gone unaddressed. Many states have enacted "press shield" laws . . . which approach the issue in a much more calibrated fashion than judicial prohibition could achieve.[85]

Another major free speech and press opinion written by Scalia was *In Re the Reporters Committee for Freedom of the Press*,[86] in which he denied that there is a First Amendment right of public access to court records pertaining to private civil actions prior to judgment. In this case, the Reporters Committee for Freedom of the Press appealed two district court orders delaying, until after trial and entry of judgment, the public's access to court records consisting of documents produced and depositions furnished by the officers of Mobil Oil; these documents and depositions were provided in the course of third-party discovery in a libel suit brought by the president of Mobil Oil against the *Washington Post* and used in connection with summary judgment and trial proceedings. This was an issue of first impression; as Scalia noted, "No Supreme Court decision deals with the precise issue of the public's First Amendment rights to court records in civil cases." The text of the First Amendment clearly did not resolve the issue, so Scalia turned for guidance to historical practice. He justified doing so because, if courts were governed by "neither the constraint of text nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential."[87]

After an exhaustive review of historical practice, Scalia found in the available authorities only "weak support" for a general rule prohibiting access to prejudgment records in private civil cases. But that was sufficient: "[W]hen laid beside our inability to find *any* historical authority, holding or dictum, to the contrary, they are more than enough to rule out a general tradition of *access* to such records." He could not "discern an historic practice of such clarity, generality and duration as to justify the pronouncement of a *constitutional rule* preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment," and for Scalia, that ended the matter.[88] Under the Constitution's scheme of separated powers, the question whether there should be such a rule was for the political branches to decide, not the courts.

One final First Amendment case needs to be mentioned. Scalia wrote the unanimous opinion for the D.C. Circuit in *Block v. Meese*,[89] in which the U.S. distributor and prospective exhibitors of three Canadian documentary films critical of Washington's nuclear-deterrence strategy and of its policy on acid rain challenged on First Amendment grounds the Justice Department's classification of these films as "political propaganda" under the Foreign Agents Registration Act. The plaintiffs argued that classifying these films as political propaganda expressed governmental disapproval of the ideas in question. Scalia rejected that claim. He did so because, he insisted, the term *political propaganda* did not express disapproval; not only had the term been applied to "material disseminated by our closest friends and allies (such as Canada)" but also "many specific items so classified have fostered policy positions consistently supported by the United States—for example, a film distributed on behalf of the Consulate General of Israel entitled *Plight of the Soviet Jewry: Let My People Go*." He also rejected the claim because even if the plaintiffs were correct in their assertion that the classification of their films as political propaganda constituted an expression of official government disapproval of the ideas in question, "neither precedent nor reason would justify us in finding such an expression *in itself* unlawful."[90] A rule that would exclude official criticism of ideas would lead, he noted, "to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's Germany, but not to denounce Nazism." He flatly rejected the premise that "the only subjects off-limits to the government are those as to which there is less than substantial unanimity among the people—thus permitting official positions on war heroism and motherhood, but excluding nuclear disarmament and acid rain." That distinction, he wryly observed, would raise "the intolerable prospect" that it is the proper role of the courts to decide "what ideas are sufficiently popular to be granted government support—the object being, presumably, to assure that only the ideas of insular minorities will suffer official disparagement."[91] He concluded by observing that the control of government expression "is no more practicable, and no more appealing, than control of political expression by anyone else."[92]

Scalia on Separation of Powers

In a per curiam opinion in *Synar v. United States*,[93] a three-judge district court panel presided over by Scalia held that the automatic deficit-reduction process established by the Gramm-Rudman-Hollings budget-balancing statute (officially known as the Balanced Budget and Emergency Deficit Control Act of 1985), under which the president was required to issue a sequestration order implementing the budget-reduction specifications of a report prepared by the comptroller general, was uncon-

stitutional on the ground that it vested executive power in the comptroller general, an officer removable only by Congress. Scalia was widely rumored to be the author of the per curiam opinion[94]—and for good reason: he was the only court of appeals judge on the panel; the opinion's lengthy treatment of the nondelegation doctrine, reliance on the Take Care Clause, and emphasis on the "technical provisions" of separation of powers have his fingerprints all over it;[95] and the biographical portrait of Scalia prepared by the Supreme Court Historical Society (which he has not requested that it correct) calls it a "Scalia opinion."[96]

