

JUSTICE SCALIA AND THE *PRINTZ* CASE: THE TRIALS OF AN OCCASIONAL ORIGINALIST

GENE R. NICHOL*

INTRODUCTION

To no one's very great surprise, the United States Supreme Court invalidated a central feature of the Brady Handgun Violence Prevention Act ("Brady Bill")¹ last year in *Printz v. United States*.² A majority of the justices concluded that the federal statute's requirement that local law enforcement officials conduct background checks on prospective handgun purchasers violates the Constitution.³ But just because a decision is predictable does not mean that it is not unfortunate. And the *Printz* ruling is surely that—on a wide array of fronts.

Printz reviewed the constitutional propriety of Congress's decision to temporarily enlist local law enforcement officers to help determine whether an applicant is eligible to buy a firearm.⁴ The Brady Bill requires the United States Attorney General to establish a national instant background check system. Until November 1998, when the federal government could make the system operational, the statute required dealers to wait five days to complete the gun sale.⁵ During that period, the act demanded that local law enforcement officers "make a reasonable effort to ascertain . . . whether receipt or possession would be in violation of the law"—as, for example, when the purchaser was a convicted felon.⁶ If the applicant proved to be ineligible, the Brady Bill also required local officials to provide notification to the prospective buyer of the reasons for that determination.⁷

The Supreme Court concluded in *Printz* that even this

* Professor and Dean Emeritus, University of Colorado School of Law.

1. 18 U.S.C. § 922 (1994).

2. 117 S. Ct. 2365 (1997).

3. *See id.* at 2367.

4. *See id.* at 2368-69.

5. *See id.* at 2369.

6. *Id.*

7. *See id.*

temporary demand for a "reasonable effort" from local government officials worked an unconstitutional interference with the "essential postulates" of state sovereignty.⁸ Congress, in short, can neither "compel the States to enact or administer a federal regulatory program,"⁹ nor "circumvent that prohibition by conscripting" local officers directly.¹⁰ It is flatly inconsistent with the "independence and autonomy" of the states, the Court concluded, for their "officers be dragooned into administering federal law."¹¹ Accordingly, the Court declared the use of state authorities to check the backgrounds of potential gun owners unconstitutional.¹²

Printz's conclusions are troubling on a number of fronts. First, at the risk of appearing simple and unsophisticated, I think it still makes sense to say that it is regrettable for a court to strain and extrapolate from the accepted uses of its powers to strike down a statute that is apparently working effectively to deal with a tragic problem. Between 1994 and 1996, the mandatory background checks required by the Brady Bill prevented approximately 6600 firearm sales each month.¹³ Over seventy percent of the rejected purchasers were convicted or indicted felons.¹⁴ In a nation that regularly suffers over 10,000 handgun murders each year, that is surely a step of no small importance. If the Supreme Court is anxious to venture beyond its understood rules of engagement, it could surely choose a better target.¹⁵

Second, I also think it is amazing that the justices are so clearly determined to resurrect principles of judicial federalism to strike down acts of the United States Congress. The track record, to wildly understate, is not good.¹⁶ Remind yourself, for a moment, of some of the Supreme Court's principal efforts to

8. *Id.* at 2376 (citation omitted).

9. *New York v. United States*, 505 U.S. 144, 188 (1992).

10. 117 S. Ct. at 2384.

11. *Id.* at 2381.

12. *See id.* at 2384.

13. *See id.* at 2387 (Stevens, J., dissenting).

14. *See id.*

15. For my money, if the United States Supreme Court wants to invalidate a federal statute without textual or historical warrant, I wish the justices would go after the federal statutes creating the "soft money" loophole that is presently making a mockery of the electoral system.

16. *See generally* Gene Nichol, *The New and Unfortunate Face of Judicial Federalism*, 23 OHIO N.U. L. REV. 1197 (1997).

referee the acceptable boundaries between state and federal power. *Dred Scott v. Sandford*'s¹⁷ portrait of states' rights had the honor of being overruled by two constitutional amendments and a Civil War. *Pollock v. Farmers' Loan & Trust Co.*¹⁸ sparked the passage of the Sixteenth Amendment. It took the Court at least thirty years to recover from its stubborn federalism collision with the New Deal.¹⁹ When the justices ruled that Congress could not legally enfranchise eighteen-year-olds in state elections, the Twenty-Sixth Amendment was passed in record time.²⁰

And that is only half the picture. It is not just the electorate that has fought to do in the Court's federalism work. The justices have been quite enthusiastic, and quite effective, in their own right. *Younger v. Harris*²¹ overruled *Dombrowski v. Pfister*²² after only six years. *National League of Cities v. Usery*²³ overruled *Maryland v. Wirtz*²⁴ after an eight year reign. *Garcia v. San Antonio Metropolitan Transit Authority*²⁵ trashed *National League of Cities* in seven. *New York v. United States*²⁶ made a mockery of *Garcia* on the same time line. The high court's treatise on congressional power to abrogate state

17. 60 U.S. (19 How.) 393 (1854) (requiring free states to recognize the property rights of slaveowners in runaway slaves).

18. 157 U.S. 429 (1895) (upholding the constitutionality of federal income tax).

19. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating commercial legislation by the United States Congress that the Court deemed local in nature).

20. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that no congressional power exists to enfranchise eighteen-year-old voters in state elections).

21. 401 U.S. 37 (1971) (creating the doctrine of "Our Federalism," which largely prohibits federal courts from enjoining state courts, even in 42 U.S.C. § 1983 cases).

22. 380 U.S. 479 (1965) (allowing federal court injunctions against state court process in some cases).

23. 426 U.S. 833 (1976) (invalidating a federal minimum wage law as applied to various local government employees).

24. 392 U.S. 183 (1968) (allowing federal labor provisions to apply to various state employees).

25. 469 U.S. 528 (1985) (overruling *National League of Cities* and returning "Tenth Amendment" analysis to its prior state of non-justiciability).

26. 505 U.S. 144 (1992) (holding that, despite *Garcia*, the United States Congress could not force a state legislature to enact a legislative scheme to deal with toxic waste disposal).

sovereign immunity in *Pennsylvania v. Union Gas Co.*²⁷ was overturned seven years later in *Seminole Tribe of Florida v. Florida*.²⁸ The closest thing I can find to an ascertainable constitutional rule in the judicial federalism cases is that major pronouncements last about seven years. Given this topsy-turvy regime, it is surprising the Court has so much confidence in its own work. No one else does.

But it is not my intention, in this brief essay, to dwell on the Supreme Court's policy choices in *Printz*. I am more fascinated by the opinion itself—as an example of constitutional decisionmaking. The majority opinion in *Printz* was written by Justice Antonin Scalia, the most outspoken constitutional theorist to sit on the high court since Felix Frankfurter. Scalia, as is well known, is also the nation's leading "originalist." He has powerfully claimed that it is essential to rely on the "contemporaneous understanding"²⁹ and to "establish the meaning of the Constitution, in 1789,"³⁰ if we are to "take the need for the theoretical legitimacy [of judicial review] seriously."³¹ A "rule of law," as Scalia sees it, "that binds neither by text nor by any particular, identifiable tradition is no rule at all."³²

These are attractive sentiments for those seeking to cabin judicial adventurism. They get, however, very rough treatment in *Printz*. The reasons why, I believe, say a good deal about originalism as a method of constitutional interpretation. They say even more, perhaps, about Justice Scalia as a constitutionalist.

I. THE ATTRACTIONS OF ORIGINALISM

The civics book version of the distribution of government powers is easy to state. Judges are to apply the law, not make

27. 491 U.S. 1 (1989) (holding that the United States Congress can override the state sovereign immunity reflected in the Eleventh Amendment by clear legislative declaration under the Commerce Clause).

28. 517 U.S. 44 (1996) (ruling that despite *Union Gas Co.*, the United States Congress has no power to override state sovereign immunity under its Article I powers).

29. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

30. *Id.*

31. *Id.* at 862.

32. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

it up. Policymaking is left to the elected branches of government. And it is particularly inappropriate for judges to “freelance” when engaging in constitutional review, where their decisions are not reversible by the Congress. It is boldly inconsistent with democratic theory for the mere preferences of unelected judges to prevail over the choices of electorally accountable branches of government. That is true, of course, even if one tends to agree with particular results of judicial intervention. To embrace the broad use of judicial power because you like the outcomes “is to . . . prefer an authoritarian regime to a . . . democracy.”³³

Nor does fidelity to the language of the Constitution eliminate the dangers of judicial overreaching. Terms like due process, equal protection, freedom of speech, and cruel and unusual punishment invite controverted and value-laden decisions. A textual warrant to enforce the rigors of “equality” throughout the land, to take only one example, would open the door to dramatic “government by judiciary.”³⁴ One person’s egalitarianism frequently collides with another’s vision of the good life. And the power to define and enforce constitutionally prescribed “liberty” is a substantial authority indeed.

After three decades of at least modest judicial activism, it is not surprising that originalism is principally a theory of constraint. It answers tensions with democratic accountability by turning to historical meaning. For the strict intentionalist, “[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of the framers.”³⁵ Judges should be “tethered” by the historic “intentions of those who created” the Constitution rather than by the text “independent of . . . historical intentions.”³⁶ Otherwise, it is virtually impossible to

33. ROBERT BORK, *THE TEMPTING OF AMERICA* 78 (1990).

34. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (2d ed. 1997).

35. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 453 (1933) (Sutherland, J., dissenting). Justice Scalia has more recently stressed the “original meaning of the text, [rather] than what the original draftsmen intended.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). Whether one focuses on the original intentions of the draftsmen or the “original meaning” of the text—as revealed through a variety of contemporaneous, authoritative texts—makes little difference for the arguments presented here. See generally Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENTARY 411 (1998).

