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DEEP TRACKS: ALBUM CUTS THAT HELP DEFINE THE ESSENTIAL SCALIA

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Jeff Sutton and Ed Whelan have collected some of Justice Scalia's "greatest hits" in a volume entitled The Essential Scalia: On the Constitution, the Courts, and the Rule of Law. The book is an excellent introduction to the jurisprudential thought and literary style of one of the most influential legal thinkers—and legal writers—in modern times. As with any "greatest hits" compilation, however, there are inevitably going to be key "album cuts" for which there will not be space. This essay seeks to supplement Sutton and Whelan's invaluable efforts by surveying three of those "deep tracks" that shed particular light on Justice Scalia's contributions to legal thought. The first opinion, a lone concurring opinion in *NLRB v. Int'l Brotherhood of Electrical Workers Local 340*, dates from Justice Scalia's first term on the Court and illuminates his interpretative methodology, his

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jurisprudential focus, and his unique take on precedent. The second opinion, *Zuni Public School Dist. No. 89 v. Dep't of Education*, is a dissent by Justice Scalia that may exemplify his approach to statutory interpretation better than any other decision, if only by way of contrast between his approach and that of other justices. The third opinion, *Melendez-Diaz v. Massachusetts*, starkly pitted Justice Scalia against a phalanx of conventionally labeled "conservative" justices (aligned with Justice Breyer) on one of the most impactful constitutional questions to reach the Supreme Court in recent decades. It sharply highlights the key, and oft overlooked, ambiguity regarding what it means to be a conservative jurist and a constitutionalist jurist. Collectively, these opinions show how, in order to understand some of the most important currents in modern law, one needs the essential Scalia – and The Essential Scalia.

INTRODUCTION

Assembling a "greatest hits" album for a musical artist is often a tricky proposition, especially if the compilation aims to encourage listeners to explore more of the artist's work and get a better sense of the artist's trajectory and impact. If the hit singles or other songs included as "greatest hits" are not really representative of the artist's catalogue, there are twin dangers of disappointment if the listeners venture further only to discover that the album cuts are wildly different from the hits and lost opportunities if the listeners don't bother to try out the studio albums, concluding that they adequately "know" the artist just from listening to the compiled hit singles.

Some artists lend themselves better than others to selective compilation. For example, one of the top-selling albums of all time is *Their Greatest Hits, 1971-1975* by The Eagles,[1] collecting the singles

[1] THE EAGLES, THEIR GREATEST HITS, 1971-1975 (Asylum 1976). By some measures, the album might rank as high as #2 in all-time sales (behind Michael Jackson's

from The Eagles' first four studio albums. While there are certainly some gems from those studio albums that did not make the compilation,[2] the *Greatest Hits* album fairly represents the work product of The Eagles during the relevant time span. Someone who listens to the album will get a good sense of the group's sound and style; and if that listener likes the songs assembled on the *Greatest Hits* package, he or she is probably going to like the studio albums as well. There is not a dramatic difference in the sound or tone of the album cuts and the singles—though in terms of songwriting quality, the singles were generally chosen as singles for good reasons.

For other artists, however, a representative "greatest hits" compilation seems entirely out of the question. Just consider, for example, what a "greatest hits" album would look (or sound) like for Pink Floyd or Rush. For one thing, some of those artists' finest work is simply too long—on more than rare occasions encompassing entire album sides[3]—for inclusion in an introductory compilation. For another thing, the songs often lose something important by being removed from the context of the studio albums from whence they came; some songs work best when they are part of a coherent whole.

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matchless Thriller). *See* WIKIPEDIA, *List of Best-Selling Albums* [https://perma.cc/5VC5-9TGB].

[2] My list of missing gems would include "Ol' 55," "After the Thrill Is Gone," and "Journey of the Sorcerer" (the latter if only because of *The Hitchhiker's Guide to the Galaxy*). Many Eagles fans will scream "James Dean." It's not among my favorites, but I won't argue the point.

[3] *Hear, e.g.*, PINK FLOYD, *Echoes*, MEDDLE (Harvest 1971); RUSH, *The Fountain of Lamneth*, CARESS OF STEEL (Mercury 1975); RUSH, *2112*, 2112 (Anthem 1976); RUSH, *Cygnus X-1 Book II: Hemispheres*, HEMISPHERES (Anthem 1978). There are also must-hear tracks from those two bands that do not consume entire album sides but exceed ten minutes in length, which probably makes them poor choices for a "greatest hits" compilation. *Hear, e.g.*, PINK FLOYD, *A Saucerful of Secrets*, A SAUCERFUL OF SECRETS (EMI Columbia 1968); PINK FLOYD, *Shine On You Crazy Diamond (Parts I-V) & Shine On You Crazy Diamond (Parts VI-IX)*, WISH YOU WERE HERE (Harvest 1975); PINK FLOYD, *Pigs (Three Different Ones)*, ANIMALS (Harvest 1977); RUSH, *Xanadu*, A FAREWELL TO KINGS (Anthem 1977); RUSH, *Cygnus X-1 Book I: The Voyage*, A FAREWELL TO KINGS (Anthem 1977). (Note to Rush fans: "Natural Science," from the stellar and underrated *Permanent Waves* album, is not quite ten minutes long, so it did not make my arbitrary cut-off for this footnote.)