The major argument for the plaintiffs was that when the Congress gave the comptroller general the power to make the economic calculations that determined the estimated federal deficit and hence the size of the required budget cuts, it engaged in an unconstitutional delegation of legislative power. The panel rejected that argument; it found that "through specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function."[97] What the panel found decisive instead was the fact that by assigning tasks that "cannot be regarded as anything but executive powers in the constitutional sense" to the comptroller general, a legislative branch official subject to removal only by Congress, the act violated Article II, § 3 of the Constitution, which charges the president alone with the obligation to "take care that the laws be faithfully executed."[98] The panel held that the Constitution flatly denies Congress the power to remove "an officer who actually participates in the execution of the laws," for "once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey."[99] The court noted that it "may seem odd" that "an important and hard-fought legislative program" such as the balanced budget act should be invalidated because of "the relative technicality of authority over the Comptroller General's removal," but in language that foreshadowed Scalia's discussion in *Plaut v. Spendthrift Farm*,[100] it declared that "the balance of separated powers established by the Constitution consists precisely of a series of technical provisions that are more important to liberty than superficially appears, and whose observance cannot be approved or rejected by the courts as the times seem to require."[101]

The court interestingly concluded by observing that although it had rejected the plaintiffs' argument based upon the doctrine of unconstitutional delegation, "the more technical separation-of-powers requirements we have relied upon may serve to further the policy of that doctrine more effectively than the doctrine itself." Since in two centuries the federal courts had only twice invoked unconstitutional delegation to invalidate legislation, the possibility of such invalidation, at least in modern times, was "not a credible deterrent against the human propensity to leave

difficult questions to somebody else."[102] The technical requirements of separation of powers were far more effective in that respect. Clearly anticipating Scalia's argument in his dissents in *Morrison v. Olson*[103] and *Mistretta v. United States*,[104] the per curiam opinion closed by suggesting that there have been "innumerable" instances in which Congress has been disinclined to delegate its legislative powers to others and has "chosen to decide a difficult issue itself because of its reluctance to leave the decision—as our holding today reaffirms it must—to an officer within the control of the executive branch."[105]

Scalia's Nomination and Confirmation as Associate Justice of the Supreme Court

During his first term in office, President Reagan was able to make only one appointment to the Supreme Court: in 1982, he named Sandra Day O'Connor to fill the vacancy created by the retirement of Justice Potter Stewart. As the 1984 election approached, speculation on what other justices might retire over the next four years and whom Reagan might appoint as their replacements if he were reelected began in earnest. Scalia was always mentioned, along with Robert Bork and Richard Posner.[106] With Reagan's landslide reelection, the speculation intensified,[107] and Scalia's role in *Synar v. United States* was seen as boosting his prospects for an appointment.[108] Then, on June 17, 1986, at a surprise news conference at the White House, President Reagan announced the retirement of Chief Justice Warren Burger,[109] the nomination of Associate Justice William Rehnquist to be chief justice, and the nomination of Scalia as associate justice to succeed Rehnquist.[110]

Initial press coverage of Scalia's nomination was uniformly positive; he was variously described as "intellectually brilliant," "highly qualified," "charming," "delightful," "an intellectually formidable advocate of conservative views and judicial restraint," and "energetic and very gregarious."[111] In-depth profiles followed, and they were equally laudatory. In one, he was called "one of the smartest, wittiest and most cogent stylists on the Federal courts, using a combination of rigorous logic, caustic irony and elegant rhetoric to skewer his opponents."[112] In another, his conservatism was characterized as consisting "of not allowing judges to place their stamp upon public policy."[113] By contrast, Rehnquist's nomination as chief justice was met with controversy and contention.