36. Richard S. Kay, *Adherence to the Original Intentions in Constitutional*

“reduce the influence . . . of a judge’s personality and ideology,” and “democratically adopted texts” become “mere springboards for judicial lawmaking.”³⁷ As Judge Robert Bork has written, “the judge who looks outside the historic Constitution always looks inside himself and nowhere else.”³⁸ Or, in Justice Scalia’s view, “[i]t is very difficult for a person to discern [the] difference between those political values that he personally thinks most important, and those political values that are fundamental to our society.”³⁹ Thus, the originalist concludes, democratic choice “should be limited not by the will . . . and judgment of the judiciary, but only by the will and judgment of the Framers.”⁴⁰

For the originalist, moreover, unless the Constitution is applied as it was originally understood, it is not in any real sense law.⁴¹ The “meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time a court has occasion to pass on it.”⁴² In fact, it is only through ascertaining the “will of the drafters” that we can “constrain the discretion” of judges and assure “that the Constitution will be interpreted consistently over time.”⁴³ In constitutional interpretation, it simply cannot be that “every day is a new day.”⁴⁴ Our most fundamental restrictions on governmental power cannot be allowed to become “novel invitation[s] to apply current societal values;”⁴⁵ and our most fundamental governing principles do not change “to suit current fashions.”⁴⁶ Though

Adjudication: Three Objections and Responses, 82 NW. U. L. REV. 226, 228-30 (1988).

37. SCALIA, *supra* note 35, at 25.

38. BORK, *supra* note 33, at 242. In constitutional analysis, Judge Bork has written, “once a court abandons the intentions of those who made the law, it is necessarily thrust into a legislative posture.” *Id.* at 81.

39. Scalia, *supra* note 29, at 863 (internal quotation marks omitted).

40. Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 276 (1981).

41. See Scalia, *supra* note 29, at 849.

42. T.M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 124 (8th ed. 1927); see also SCALIA, *supra* note 35, at 40-41 (“[The Constitution’s] whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”).

43. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

44. SCALIA, *supra* note 35, at 68.

45. Scalia, *supra* note 29, at 854.

46. *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting).

the process of discovering historical meaning may be difficult,⁴⁷ it is a far cry from allowing the “unguided value judgments” of unelected judges to reign supreme.⁴⁸ As Justice Scalia has put it, originalism “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”⁴⁹ Historical constraint is, therefore, essential to the legitimacy of judicial review—the “most fundamental aspect of constitutional theory.”⁵⁰ And a judicial exercise in constitutional interpretation that is not rooted in both history and text is lawless.⁵¹ No small defect, that.

II. THE CURIOUS USES OF CONSTITUTIONAL INTERPRETATION IN *PRINTZ V. UNITED STATES*

Printz is remarkably tough to square with these sentiments. Justice Scalia, writing for a bare majority,⁵² determined that “the federal government may not compel the states to . . . administer a . . . regulatory program.”⁵³ This, in my view, is an overly aggressive description of the Brady Bill’s demands. But the provision did require the regular use of local officials to determine compliance with the statute.⁵⁴ Thus, even though clearly within the commerce power, the act represented to the Court an impermissible effort to “conscript” state actors into federal regulatory service. Accordingly, the majority declared it “incompatible with our constitutional system.”⁵⁵

Of course, if the Brady Bill violates the Constitution, it is always interesting to ask, “which part?” Justice Scalia conceded, almost at the outset, that “there is no constitutional text speaking to this precise question.”⁵⁶ Rather, he indicated, that “the structure of the Constitution . . . and the juris-

47. See Scalia, *supra* note 29, at 863 (stating that “judges and lawyers will find the correct historical answer to . . . original intent”).

48. BORK, *supra* note 33, at 146.

49. Scalia, *supra* note 29, at 864.

50. See *id.* at 864-65 (punctuation omitted).

51. See *supra* note 32 and accompanying text.

52. See *Printz v. United States*, 117 S. Ct. 2365, 2368 (1997). The Chief Justice and Justices O’Connor, Thomas, and Kennedy joined the opinion of the Court. See *id.*

53. *Id.* at 2383 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

54. See *id.* at 2369.

55. *Id.* at 2384.

56. *Id.* at 2370.

prudence" of the Supreme Court must guide the way.⁵⁷

It is worth noting, if only as a preliminary matter, that this is surely no small step for a discretion-busting, strict "intentionalist." To the extent that originalism's principal focus is judicial constraint—assuring that the Constitution prevails rather than the judge's predilections—it is at least somewhat curious to embrace non-textual interpretation in the first place. Locating constitutional principles outside the clauses of the text has produced no small array of judicial sore points for political conservatives.⁵⁸ More than one strict reader of the Constitution has concluded that the danger of judicial adventurism is simply too great to allow non-textual review.⁵⁹ And, as I will discuss shortly, Justice Scalia eventually resorts to a "structural" analysis, of sorts, to justify his conclusion in *Printz*. But one need not have too strong a memory to recall that Charles Black and Phillip Bobbitt managed to "justify" much of the Scalia-despised Warren Court legacy through "structural" examinations of the Constitution.⁶⁰ The structure of the Constitution can surely prove to be the rough equivalent of the Ninth Amendment in a determined justice's hands. It likely leaves any strong notion of constraint by the wayside.

If the text of the Constitution does not demand *Printz*'s rule, what does? Justice Scalia determined that sheriffs cannot be forced to perform background checks because we have an "incontestable" commitment to "dual sovereignty."⁶¹ Despite the creation of significant federal powers under the Constitution, the states retain "a residuary and inviolable

57. *Id.*

58. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

59. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); *Griswold*, 381 U.S. at 521 (1965) (Black, J., dissenting); see also *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights . . .").