And, finally, those artists' work product is simply too diverse to be effectively captured by any kind of compilation. That is true of other artists as well; Led Zeppelin here leaps to mind as a prime example of a band with so many different sounds that it is hard to see how a limited compilation would work well. It is no accident that there has never been a successful "greatest hits" album for any of these bands.

Now, suppose that you have to assemble for an artist a "greatest hits" compilation that contains only *excerpts* from the songs. You can only present perhaps one verse and one chorus, and maybe one brief instrumental bridge, from any single work. For artists with complex works, it will be close to impossible under those constraints to put together anything even faintly representative of the artist's career. Try to imagine, for example, a collection of snippets from songs by Yes. It simply won't work.

Jeff Sutton and Ed Whelan faced all of these potential problems and more in trying to compile Antonin Scalia's greatest hits for *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law*.[4] Not even counting his fifteen years in the legal academy and the federal executive department, Judge and then Justice Scalia produced almost three and half decades' worth of opinions, speeches, articles, and books. The range of subjects covered by that massive work product is staggering, spanning the worlds of legal and political theory. Much of that work product is Yes-like in its length and complexity, many of Justice Scalia's writings are Rush-like in their subtlety and technical prowess, and the catalogue as a whole has a Zeppelin-like feel of diversity and breadth. Even more importantly, Justice Scalia rightly prided himself on analytical precision and rigor. Accordingly, his works typically build arguments logically from premises to conclusions. When the chains of reasoning have any significant length, trying to excerpt the arguments is necessarily going to leave

[4] Antonin Scalia, THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW (Jeffrey S. Sutton & Edward Whelan eds., 2020) [hereinafter The Essential Scalia].

out something important, even when those excerpts have a good measure of stand-alone merit. One can absolutely listen to David Gilmour's magnificent guitar solo from "Comfortably Numb"[5] or Jimmy Page's legendary blast on "Stairway to Heaven"[6] and appreciate them as self-contained bits of musical genius, but surely something is lost if that is *all* that one hears from those songs. Similarly, Justice Scalia's writings contain a plethora of memorable passages with enduring merit, both literary and substantive, but those passages lose something when taken out of the context of the larger arguments in which they were embedded.

Even to attempt to capture the true scope of Justice Scalia's thought would require at least the equivalent of a multi-album boxed set, probably spanning half a dozen or more lengthy volumes. If the goal is to *introduce* people to Justice Scalia's thought, that is not an option. No one unfamiliar with Yes is going to listen to the four-CD *Yesyears*[7] as their first exposure, and no one unfamiliar with Justice Scalia's writings will sit down and read a six-volume series of 500-page books. Accordingly, Jeff Sutton and Ed Whelan took on the Herculean tasks of (a) picking out a subset of Justice Scalia's works to include in an edited volume and (b) choosing excerpts or snippets from those works that convey the most important elements of Justice Scalia's substantive and literary styles.

So how did they fare?

Pretty darned well, all things considered. If I were trying to slot Justice Scalia into the world of classic rock, I would probably analogize him to Rush or Yes, given the elegance, intricacy, and sophistication of his thought and writing.[8] This makes an effective "greatest hits" compilation of Justice Scalia's work product close to impossible. But given those constraints, Sutton and Whelan have

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[5] *Hear* PINK FLOYD, *Comfortably Numb*, THE WALL (Harvest 1979).

[6] *Hear* LED ZEPPELIN, *Stairway to Heaven*, [UNTITLED FOURTH ALBUM] (Atlantic 1971).

[7] YES, YESYEARS (Atco 1991).

[8] It is not at all a coincidence that Rush and Yes would both easily make my list of top five all-time artists, just as Justice Scalia would easily make my list of top five all-time legal theorists.

done about as good a job as is humanly possible of picking out the most important themes in Justice Scalia's work and his most noteworthy and memorable pieces of writing.