Rehnquist was a lightning rod for criticism and invective for several reasons: the fact that his confirmation in 1971 as associate justice had been controversial (at the time, he received as many negative votes, twenty-six, as any confirmed justice in U.S. history); the fact that he had served as an associate justice for sixteen years and had written hundreds of opinions, many in lone dissent, challenging the liberal activism that characterized much of the Burger Court's work; and the

fact that his engaging personality and powerful intellect were feared by many as likely to provide the leadership necessary to take the Supreme Court in a more conservative direction. His confirmation hearing was especially acrimonious; occurring the week before Scalia's, it was scheduled to last two days but in fact took four. The vote of the Judiciary Committee recommending Rehnquist's confirmation to the full Senate was 13 to 5. Debate in the full Senate was intense; it took five days and ended only after the Senate voted 68 to 31 in favor of a petition by the leadership to cut off further debate and bring the nomination to a vote. He was finally confirmed on a vote of 65 to 33, which, until then, was the highest number of negative votes received by a confirmed justice.[114]

The heavy guns fired on Rehnquist were never even trained on Scalia, even though he was widely considered to be as conservative as Rehnquist. Three factors account for that.

First, it helped a great deal that he was the first Italian American nominated to serve on the Supreme Court; even Robert Byrd of West Virginia, Senate minority leader at the time, saw that it was in his interest to invite Scalia, by then unanimously recommended for confirmation by the Senate Judiciary Committee, to join him at a state Italian heritage festival that year. By so doing, Byrd was named the event's "Honorary Italian of the Year," and Scalia was able to proclaim: "If and when I get there [to the Supreme Court], it should not just be an honor to all Italian-Americans, but to stand for just what kind of a country the United States is. My father came to this country when he was just 15, so I was the son of an immigrant and look where I am today."[115]

Second, unlike Rehnquist—who had already served on the Supreme Court and had voted on such controversial issues as abortion, affirmative action, and criminal procedure—Scalia refused to answer any questions about his views of these and other matters by saying that otherwise he could later be accused of not being impartial. This repeated refrain (although consistent with the approach taken by past nominees, including Justice O'Connor) frustrated the senators but effectively denied them an opening to attack his views.

And third, Scalia's critics knew that if they were successful in killing Rehnquist's nomination, they would succeed in killing Scalia's as well; if Rehnquist were rejected as chief justice, he would retain his seat as associate justice and there would be no position for Scalia to assume. His critics could attack Rehnquist and yet appear friendly to Scalia, thereby quelling the criticism that they were simply opposed to anyone Reagan would nominate while potentially killing the nomination of both.

Scalia's confirmation hearing was held on August 5 and 6, 1986. Scalia testified before the Senate Judiciary Committee on the afternoon and into the evening of August 5. Senator Joseph Biden, ranking Democrat on the committee, told

Scalia that compared with the fireworks at the Rehnquist hearing the week before, the proceedings were "pretty boring."[116] Seven recurrent themes emerged from Scalia's colloquy with the senators.

The first theme involved Scalia's refusal to answer all questions about his views on any constitutional question that might come before the Court. He refused even to answer whether he agreed with Chief Justice John Marshall's 1803 decision in *Marbury v. Madison*,[117] in which the Court asserted its power of judicial review—i.e., the power to declare unconstitutional acts of the other branches of the federal government.[118] The most dramatic refusal was his response to Senator Edward Kennedy, whose very first query was: "Judge Scalia, if you were confirmed, do you expect to overrule the *Roe v. Wade*?" Scalia calmly replied that it would be improper for him to answer that question. He explained why:

> Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.[119]

Scalia's repeated refusal to express an opinion on whether any of the existing law of the Supreme Court was right or wrong exasperated the senators.[120] Senator Arlen Specter expressed this frustration to him: "The question I have for you is how does a Senator make a judgment on what a Supreme Court nominee is going to do if we do not get really categorical answers to fundamental questions?" Scalia responded that the question was "very hard" only for "someone who does not have a track record," who has not written "opinions in the past dealing with the important features of the Constitution and of statutes," and who has not demonstrated "veneration for the important principles that you are concerned about." But, he continued, it was not hard at all in his case, given his four years on the court of appeals, his "extensive writings on administrative law and constitutional law" as a professor, and his "testimony and statements" when he was in the executive branch.[121] He continued by declaring that he had thought about "this issue a long time" as he was preparing to appear before the committee and that he had come to the following conclusion: if his answer to a question from Senator Specter or any other member of the committee "is obvious, then you do not need an answer, because your judgment of my record and my reasonableness and my moderation will lead you to conclude . . . [that] anybody that we think is not a nutty-nutty would have to come out that way." By contrast, if his answer to one of their questions "is not obvious, then I am really prejudicing future litigants." On balance,

he concluded, "the only safe position that I can take in conscience is to simply not say that there is any particular case regarding which I would absolutely vote against a litigant who urges a position that is contrary to it."[122]