60. See CHARLES BLACK, *DECISION ACCORDING TO LAW* (1981); PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); PHILLIP BOBBITT, *CONSTITUTIONAL FATE* (1982). All three are books that I admire. See Gene R. Nichol, Jr., *Giving Substance Its Due*, 93 *YALE L.J.* 171 (1983) (book review). But they hardly set forth modest visions of judicial power.

61. *Printz*, 117 S. Ct. at 2376.

sovereignty.”⁶² The Tenth Amendment reflects it. The presupposition of “the continued existence of the states” illustrates it.⁶³ The “separation of two spheres” of government power in the Constitution is one of the great “structural protections of liberty.”⁶⁴ The power of the federal government, the Court concluded, “would be augmented immeasurably if it were able to impress into its service . . . the police officers of the 50 states.”⁶⁵ In order to assure the independent integrity of state government, therefore, the Brady Bill must fall.⁶⁶

These are strong sentiments. It is certainly hard to deny that we are committed to dual sovereignty. I have never even heard anyone advocate the dissolution of the states. So far, therefore, so good. But it is no doubt easier to espouse “separate spheres” for federal and state government than it is to define the appropriate line of demarcation between the two. And *Printz* offers almost nothing to locate the constitutional line in the sand.

Despite the holding of *Printz*, it is perfectly permissible for the federal government, for example, to require states to reapportion legislatures,⁶⁷ integrate schools,⁶⁸ reform prisons,⁶⁹

62. *Id.* (quoting THE FEDERALIST NO. 39 (James Madison)).

63. *Id.*

64. *Id.* at 2378.

65. *Id.*

66. Justice Scalia also claimed that the Brady Bill’s contested provision would threaten the notion of a unified executive branch at the federal level. The unity of the executive branch, he claimed, “would be shattered, and the power of the President would be subject to reduction, if Congress could . . . [require] state officers to execute its laws.” *Id.* This, of course, puts Justice Scalia in the somewhat tenuous position of claiming that the Brady Bill both decimates state authority and threatens to unconstitutionally paralyze federal power. This vision of unified executive power has been soundly rejected before. See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the Independent Counsel authority); see also *New York v. United States*, 505 U.S. 144, 166 (1992) (upholding schemes of cooperative federalism that include components of local enforcement). Scalia’s vision of executive authority would also make citizen suits filed pursuant to broad grants of statutory standing unconstitutional. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). So not only would this theory invalidate a bevy of “commandeering” statutes, see *infra* notes 91-106, but it would also upset a wide array of other well-settled federal practices.

67. See *Reynolds v. Simms*, 377 U.S. 533 (1964).

68. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

69. See *Wolff v. McDonnell*, 418 U.S. 539 (1974).

clean up pollution,⁷⁰ comply with civil rights mandates,⁷¹ pay attorney fees,⁷² submit electoral schemes to the Justice Department,⁷³ chase down deadbeat dads,⁷⁴ and pay their employees minimum wage.⁷⁵ Nor did *Printz* undo the long-standing holding of *Testa v. Katt* that state judges may appropriately be “commandeered” to try federal causes of action against the will of state government⁷⁶—because “[w]hen Congress . . . adopts an act, it [speaks] for all the people and all the States and thereby establishe[s] a policy for all.”⁷⁷ It is “as much the policy of [the state] as if the act had emanated from its own legislature”⁷⁸—a theory that would seem to embrace the Brady Bill as well. And, as all guardians of state sovereignty know, even if there are tasks that the federal government cannot impose upon the states through regulation, the same results can be easily achieved with federal dollars. Carrots breeze in where sticks fear to tread. One clear proof of that is that no one doubts that the great alleged intrusion upon state sovereignty reflected in the Brady Bill would have been perfectly permissible if Congress had simply conditioned federal criminal justice funding on a state’s compliance with the program.⁷⁹ Can so great a constitutional sin be so easily remedied? Do the Brady Bill’s transgressions amount to no more than modest drafting errors?

Justice Scalia’s “structural” claims, then, are thin. A commitment to state sovereignty in general says nothing about whether state officers may be required to perform certain federal tasks, at least so long as the Court readily sustains dozens of other, more pressing, federal mandates upon local prerogative. Saying that we should have separate spheres simply does not tell us a great deal about where to separate

70. See *New York v. United States*, 505 U.S. 144 (1992).

71. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

72. See *Hutto v. Finney*, 439 U.S. 1122 (1978).

73. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

74. See Michelle Dally Johnston, *Republicans Fight Federal Mandate on Child-Support*, DENV. POST, Feb. 28, 1997, at B4.

75. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

76. 330 U.S. 386 (1947).

77. *Id.* at 392 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)).