The key to their handling of the material is the organization. They have sorted the material by topic, moving (roughly speaking) from the most abstract ideas ("The Rule of Law," "Originalism," "Textualism") to relatively abstract applications of those principles ("Constitutional Structure") to more particularistic applications ("Review of Agency Action"). That was a wise choice of structure; it is hard to understand Justice Scalia's specific opinions or comments without seeing the wider interpretative and jurisprudential context from which they spring. Because my tastes run more to the abstract than to the particular, I would have liked to have seen a bit more emphasis placed on the higher-level material on originalism and textualism, but that is a quibble that likely says more about me than about Sutton, Whelan, or Justice Scalia. For anyone who wants an introduction to, or perhaps a refresher in, Justice Scalia's enormous contributions to and influence on modern legal thought, this volume is a terrific place to start.

Indeed, rather than critique the volume, which would involve nothing more dramatic or intellectually interesting than some additional idiosyncratic quibbles, my goal here is to supplement it. When dealing with an artist with the breadth and longevity of a Justice Scalia, even a comprehensive compilation is going to miss some deep-tracks gems. Accordingly, I want to highlight here three opinions authored by Justice Scalia which—quite understandably—did not make the cut for *The Essential Scalia* but which each say something important about Justice Scalia's approach to law and adjudication. They do so as much by contrast with the approaches of other people as by Justice Scalia's exposition of his own views, and it was therefore entirely reasonable for Sutton and Whelan to exclude them from the "greatest hits" volume that was intended to showcase Justice Scalia in a more direct fashion. These opinions are truly album cuts, but they are album cuts that say a great deal about Justice Scalia's artistry.

The first opinion, a lone concurring opinion in *NLRB v. Int'l Brotherhood of Electrical Workers Local 340*,[9] dates from Justice Scalia's first term on the Court, and it illuminates his interpretative methodology, his jurisprudential focus, and his unique take on precedent. The second opinion, *Zuni Public School Dist. No. 89 v. Dep't of Education*,[10] features a dissent by Justice Scalia that may exemplify his approach to statutory interpretation better than any other decision, if only by way of contrast between his approach and that of other justices. The third opinion, *Melendez-Diaz v. Massachusetts*,[11] starkly pitted Justice Scalia against a phalanx of conventionally labeled "conservative" justices (aligned with Justice Breyer) on one of the most impactful constitutional questions to reach the Supreme Court in recent decades. It sharply highlights the key, and oft overlooked, ambiguity regarding what it means to be a *conservative* jurist and a *constitutionalist* jurist.[12]

Whether one mostly agrees or mostly disagrees with Justice Scalia, there is no denying his enormous influence on jurisprudence; he is a topic well worth studying and as fit a subject for a "greatest hits" collection as one will find in the legal world. As a matter of full disclosure: I clerked for Justice Scalia twice, including during his first term on the Supreme Court in 1986-87, and it is no great secret that I fall into the "mostly agrees" camp. It is also no great secret (since I have said so in print on multiple occasions) that there are important

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[9] 481 U.S. 573 (1987).

[10] 550 U.S. 81 (2007).

[11] 557 U.S. 305 (2009).

[12] Another good candidate for inclusion as a missing deep track, which illuminates some of the same themes as Melendez-Diaz, is Arizona v. Hicks, 480 U.S. 321 (1987). That decision has been discussed at length elsewhere. *See, e.g.*, George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990); Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 U. CHI. L. REV. 2265 (2017); Timothy MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 184-88 (2015).

aspects of his jurisprudence with which I vigorously disagree.[13] But in this review essay, I come neither to praise nor to bury Justice Scalia but rather to help understand him and his place in legal thought by building on the impressive foundation laid by Sutton and Whelan in their invaluable volume.

I. "CAUSE THAT UNION MAN'S GOT SUCH A HOLD OVER ME. HE'S THE MAN WHO DECIDES IF I LIVE OR I DIE, IF I STARVE, OR I EAT"[14]

It is fair to describe Justice Scalia's 1987 concurring opinion in *NLRB v. Int'l Brotherhood of Electrical Workers, Local 340*[15] as "obscure." I do not believe the opinion has ever been cited in a subsequent Supreme Court decision; I know of only one lower court decision that mentions it;[16] and slightly more than a dozen law review articles cite it, only one of which contains a significant textual discussion of Justice Scalia's expressed views in that case.[17] That neglect is unfortunate, because the brief but powerful concurring opinion provides important insight into Justice Scalia's jurisprudential approach, especially with respect to the relative roles of text and precedent in adjudication. This opinion is thus, as the late great Tom Petty might have put it, a buried treasure.

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[13] See, e.g., Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143 (2017); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2015); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007). I disagreed with Justice Scalia even more vigorously and broadly on many questions of political theory and morality, but those subjects are beyond the scope of this essay.

[14] THE KINKS, *Get Back in Line*, LOLA VERSUS POWERMAN AND THE MONEYGOROUND, PART ONE (Reprise 1970).