A second recurrent theme was Scalia's rhetorical sophistication in parrying certain lines of inquiry. In response to Senator Charles Mathias's veiled suggestion that, since Scalia had "a very deeply held personal position" on the abortion question and had expressed his views in print on that matter, he "should recuse himself" from hearing any challenges to *Roe v. Wade*, Scalia stated, "It is not at all unusual for Justices to have to confront" cases about which they feel strongly concerning "the morality of the issue." He cleverly mentioned *United States v. Reynolds*,[123] in which the Supreme Court held that Congress did not violate the Free Exercise Clause of the First Amendment when it prohibited polygamy in the federal territories: "Now that was certainly a moral issue. The issue of monogamy for the Justices sitting on that case. They obviously—at least many of them—must have had religious views about the matter and they did not feel it necessary, those who had those views, to disqualify themselves."[124]

Another example of Scalia's deft employment of rhetoric was found in one of his explanations as to why he would not indicate his views about various Supreme Court cases (such as *Roe v. Wade*) that certain members of the committee wanted to consider settled. He pointed out that even *Plessy v. Ferguson*,[125] upholding as constitutional racial segregation, was "considered a settled question at one time, but a litigant should have been able to come in and say, 'It is wrong,' and get a judge who has not committed himself to a committee as a condition of his confirmation to adhering to it."[126] He put those who would protect *Roe* on the defensive by placing them in the same category as those who had protected *Plessy*.

A final example came when Scalia was criticized by Senator Paul Simon for being weak on the First Amendment because of his dissenting opinion in *Ollman v. Evans and Novak*. Scalia responded that he was being put in "a sort of damned-if-you-do-damned-if-you-don't situation. I could have been criticized as being against Marxists had I come out the other way. It was a suit by a Marxist against conservative columnists."[127]

A third recurrent theme during Scalia's testimony was his commitment to an original-meaning approach to constitutional interpretation and his rejection of the "Living Constitution." In response to several senators, Scalia made clear that "in any case, I start from the original meaning," that is, "the text of the document and what it meant to the society that adopted it." He declared that his textualist, original-meaning approach was part of his "whole philosophy, which is essentially a democratic philosophy that even the Constitution is, at bottom, a democratic document." He contrasted the words *original meaning* with *original intent* and said that if "somebody should discover that the secret intent of the framers was

quite different from what the words seem to connote, it would not make any difference" for him.[128] He confessed that he did not have "a fully framed omnibus view of the Constitution,"[129] and some of his comments made that clear. Despite his criticisms of Judge Bork's call for a "continuing evolution of doctrine" in *Ollman*, he volunteered that "there are some provisions of the Constitution," including the Cruel and Unusual Punishments Clause of the Eighth Amendment, "that may have a certain amount of evolutionary content within them," and he acknowledged that he had "always had trouble with [the constitutionality of] lashing."[130]

Although Scalia may not have developed "a full constitutional matrix" by the time of his nomination, he had clearly thought through many of the most difficult problems of treating the Constitution as so "evolvable" that "in effect a court of nine judges can treat it as though it is a bring-along-with-me statute and fill it up with whatever context the current times seem to require."[131] The "Living Constitution" approach to constitutional interpretation, he warned, allows the Court to employ especially the Due Process Clauses of the Fifth and Fourteenth Amendments to find contrary to "the most fundamental beliefs of our society" a practice "that was in existence when the Constitutional provision in question was adopted and is still in existence" today.[132] Yet judges have no guidance, other than their "own intuition, to say what are the deepest and most profound beliefs of our society." Speaking personally, he worried "that I am left with nothing to tell me what are our most profound beliefs except my own little voice inside. I do not want to govern this society on the basis of that."[133]