78. *Id.*

79. See *Printz v. United States*, 66 F.3d 1025, 1029 (9th Cir. 1995); see also *Printz v. United States*, 117 S. Ct. 2365, 2389 (1996) (Stevens, J., dissenting).

them. At bottom, Justice Scalia's federalism analysis constitutes little more than a bow to his constituents, a wave to the crowd. We know we are supposed to support states' rights. Yet we are not told what that means.⁸⁰

Printz holds that the federal government cannot require local officials to assist in the enforcement of federal programs. This judge-made rule, which is proffered to thwart the will of Congress, is not based on the language of the Constitution. It represents, therefore, just the type of decision most typically decried by advocates of judicial restraint. And its mooring as a beachhead of "dual sovereignty" is, at the least, unexplained. There is, of course, one further direction to inquire—historical practice. What then of our historical patterns? What of the intentions of the Constitution's framers? This, as we know, is supposed to be Justice Scalia's favored ground. But, as it turns out, history is an even greater impediment to the Court's decision in *Printz* than logic.⁸¹

III. THE USE OF HISTORY IN *PRINTZ*

It is not as if history is silent about the employment of state actors to carry out federal policy. The potential federal use of local agents to collect taxes was "much debated" among the Founders.⁸² Deflecting a claim that a new, overbearing bureaucracy of federal tax collectors would appear if the Constitution were ratified, Alexander Hamilton wrote in *Federalist No. 36* that "the United States will make use of the State officers and State regulations for collecting" taxes.⁸³ Madison took the same position in *Federalist No. 45*, stating that the central government's power to raise and collect revenue "will generally be [executed] by the officers . . . appointed by the several States."⁸⁴ Noted historians have claimed, even further, that "Madison . . . expected the new federal government to govern through the state govern-

80. See *Printz*, 117 S. Ct. at 2372, 2374 n.6, 2375 & n.9.

81. See *infra* Part III.

82. See *Printz*, 117 S. Ct. at 2389 (Stevens, J., dissenting).

83. *Id.* at 2390 (quoting THE FEDERALIST NO. 36, at 235 (Alexander Hamilton) (E. Bourne ed., 1947)).

84. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob Cooke ed., 1961).

ments.”⁸⁵ The opponents of the Constitution conceded the likely use of state personnel as well.⁸⁶ Patrick Henry, for example, argued that “the sheriff comes today as a state collector. Next day he is federal.”⁸⁷

Hamilton made the point in a broader sense by emphasizing 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.”⁸⁸ By “[employing] the ordinary magistracy”⁸⁹ of each state in the execution of federal law, the national government would directly bind individual citizens. Again, Madison echoed the view in *Federalist No. 45*: it is “extremely probable . . . , particularly in the organization of the judicial power, that the officers of the States will be clothed with the correspondent authority of the Union.”⁹⁰ These are

85. SAMUEL BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 252 (1993); see also Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1028-30 (1995).

86. See 3 *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 167-68 (Jonathan Elliot ed., 1888) (statement of Patrick Henry).

87. *Id.* at 168.

88. *THE FEDERALIST NO. 27*, at 175 (Alexander Hamilton) (Jacob Cooke ed., 1961).

89. *Id.* at 174.

90. *THE FEDERALIST NO. 45*, at 313 (James Madison) (Jacob Cooke ed., 1961). Justice Scalia, as he must, concedes a federal power to “commandeer” state court judges in the resolution of federal matters. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947). He concludes, however, that the early statutes requiring that federal tasks be performed by state judges and state court clerks tell us nothing about whether state executive officers can be required to carry out federal mandates. There are, of course, several responses to this claim. First, Justice Scalia appears to be on quite a roll in *Printz*, concluding at every turn that, all obvious appearances to the contrary, history actually has nothing “conclusive” to say to us about the Brady Bill. If an originalist were actually this skeptical about the use of history across the board, he would simply be forced to drop his theory. Second, Scalia offers no historical proof whatsoever that the Framers embraced his proffered dichotomy between judges and local sheriffs. It likely is based on a more demeaning view of judges than the Framers would have entertained. And the quote above, once again, suggests directly that all state officers were seen as subject to the call. Finally, it is a bit disingenuous to ignore the obviously executive functions that state judges and clerks were ordered to undertake by the early congresses. Surely a requirement that a state judge investigate the seaworthiness of vessels, via a court-appointed panel of experts carrying out essentially administrative tasks, has “something” to tell us about the issue in *Printz*. It suggests, for example, that the first Congress was willing to charge state actors with far greater administrative responsibilities than those obliged

relatively straightforward, frequent, and unambiguous claims. One can almost imagine the taunting use Justice Scalia would have made of them—had he only been on the other side.

The belief in the acceptability of using state actors in the federal cause also apparently bore fruit in the very first Congress, which passed legislation requiring state courts to “record applications for citizenship” on behalf of the federal government.⁹¹ Nor did the Congress confine the demanded state activities as narrowly as those sought in the Brady Bill. A 1790 federal law called upon state courts to certify the seaworthiness of vessels.⁹² Under its terms, an investigative committee of persons “most skillful in maritime affairs” performed essentially executive functions under the supervision of state courts.⁹³ A few years later, Congress imposed a variety of naturalization reporting requirements on state court clerks—including certifying and transmitting certain “abstracts” to the “Secretary of State of the United States.”⁹⁴ Failure to comply with such duties was punishable criminally.⁹⁵ The Extradition Act of 1793 required, under federal mandate, the “executive authority” of a state to return a fugitive to the locale from which he had fled.⁹⁶ And in 1802, Congress directed state court clerks to participate in the creation of a national registry of aliens and issue certificates to applicants seeking naturalization.⁹⁷

Nor were such practices limited to the Founding era. An 1882 act enlisted state officials “to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid.”⁹⁸ At the

under the Brady Bill. See generally Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 *IND. L. REV.* 71 (1998).

91. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, discussed in *Printz v. United States*, 117 S. Ct. 2365, 2370 (1996).

92. See Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132, discussed in 117 S. Ct. at 2370.

93. *Printz*, 117 S. Ct. at 2392.

94. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 566, 567.

95. See *id.* § 2, discussed in 117 S. Ct. at 2391.

96. Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302, discussed in 117 S. Ct. at 2371.

97. See Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154-55.

98. Act of Aug. 3, 1882, ch. 376, §§ 2, 4, 22 Stat. 214, quoted in 117 S. Ct. at 2375.

turn of the century, Congress required state officials to send convicts back to their country of origin under the direction of the Secretary of the Treasury, without compensation.⁹⁹ During World War I, the selective service law authorized the President “to utilize the service of any or all officers or agents of the United States and of the several states” to enforce the draft.¹⁰⁰ Refusal to comply with a presidential directive was made a crime.¹⁰¹ And, more recently, the Congress has not only visited federal causes of action upon unwilling state court judges,¹⁰² but imposed significant reporting requirements on state officers as well.¹⁰³ Modern federal statutes require state and local officials to report cases of missing children,¹⁰⁴ to implement highway safety programs and report traffic fatalities,¹⁰⁵ and to submit plans for hazardous material abatement and report potentially dangerous sites to the federal government.¹⁰⁶

Justice Scalia’s response to this litany of counter-examples is somewhat out of character for such a forceful advocate. The listed examples, he writes, “do not necessarily”¹⁰⁷ conflict with his proffered constitutional rule; they do not “necessarily imply”¹⁰⁸ or provide “clear support”¹⁰⁹ or “clearly confirm”¹¹⁰ or “conclusively”¹¹¹ determine the “precise issue” before the Court.¹¹² It is possible, he seems to say, to find at least some ambiguity in the cascade of historical practices offered to contradict his new constitutional rule. (Admittedly, the “possible ambiguity” claim grows tiresome after seven or eight

99. *See id.*; *see also* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

100. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81.

101. *See id.*

102. *See Testa v. Katt*, 330 U.S. 386 (1947); *Second Employer’s Liability Cases*, 223 U.S. 1 (1912).

103. *See Printz*, 117 S. Ct. at 2376.

104. *See* 42 U.S.C. § 5779(a) (1994).

105. *See* 23 U.S.C. § 402(a) (1994).

106. *See* 20 U.S.C. § 4013 (1994) (requiring governors to submit plans for asbestos abatement and follow certain reporting procedures); 42 U.S.C. § 6933(a) (1994) (requiring states to inventory hazardous waste sites); 42 U.S.C. § 6991(a) (1994) (requiring governors to inventory underground storage tanks).

107. *Printz*, 117 S. Ct. at 2370 n.1.

108. *Id.* at 2372.

109. *Id.* at 2375.

110. *Id.* at 2375 n.9.

111. *Id.* at 2379.

112. *Id.* at 2376.

uses.) The reader of the opinion is almost left with the impression that Justice Scalia is playing a game of cat and mouse, ending by saying “you can’t force me to admit that history is on your side—sure, it’s true, but I’ll never admit it.”

Finally, in case anyone is convinced by the multiple citations to Alexander Hamilton acknowledging that the federal government can use state actors to carry out its policies, Justice Scalia explains that Hamilton was “from first to last the most nationalistic of all the nationalists”¹¹³ and “the most expansive expositor of federal power.”¹¹⁴ Accordingly, one supposes, his views should be dismissed out of hand. It is no longer enough, apparently, that his dissenting colleagues be chastised. Poor, dead Alexander Hamilton also comes under the lash. This, simply put, does not sound like someone who is actually interested in what history has to offer. At least if it is not on his side.

But, in a stronger sense, these quibbles are beside the point. Justice Scalia’s mischaracterization of history and intention in *Printz* is but a rear-guard action, aimed at deflating the rather strong argument that the majority’s rationale is at odds with original intention and practice. This, however, gets the dynamic of constitutional interpretation backwards. Justice Scalia, in *Printz*, creates a constitutional mandate supported by no “clause, sentence or paragraph in the entire text of the Constitution.”¹¹⁵ He then goes to great lengths to try to rebut the dissenting justices’ claims that the Framers of the Constitution and the early congresses clearly believed it to be acceptable to employ state actors on federal missions. And the effort is surprisingly unconvincing. But even if the rebuttal were more compelling, it is not the showing that Justice Scalia, the originalist, needs to make.

Under his theory of interpretation, Justice Scalia must, at the least, make an affirmative historical case for the existence of his “no commandeering” rule. That effort, however, is totally missing from the *Printz* majority’s multi-page diatribe. Even if the dissenters are wrong that the Framers clearly indicated a belief in the acceptability of the federal use of state actors, that,

113. *Id.* at 2375 n.9 (quoting CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 199 (1964)).