[15] 481 U.S. 573 (1987).

[16] *See* Critical Mass Energy Product v. NRC, 975 F.2d 871, 881-82 (Randolph, J., concurring) (en banc).

[17] *See* Anne Marie Lofaso, *Justice Scalia's Labor Jurisprudence – Justice Denied?*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 13, 55-57 (2017).

The case involved a provision added by the Taft-Hartley Act in 1947 to the federal labor laws as section 8(b)(1)(B) of the National Labor Relations Act,[18] declaring: "It shall be an unfair labor practice for a labor organization or its agents— (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."[19] Unions, in other words, do not get a say in who employers choose as their bargaining representatives. Operationally, unions cannot use coercive powers to force employers into multi-employer bargaining units or into choosing as representatives persons who the unions think will be favorable to their positions.[20] While it is not self-evident what it means to "restrain or coerce" an employer in this context, it *is* self-evident that the only subject matter of the prohibition is interference with the employer's "*selection* of his representatives for the purposes of collective bargaining or the adjustment of grievances."[21]

The constitution of the International Brotherhood of Electrical Workers Union provides, and provided in 1982, that Union members may be penalized for "[w]orking for, or on behalf of, any employer . . . whose position is adverse or detrimental to the I.B.E.W."[22] In 1982, the Union, under this provision, fined three of its members for working for employers who did not have collective bargaining agreements with the Union and who paid wages below the Union's fixed scale. The employers—not the fined Union members, but the employers—filed an unfair labor practice charge with the National Labor Relations Board (NLRB) under section 8(b)(1)(B), claiming that the fines imposed on the employees "restrain[ed] or coerce[d]" the

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[18] Labor Management Relations Act, 29 U.S.C. § 158(b)(1)(B) (1947).

[19] 29 U.S.C. § 158(b)(1)(B) (1947).

[20] *See* 481 U.S. at 580 ("This section was enacted to prevent a union from exerting direct pressure on an employer to force it into a multiemployer bargaining unit or to dictate its choice of representatives for the settlement of employee grievances.").

[21] 29 U.S.C. § 158(b)(1)(B) (emphasis added).

[22] Int'l Brotherhood of Elec. Workers Const. and Rules for Local Unions and Councils Under Its Jurisdiction (Sept. 2016), art. XXI, § 1(f). [https://perma.cc/FTB8-FT2X].

employers in their selection of bargaining representatives. The NLRB found that two of the three employees were functioning as supervisors for their employers when they were fined.[23] The agency also found, and no one disputed, that in 1982 the employers had no collective bargaining agreement with the Union. In other words, the fined Union members who were working as supervisors for the employers had *no* collective bargaining or grievance adjustment dealings with the IBEW local that fined them.

If one is at all a devotee of plain meaning in statutory interpretation, it is difficult to see how a provision aimed at prohibiting unions from coercing employers in the selection of representatives "for the purposes of collective bargaining or the adjustment of grievances" could be implicated by union discipline of a member who cannot possibly have a collective bargaining or grievance adjustment role with respect to that union because there is no union/employer relationship over which to bargain or grieve. One might also think that "restrain" and "coerce" are active verbs, connoting some kind of direct link between the prohibited union action and the employer's selection process. So, how could internal union discipline of a member who worked for an employer with whom the union had no dealings find its way to the NLRB, much less result in an unfair labor practice ruling?

If one looks only at the text of section 8(b)(1)(B), the result is wholly implausible. As it happens, however, the NLRB before 1982 had already given the statutory provision at issue a very broad interpretation. If one starts with those interpretations rather than with the statute, the employers' case starts to look much better. The story of the evolution of the NLRB's take on this statute is long and twisted, but it is necessary context for understanding Justice Scalia's

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[23] *See* Int'l Brotherhood of Elec. Workers, 271 N.L.R.B. 995. 996-98 (1984). The third employee sometimes functioned as a supervisor for the employer but was found to be working solely as a rank-and-file electrician during the events giving rise to the Union discipline. *See id.* at 1000-01.

brief but potent statements in *Int'l Brotherhood of Electrical Workers, Local 340*.

The first step came in 1968, when the NLRB concluded that union attempts to influence or control the *performance* of an employer-selected representative's collective bargaining or grievance adjustment functions could constitute an attempt to "restrain or coerce . . . the selection" of representatives.[24] The theory in this *Oakland Mailers* decision was that employers would have little choice but to replace a representative if a union effectively controlled that person's decisions through internal disciplinary measures, so that the employer was not really then allowed to select whomever it chose. The NLRB explained:

> Respondent's actions, including the citations, fines, and threats of citation, were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them. In all the circumstances, therefore, we find that Respondent's acts constitute restraint and coercion of the

[24] *See* San Francisco-Oakland Mailers' Union No. 18, 172 N.L.R.B. 2173 (1968).