A fourth recurrent theme was Scalia's opposition to the use by courts of legislative history. He told a fairly incredulous Senator Charles Grassley that "Congress does not act in committee reports. I will say that flat out. Congress acts by passing a law." What the whole Congress intended, he insisted, was best found in the words it used rather than in statements "on the floor by a single Senator" or in committee reports. And thus, he explained to Senator Grassley, he avoided the use of legislative history in order to make "sure that we are not disenfranchising the Congress and getting you, as a member of the Senate, committed to a position which in fact you knew nothing about and would disagree with."[134] He went so far as to tell Senator Simon that if he "could create the world anew," he "would call all legislative history into question,"[135] and he was so bold as to say that his views on the matter were "the wave of the future."[136]

A fifth recurrent theme was Scalia's understanding of the problem of overbroad delegation of power by Congress. Scalia presented it not so much as a constitutional problem but as a democratic one. As he told Senator Kennedy, "The more specific Congress can be, the more democratic the judgment is, because if Congress is not specific, the judgment is made by the courts, and the courts are not democratic institutions."[137] Senator Grassley endeavored to enlist him as a defender

of the legislative veto by suggesting that Congress "cannot anticipate crises, and I hope you accept that it is unreasonable to expect Congress to do otherwise" and by speculating that, were the "Founding Fathers" alive "today," they would find the legislative veto "a fair and practical way to deal with bureaucracy." Scalia deftly sidestepped Grassley's entreaty by admitting that it was "conceivable that had they envisioned the kind of system that would develop, they would have made provision in the Constitution for a legislative veto." But, he noted, "they did not."[138]

A sixth theme was introduced when Senator Howell Heflin questioned Scalia about his "general philosophy of the role of the judiciary relative to federalism." Scalia's answers to most of the questions the committee posed to him were predictable and based on his appellate opinions; his answer to this question, however, was more illuminating, for he had written no previous opinions on federalism—not surprising given that he served on D.C. Circuit. He made it clear that he thought "the primary institution to strike the right balance" between the federal government and the states "is the Congress."[139] He described federalism in terms of line drawing and declared that it is "very hard" to find a clear line "between those matters that are appropriate for the States and those that are appropriate for the Federal Government." Difficult as that task may be, however, he insisted that "finding that line is much easier for a legislature than for a court," and he hinted that "the history of this century" had shown that the Supreme Court, after years of struggle, had appropriately come to that conclusion.[140] His steadfast refusal to answer questions about his views on any constitutional question that might come before the Court contrasted strikingly with his willingness to answer the question about whether he thought the courts should defer to Congress's decision of where to draw the line between federal and state power.[141]

Finally, a seventh recurrent theme was Scalia's understanding of freedom of speech and the press. Scalia's circuit opinions in *Ollman* and *CCNV v. Watt* had prompted William Safire of the *New York Times* to brand him "the worst enemy of free speech in America today,"[142] and the committee members were interested in exploring at length Scalia's view on this matter. Scalia immediately began by establishing his bona fides. He told Senator Strom Thurmond within minutes of the opening of his hearing that "I am the first academic to be nominated to the Court since [Justice Felix] Frankfurter. I have spent my life in the field that the first amendment is most designed to protect." He also pointed out, "I think I am one of the few Supreme Court nominees that has been the editor of a magazine." He suggested that if he were to have "a skewed view of the first amendment, it would be in just the opposite direction."[143]

Senator Biden was especially interested in Scalia's dissent in the *Watt* case, causing Scalia to lead Biden through a series of careful distinctions. He began by defining "speech as any communicative activity," and he acknowledged that sleeping could

be a form of communication. But, he continued, whether the government could prohibit that communication without running afoul of the First Amendment would depend on whether it had "passed a law that allows all other sleeping but only prohibits sleeping where it is intended to communicate." He pointed out that a law that applies to "an activity which in itself is normally not communicative, such as sleeping [or] spitting," is not subject "to the heightened standards of the First Amendment." By contrast, a law that does apply to "communicative activity, naturally communicative activity—writing, speech, and so forth—any law, even if it is general, across the board, has to meet those higher standards." Biden wondered how Scalia's understanding would apply to those civil rights demonstrators of the 1960s who had engaged in sit-ins in segregated restaurants to protest Jim Crow legislation. Scalia responded forthrightly, insisting that those protests were outside the ambit of First Amendment protection: "If you want to protest, as a means of civil disobedience, and take the penalty, that is fine. But if the law is not itself directed against demonstrations or against communication, I do not think it is the kind of law that in and of itself requires heightened scrutiny."[144] After their colloquy, Biden remarked that his apprehensions were allayed and his mind put "at ease a great deal."[145] He observed, however, that without the additional explanation Scalia had just given, someone could well have concluded that Scalia was the enemy of free speech Safire accused him of being, to which, in typical fashion, Scalia quipped, "I will have to write longer opinions."[146]