114. *Id.*

115. *Id.* at 2389 (Stevens, J., dissenting).

of course, does not mean, without more, that they clearly rejected the practice. An originalist requires such proof to justify a constitutional rule. As Justice Scalia has written in criticizing his colleagues, "a rule of law that binds neither by text nor by any particular tradition, is no rule at all."¹¹⁶ The rule created in *Printz* is, of course, supported by neither "text" nor "particular tradition." In fact, no effort is made to tie the judge-made principle to either source. It is too bad that Scalia was not asked to write a dissent to his own opinion. The fur would have flown.

IV. STICKING TO ORIGINALISM

The theory of original intention, like other constitutional methodologies, is plagued with difficulties. The frequent scarcity of ratification debate records, the difficulty of attributing a single intention to so large and diverse a group, the vagaries of constructed history, the Framers' apparent ambivalence about intention, and the abstract and aspirational nature of many constitutional provisions cast significant doubt on the ability of original intention to accurately guide judges.¹¹⁷ But these drawbacks are rank pettiness compared to originalism's central difficulty: its principal advocates relentlessly refuse to stick by it. Originalism works if they agree with the outcome dictated by history. If history does not lead them where they want to go, they simply reject it.

Judge Bork, of course, was famously guilty of such maneuvers. Bork's originalism provided energetic critiques of much of the modern liberal agenda.¹¹⁸ But when he became a candidate for the highest judicial office, for rather obvious political reasons, he was unwilling to cast aside staples of American constitutional law like *Brown v. Board of*

116. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989).

117. See generally MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1989); Brest, *supra* note 43; Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928 (1997); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretations*, 77 VA. L. REV. 669 (1991); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POLY 437 (1996); Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. U. L. REV. 175, 182 (1993).

118. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); BORK, *supra* note 33.

*Education*¹¹⁹ and *Craig v. Boren*.¹²⁰ As a result, the articulate, strident, and condescending jurist was reduced to ambivalent babble.¹²¹

In *Printz*, Justice Scalia faced a powerful historical claim directly refuting his proffered rule. But rather than give in, he put his head down and pressed on—explaining at every turn why the lessons of the founding period have nothing to offer. This, admittedly, has not been Scalia's typical pattern. Usually when history is inconvenient, he simply ignores it. Justice Scalia's takings jurisprudence, for example, is completely inconsistent with the original understanding that only a physical invasion presents a constitutional violation.¹²² He does not seem to care. His wholesale revision of the jurisprudence of the Free Exercise Clause in *Employment Division Department of Human Resources v. Smith*¹²³ was accomplished without even a nod toward the original meaning of the provision. In *Lujan v. Defenders of Wildlife*,¹²⁴ Scalia fashioned a powerful new Article III doctrine to invalidate a federal grant of statutory standing. Neither the text of the Constitution nor historical practice supported his bolstered injury requirement. So he simply did not talk about them.¹²⁵

119. 347 U.S. 483 (1954) (school desegregation).

120. 429 U.S. 190 (1976) (sex discrimination).

121. See Gene R. Nichol, Jr., *Bork's Dilemma*, 76 VA. L. REV. 337 (1990).

122. See Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 40 (1997); William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393 (1993); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

123. 494 U.S. 872 (1990) (announcing a new interpretation of the Free Exercise Clause concerning state laws of "general applicability"); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1116-17 (1990).

[T]he Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise clause might have a bearing on the . . . permissible readings of the text. This is particularly surprising because the author of the majority opinion . . . has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning.

Id. See generally Douglas Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1996). Justice O'Connor offered a spirited argument that *Smith* is inconsistent with the original understanding of the Free Exercise Clause in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting).

124. 504 U.S. 555 (1992).

125. See Nichol, *supra* note 66.

The act of Congress was invalidated because he and his colleagues thought it was a bad idea.

Scalia cheered mightily, as well, the Court's decision in *Adarand Constructors v. Peña*,¹²⁶ striking down various federal affirmative action programs. He only objected that the majority's view was not enthusiastic enough. The Court ought simply to have concluded, by his lights, that all federal affirmative action programs are unconstitutional per se—"[the] concept is alien to the Constitution's focus upon the individual."¹²⁷ I suppose that is a possible argument for a policy-oriented judicial activist willing to make it up as he goes along. But how can an originalist sign on to *Adarand*? Clearly the text of the Constitution does not prohibit federal affirmative action: the Equal Protection Clause, by its terms, only applies to the states. And how well developed could the Framers' vision of constitutionally mandated (if textually unmentioned) equality have been in 1789? After all, slavery was rampant.

So *Adarand* is, once again, a judge-made rule invalidating an act of Congress that "binds neither by text nor tradition."¹²⁸ One wonders why it is not "lawless."¹²⁹ Justice Scalia, of course, provides no answer. In fact, history and text are simply left off the table because abolishing affirmative action is a policy that Scalia favors.¹³⁰ Apparently history need not support judge-made rules designed to curb land use authority, or to close access to the federal courts, or to prevent discrimination against white males. But a judge-made rule offering even modest protection for lesbians and gay men from purposeful discrimination that is not rooted in history of the Fourteenth Amendment is, by his lights, rampant, illegitimate lawmaking by the courts.¹³¹

The obvious problem is that constitutional theories are meant to be applied to cases in which we like the results and to

126. 515 U.S. 200 (1995).

127. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

128. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) ("A rule of law that binds by neither text nor by any identifiable tradition is no rule of law at all.").

129. *Id.*

130. See Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 *YALE L.J.* 529, 564 (1997).

131. See Justice Scalia's dissenting rant in *Romer v. Evans*, 517 U.S. 620, 636 (1996).

cases in which we dislike the results. Otherwise constraint is a laughable concept. Like other originalists, Justice Scalia departs radically from his chosen theory when it suits his fancy. Inconsistency of this sort, of course, is pervasive in constitutional decisionmaking. So he is hardly alone. But Scalia's entire theory of original understanding, unlike the more expansive views he repeatedly attacks, is premised on the utter illegitimacy of judicial policymaking. The epithets he hurls at his adversaries, therefore, come back rather forcefully to face him.

It may be, then, that Justice Scalia needs to develop a theory to explain when originalism applies to constitutional interpretation and when it does not. Others, of course, have attempted to do so. Henry Monaghan has seriously explored linking a theory of originalism with a now-essential bow to concepts of *stare decisis*.¹³² To make originalism work at all, questions of *stare decisis* must be placed squarely on the table—since such a large percentage of modern American constitutional law cannot be justified under originalist principles.¹³³ So unless we are to undertake a massive purge of the constitutional decisions of the past half-century, originalism must be tempered with an unignorable respect for precedent.

But this is not Justice Scalia's chosen course. And that is understandable. His frequent departures from originalism typically create new, judicially inspired, non-textual barriers to democratic decisionmaking. He does not feebly ask historical intention to yield to long-established constitutional rules.

132. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

133. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (discrimination against lesbians and gay men); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (affirmative action); *Shaw v. Reno*, 509 U.S. 630 (1993) (voting rights); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (discrimination against the mentally handicapped); *Plyler v. Doe*, 457 U.S. 202 (1982) (education for children of undocumented parents); *Zobel v. Williams*, 457 U.S. 55 (1982) (extension of right to travel); *Craig v. Boren*, 429 U.S. 190 (1976) (sex discrimination); *Sugarman v. Douglass*, 413 U.S. 634 (1973) (discrimination against aliens); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception as fundamental right); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (challenge to state poll tax under Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533 (1964) (reapportionment of state legislatures); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on appeal). These mainstays of modern constitutional law involve only one short phrase of the Fourteenth Amendment.

Quite the contrary. Rather, he launches fresh, non-textual reasons to bar environmental accountability,¹³⁴ to protect powerful economic interests from democratic control,¹³⁵ and to allow whites to sue for race discrimination.¹³⁶ No theory explains why history is irrelevant to these controversial matters. No standard details the reasons that politically conservative results are acceptable, even when history is on the other side. On these vital fronts, the justice stands silent. Small wonder.

Justice Scalia, no doubt, is a very able lawyer. Surely he knows that these inconsistencies exist in his approach to constitutionalism. It is impossible to believe that he is unaware of them. You might think, at the least, therefore, that he would speak more modestly of his colleagues' shortcomings. Applying the Constitution in a complex, pluralistic society is, by any standard, tough work. And yet, even in *Printz*, he rails at his adversaries. The dissent proffers ever "more implausible theor[ies]"¹³⁷ and simply "posits the impossible."¹³⁸ It "resorts to the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause."¹³⁹ And it embraces "empty formalistic reasoning of the highest order."¹⁴⁰ Of course, the year before he had characterized one of his colleagues' major opinions as "comical," "preposterous," racked with "terminal silliness," employing a principle "the world has never heard of."¹⁴¹ I suppose that might have been seen as generous when compared to his criticisms of another major opinion a few years earlier as "outrageous,"¹⁴² "fabricated,"¹⁴³ "frightening,"¹⁴⁴ "Realpolitik,"¹⁴⁵ "appall[ing],"¹⁴⁶

134. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (declaring aspects of the Endangered Species Act unconstitutional).

135. See *supra* note 122.

136. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

137. *Printz v. United States*, 117 S. Ct. 2365, 2382 (1997).

138. *Id.* at 2383.

139. *Id.* at 2378-79.

140. *Id.* at 2382.

141. *Romer v. Evans*, 517 U.S. 620, 639, 645, 652 (1996).

142. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in the judgment and dissenting in part).

143. *Id.* at 984.

144. *Id.* at 998.

145. *Id.* One could only guess what sort of language Justice Scalia would have used were he to have dissented in full.

146. *Id.*

—reflecting “czarist arrogance”¹⁴⁷ and arguments “which it is beyond human nature to leave unanswered.”¹⁴⁸ One could hope that Justice Scalia’s inconsistent applications of principle and his lengthening tenure on our highest tribunal would have led to some ascertainable sense of humility. Not so. He apparently prefers hypocrisy.

147. *Id.* at 999.

148. *Id.* at 981.