> Charging Party in the selection of its representatives within the meaning of Section 8(b)(1)(B) of the Act.[25]

Although control of a *representative's action* is not literally the same thing as control of an *employer's selection of a representative,* which is the only subject directly addressed by the statute, the NLRB's decision is at least understandable. To be sure, one could perfectly well construe section 8(b)(1)(B) to apply *only* to direct attempts to affect the selection process, as the NLRB construed it for quite some time.[26] But, one could also construe the term "representatives" to have a functional, and not merely formal, meaning so that the statute protects not just a bare right to choose a person, but also the right to have that person act, in fact as well as form, as the employer's agent. Union efforts to coerce agents in the performance of their union-related activities could thus be seen indirectly to coerce the employer's selection of a representative and thus to implicate the statute. This is not an inevitable construction of the statute, and it is not even necessarily the best construction of the statute, but it is not absurd on its face. If one believes in some measure of deference to agencies in the interpretation of statutes (and such deference to NLRB interpretations in particular was commonplace even in the decades before the term "*Chevron* deference"[27] merited an entry in

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[25] *Id.* (footnote omitted).

[26] *See* Florida Power & Light Co. v. Int'l Brotherhood of Elec. Workers, Local 641, 417 U.S. 790, 798-99 (1974). This construction is supported by the fact that the employer can always avoid any potential conflict of interest for its representatives by simply choosing only representatives who are not members of a union. *See id.* at 807-09.

[27] The so-called Chevron doctrine, which prescribes a measure of deference to agencies in the interpretation of statutes which the agencies administer, is named for *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The doctrine does not actually stem from the decision for which it is named, but that is a story for another time. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013).

legal dictionaries),[28] one might well be inclined to let the agency have this one.

Once that step is taken, the next question is whether a union "restrain[s] or coerce[s]" the employer in its "selection" of representatives anytime a union disciplines supervisor/members for exercising their supervisory power, even when that exercise of power does not pertain to collective bargaining or grievance adjustment. A year after *Oakland Mailers,* the NLRB said yes to that one as well, calling the statute "a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers."[29] That conclusion is considerably harder to locate in the language of the statute than was the decision in *Oakland Mailers*, since the statutory language deals only with representation "for the purposes of collective bargaining or the adjustment of grievances."[30] With this ruling, the functional reasons for giving a broad meaning to the word "representatives" start taking on a life of their own, divorced from any anchor in the statute. A perceived *purpose* of the statutory language becomes the object of interpretation, rather than the language itself.

If section 8(b)(1)(B) is indeed taken to be "a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers," how about union discipline of a supervisor for crossing a picket line to perform rank-and-file work rather than for exercising supervisory responsibilities? Does the NLRB's functionally construed (or

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[28] Indeed, many of the seminal pre-Chevron cases on deference to agency interpretations of statutes involved the NLRB. *See, e.g,* Gray v. Powell, 314 U.S. 402 (1941); NLRB v. Hearst, 322 U.S. 111 (1944); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

[29] *See* Toledo Locals Nos. 15-P & 272, Lithographers & Photoengravers Int'l (Toledo Blade Co., Inc.), 175 N.L.R.B. 1072, 1080 (1969), *enforced* NLRB v. Toledo Locals Nos. 15-P & 272, Lithographers & Photo-Engravers Int'l Union, AFL-CIO, 437 F.2d 55 (6th Cir. 1971).

[30] 29 U.S.C. § 158(b)(1)(B).

reconstructed?) statute reach even that far? Yep, said the NLRB.[31] Nope, said the Supreme Court, in a 5-4 decision[32] that announced:

> We may assume without deciding that the Board's Oakland Mailers decision fell within the outer limits of this test, but its decisions in the present cases clearly do not. For it is certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.[33]

The Court thus drew a line that required *some* clear connection between union action and supervisory functions in order to implicate the statute. Four justices, however, would have deferred to the NLRB's position,[34] endorsing the statement from a lower court judge that

> "[w]hen a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equall*y interferes with the employer's control over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the

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[31] *See* Int'l Brotherhood of Elec. Workers System Council U-4 (Florida Power & Light Co.), 193 N.L.R.B. 30 (1971); Intl'l Brotherhood of Elec. Workers (Illinois Bell Telephone Co.), 192 N.L.R.B. 85 (1971).

[32] *See* Florida Power & Light Co. v. Int'l Brotherhood of Elec. Workers, Local 641, 417 U.S. 790 (1974).

[33] *Id.* at 805.

[34] *See id.* at 816 (White, J., dissenting) ("This Court is not a super-Board authorized to overrule an agency's choice between reasonable constructions of the controlling statute. We should not impose our views on the Board as long as it stays within the outer boundaries of the statute it is charged with administering.").