Scalia's confirmation hearing continued the next day (August 6), with the committee receiving testimony from twenty-one different individuals who represented a wide range of opinion, including: Robert B. Fiske, chairman of the Standing Committee on the Federal Judiciary of the American Bar Association, who announced that his fourteen-member committee had unanimously voted Scalia "well qualified," the highest of three possible ratings for Supreme Court nominees; Gerhard Casper, dean of the University of Chicago Law School, who praised Scalia's legal brilliance and powerful intellect; Eleanor Smeal, president of the National Organization for Women, who predicted that Scalia's confirmation would have "disastrous" consequences for women; and Joseph Rauh, appearing on behalf of Americans for Democratic Action and the Leadership Conference on Civil Rights, who decried Scalia's "right-wing" views and denounced his nomination as "a tragedy for our county."[147]

On August 14, the Senate Judiciary Committee gave unanimous approval to Scalia's nomination, and on the evening of September 17, after a five-day debate on the confirmation of Rehnquist as chief justice, the full Senate spent fewer than five minutes before it confirmed Scalia's nomination by a vote of ninety-eight to zero.[148] Scalia was sworn in as the 103rd member of the Supreme Court on Friday, September 26, and he took his seat at the beginning of the 1986–1987 term of the Court on October 6. On November 4, he issued his first opinion in *O'Con-*

nor v. United States,[149] writing for a unanimous court that U.S. citizens working in Panama for the Panama Canal Commission were not exempt from paying federal income taxes on their salaries. It is a long-standing Court tradition to give a new justice an easy, unanimous opinion for the first assignment.[150] Not surprisingly, though, Scalia used this occasion to stake out immediately his ground as a textualist. In a nine-page opinion, he parsed the language of the Panama Canal Treaty of 1977 and concluded that, "in our view of the text," neither the United States nor Panama intended to create such a tax exemption.[151]

Conclusions

When he appeared before the Senate Judiciary Committee, Scalia insisted that he did not have a "fully-framed" view of the Constitution. However, no one familiar with his pre-judicial career (especially his service in the Office of Legal Counsel in the Justice Department and his firsthand involvement in Washington politics), his opinions while on the D.C. Circuit, or his lively interactions with members of the Senate during his confirmation hearing would have been in the least bit surprised by the jurisprudential approach he would take once on the Supreme Court. His advice to President Ford as assistant attorney general revealed the importance he placed on the Constitution's separation of powers and his textualist approach to the Take Care Clause of Article II; so, too, did his appellate opinions on standing and his per curiam opinion in *Synar*. His editorial stances in *Regulation* and his appellate opinions refusing to read the APA as authorizing judicial review of agency actions when its text did not provide for it supplied evidence of his emerging textualist approach to questions of constitutional and statutory interpretation; the same can also be said for his principled refusal to employ legislative history while on the D.C. Circuit and for his bold prediction to the members of the Senate Judiciary Committee that his rejection of legislative history represented "the wave of the future." His appellate opinions insisting that the constitutional standards for standing should be kept high and his conviction as expressed before the Senate that questions concerning where to draw the line between the powers of the federal government and those of the states are best addressed by Congress (and not by the judiciary) clearly presaged his repeatedly affirmed commitment to judicial restraint once on the Supreme Court. Finally, his declaration in *Ollman* that the meaning of the First Amendment does not evolve over time and his message to the Senate Judiciary Committee that the Constitution is not a "bring-along-with-me statute" that nine justices are free to fill with "whatever context the current times seem to require" announced his unequivocal rejection of the "Living Constitution" approach to constitutional interpretation.

Chapter Two systematically presents Scalia's affirmative approach to the interpretive enterprise. It is a textualist approach that he could do little more than outline in his D.C. Circuit opinions and in his testimony before the Senate but that he has been able subsequently to articulate fully and refine at length in his many Supreme Court opinions, concurrences, and dissents and in his extensive extrajudicial writings.