> way the supervisor interpreted the collective bargaining agreement or performed his 'normal' supervisory duties."[35]

Before *Int'l Brotherhood of Electrical Workers, Local 340*, the last iteration of this interplay between statutory language and perceived statutory purposes was *American Broadcasting Cos., Inc. v. Writers Guild of America, West, Inc. ("ABC")*.[36] A writers' union had struck the entertainment industry and issued internal orders to its members not to cross the picket lines. The production companies insisted that supervisory personnel belonging to the union report to work *solely* to perform their supervisory functions, such as grievance adjustment and occasional collective bargaining negotiations, though *not* to perform writing functions that were the subject of the strike. The union imposed discipline, including fines, on members who reported to work, which the NLRB found to be a violation of section 8(b)(1)(B).[37] Although the union disciplinary action applied across the board to all strike crossings and did not depend on any factual findings regarding the exercise of collective bargaining or grievance functions by the fined employees, the agency concluded that the union action effectively deprived the employers of the services of their chosen representatives and thus constituted restraint or coercion prohibited by section 8(b)(1)(B). The Supreme Court, in another 5-4 decision, affirmed the NLRB's conclusion, in an opinion dripping with deference to the agency.[38] The Court summarized the line of authorities from *Oakland Mailers* through *Florida Power & Light* as holding that a violation of the statute occurs from union discipline of its members

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[35] *Id.* at 815 (quoting Int'l Brotherhood of Elec. Workers, AFL-CIO v. NLRB, 487 F.2d 1143, 1176 (D.C. Cir. 1973) (en banc) (MacKinnon, J., dissenting)).

[36] 437 U.S. 411 (1978).

[37] *See* Writers Guild of America, West, Inc., 217 N.L.R.B. 957 (1975).

[38] The opinion was authored by Justice White, who had written a strong dissent in *Florida Power & Light Co.* urging deference to the NLRB.

> whenever such discipline may adversely affect the supervisor's conduct in his capacity as a grievance adjustor or collective bargainer. In these situations—that is, when such impact might be felt—the employer would be deprived of the full services of his representatives and hence would be restrained and coerced in his selection of those representatives.[39]

The Court stated that this principle could apply even when the fining union had no collective bargaining relationship with the employer: "A union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents."[40]

The upshot of these decisions is that, circa 1978-1987, unions could take no action at all against supervisory employees that had any effect on those employees' ability to perform supervisory functions for their employers, though they could take action against supervisors who performed only non-supervisory, rank-and-file functions. That is quite a lot to draw out of a statutory provision dealing with employer selection of collective bargaining representatives, but there you have it.

Such was the doctrine in 1987 when *Int'l Brotherhood of Electrical Workers, Local 340* reached the Supreme Court. The case before the NLRB involved union fines of supervisory employees of two electrical contracting firms. At the time of the fines, which were imposed for " 'working for an employer who is no longer signatory to an IBEW agreement with Local Union 340,' "[41] neither firm had a collective bargaining agreement with the union in question; they were part of a multi-employer bargaining unit that had reached an

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[39] 437 U.S. at 429.
[40] *Id.* at 438 n.37.
[41] Int'l Brotherhood of Elec. Workers, Local 340, 271 N.L.R.B. 995, 998 (1984).

agreement with a different union.[42] The NLRB, adopting in full the decision of the administrative law judge who heard the case, summarized the interpretation of section 8(b)(1)(B) that it had developed over the previous two decades:

> It is also well settled that union discipline of supervisor-members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies*, *supra*, at 433-437 fn. 36. . . . The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies*, *supra*, 433-437.[43]

In response to the union's objection that it could not be liable under section 8(b)(1)(B) because it had no collective bargaining relationship with the employers,[44] the Board concluded that the Supreme Court's decision in *ABC* was best read to allow liability, even absent such a relationship.[45] Since the Court in that case had said that *any* union action that might induce a supervisor to stop

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[42] *See id.* at 999.

[43] *Id.* at 1000.

[44] *See id.* at 1001 ("Respondent . . . argues that no violation of Section 8(b)(1)(B) can be found because the Union did not have a collective-bargaining agreement or a collective-bargaining relationship with either of the employers at the time Schoux and Choate engaged in the conduct for which they were fined.").

[45] *See id.* at 1001-02.

working for a company implicates section 8(b)(1)(B), this was an entirely plausible extrapolation from the language and reasoning of *ABC*.

The Ninth Circuit, relying on prior circuit authority[46] in which the NLRB had declined to acquiesce,[47] concluded that liability under section 8(b)(1)(B) required a closer connection between union action and employer choice of representative than was found by the agency: "when a union does not represent or intend to represent the complaining company's employees there can be no Section 8(b)(1)(B) violation when a union disciplines members even if they are designated bargaining representatives."[48]

The Supreme Court affirmed the Ninth Circuit's decision by a 6-3 vote, with Justice White, Chief Justice Rehnquist, and Justice O'Connor dissenting. The five-justice majority began by questioning whether the disciplined union members even counted as employer representatives for section 8(b)(1)(B) purposes in this context. After all, the union members were disciplined for actions in their capacities as union members, not for actions in their capacities as bargaining or grievance-adjustment representatives for the employer. The NLRB nonetheless treated *all* supervisory personnel as section 8(b)(1)(B) representatives, regardless of the functions that they actually performed at the time of the union discipline, on the theory that the universe of supervisory personnel constituted a "reservoir" of potential bargaining or grievance-adjusting representatives,[49] so that anything that reduced the incentives of employees to be supervisors effectively interfered with the employer's free future choices of section 8(b)(1)(B) representatives. The Supreme Court majority

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[46] *See* NLRB v. Int'l Brotherhood of Elec. Workers, 714 F.2d 870 (9th Cir. 1980).

[47] *See* 271 N.L.R.B. at 1001.

[48] *See* NLRB v. Int'l Brotherhood of Elec. Workers, Local 340, 780 F.2d 1489, 1492 (9th Cir. 1986).

[49] *See* 481 U.S. at 586-87 (discussing the evolution of and stated rationales for this "reservoir" doctrine).

specifically rejected this doctrine—even though it was mentioned only in passing by the NLRB in its decision in the case and was not raised by the petition for certiorari.[50]

The crux of the majority's opinion was its conclusion that "the absence of a collective-bargaining relationship between the union and the employer . . . makes the possibility . . . [of coercion of employers] too attenuated to form the basis of an unfair labor practice charge."[51]

> In other words, the assumption underpinning *Florida Power* and *ABC*—that an adverse effect can occur simply by virtue of the fact that an employer representative is disciplined for behavior that occurs during performance of § 8(b)(1)(B) tasks—is not applicable when the employer has no continuing relationship with the union.[52]

The Court noted that the union discipline in this case "does not coerce Royal and Nutter in their *selection* of § 8(b)(1)(B) representatives. Section 8(b)(1)(B) . . . was not intended to prevent enforcement of uniform union rules that may occasionally have the incidental effect of making a supervisory position less desirable."[53] Such reasoning from the "incidental effect" of union discipline on employer options was, of course, precisely the reasoning of numerous prior NLRB decisions, and it was precisely the reasoning underlying *ABC,* which read section 8(b)(1)(B) to foreclose union discipline of supervisors who performed any grievance-adjustment functions at all, including functions involving personal grievances and grievances involving

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[50] *See id.* at 599 n.1 (White, J., dissenting). The NLRB's "reservoir" doctrine was certainly dubious as a matter of statutory construction, but Justice White seems right that it was not necessary or appropriate for the Court to reach the issue in this case. Justice Scalia agreed that it was not necessary to reach the issue. *See id.* at 596 (Scalia, J., concurring in the judgment).

[51] Id. at 589.

[52] *Id.* at 590.

[53] *Id.* at 591.

employees who do not belong to the disciplining union. The Court explained in a footnote:

> *ABC* does suggest in dictum that any discipline that affects a supervisor-member's "willingness to serve" as a § 8(b)(1)(B) supervisor is unlawful . . . .
>
> This statement was unnecessary to the disposition of *ABC*. There the Court held that the union fines had adversely affected the manner in which the employer representatives *fulfilled § 8(b)(1)(B) functions* and therefore interfered with the employer's control over its representatives.[54]

The dissenting opinion, emphasizing the Court's long history of deference to the NLRB in the interpretation of the labor laws,[55] argued that the majority downplayed the significance of *ABC*:

> Moreover, we traveled this road previously in *ABC* . . . . [W]e agreed with the Board that ABC was "restrained and coerced within the meaning of § 8(b)(1)(B) by being totally deprived of the opportunity to choose these particular supervisors as [its] collective-bargaining or grievance-adjustment representatives during the strike." The *manner* in which these supervisor-members performed their duties was obviously not affected since they performed no duties during the strike; as here, it was their willingness to serve as employer

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[54] *Id.* at 591 n.15 (citations omitted) (emphasis in original).

[55] The dissenting opinion did not, in 1987, make any mention of the 1984 decision in Chevron. That will only be surprising to people who believe that the Chevron doctrine in the Supreme Court originated in the 1984 Chevron decision. That is manifestly not what happened. The Chevron doctrine was a lower-court creation that did not penetrate the Supreme Court until many years after the Chevron decision. It was still in its earliest stages of penetration in 1987. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013).

> representatives that was at issue. We cited approvingly the Board's disposition of an unfair labor practice claim analogous to the claim asserted in *ABC* and virtually identical to the one asserted here. In *A.S. Horner, Inc., supra,* the Board held that union discipline imposed on a member who worked as a supervisor for an employer which had no contract with the union violated § 8(b)(1)(B) because it would have required the supervisor to leave his job and thus would have deprived the employer of the services of its selected representative. 437 U.S at 36, n.36.
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> . . . The majority seeks to distinguish *ABC* on the ground that respondent here has no collective-bargaining relationship at all with Royal and Nutter, but this fact is without significance. The harm is the same in both cases – the union discipline would deprive the employer of the services of its selected representative.[56]

Thus, the crux of the case, as seen by both the majority and dissent, was how best to understand the decision in *ABC* and whether the Board's action in this case fell within the policies underlying *ABC*.

Justice Scalia concurred in the result only, as he had a very different view from either the majority or the dissent about the relevance of the Court's prior decision in *ABC*. His concurring opinion is brief enough to reproduce here in principal part.

> . . . I would affirm the Court of Appeals solely on the ground that the Union had no collective-bargaining agreement covering either Royal or Nutter.
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> Section 8(b)(1)(B) of the National Labor Relations Act . . . by its plain terms governs only the relationship between unions and employers, not the relationship between unions and their members. Further, it pertains to only one aspect of the

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[56] 481 U.S. at 600-02 (White, J., dissenting) (some citations omitted).

union-employer relationship: the employer's *selection* of a bargaining or grievance adjustment representative. Nonetheless, in *American Broadcasting Cos. v. Writers Guild, Inc.*, 437 U.S. 411 (1978) (*ABC*), we affirmed the Board's application of this statute to union discipline of members who cross picket lines in order to perform grievance adjustment work for employers with whom the union has a collective-bargaining contract. The Board now asks us to approve an extension of the statute to a still more remote form of such "restraint" by a union upon employer "selection," namely, such restraint directed against an employer with whom the union has no collective-bargaining agreement.

If the question before us were whether, given the deference we owe to agency determinations, the Board's construction of this Court's opinion in *ABC* is a reasonable one, I would agree with the Government that it is. We defer to agencies, however (and thus apply a mere "reasonableness" standard of review) in their construction of their statutes, not of our opinions. The question before us is not whether *ABC* can reasonably be read to support the Board's decision, but whether § 8(b)(1)(B) can reasonably be read to support it. It seems to me that *ABC* and the Board's prior decision in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.),* 172 N.L.R.B. 2173 (1968), which held that unions violate § 8(b)(1)(B) by disciplining member-representatives for the manner in which they interpret collective-bargaining contracts, represent at best the "outer limits," *Florida Power & Light Co. v. Electrical Workers,* 417 U.S. 790, 805 (1974), of any permissible construction of § 8(b)(1)(B). I would certainly go no further, and would accordingly limit the Board's indirect restraint theory to circumstances in which there is an actual contract between the union and affected employer, without regard to whether the union has an intent to establish such a contract . . . .

> The Board's approach is the product of a familiar phenomenon. Once having succeeded, by benefit of excessive judicial deference, in expanding the scope of a statute beyond a reasonable interpretation of its language, the emboldened agency presses the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute. Some distance down that path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic . . . .
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> That is the case here. Logic is on the side of the Board, but the statute is with the respondent. I concur in the judgment of the Court.[57]

There is a great deal packed into this short opinion, apart from its textualist interpretation[58] of section 8(b)(1)(B). In particular, it says much about a topic that appears only episodically in *The Essential Scalia*: Justice Scalia's views on judicial precedent.

Many of the cases and speeches excerpted in *The Essential Scalia* at least implicitly discuss judicial[59] precedent to some degree. That is

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[57] *Id.* at 596-98 (Scalia, J., concurring in the judgment).

[58] For insights into Justice Scalia's theories of statutory interpretation, *see* Scalia, *supra* note 4, at 25-30, 247-62.

[59] There are many potential sources of precedent other than judicial decisions, including legislative precedents, executive precedents, and historical precedents, just to name a few. *See, e.g.*, id. at 13-15 (relying on historical precedents). My discussion

not surprising; it is rare, in either constitutional or statutory cases, to encounter an issue on which the Supreme Court has never previously said anything arguably relevant. It might, therefore, seem odd that the extensive list of topics covered by *The Essential Scalia*'s Table of Contents does not include precedent—and, indeed, that there is not even an entry for "precedent" in the book's index.

On reflection, however, that omission is almost inevitable. Justice Scalia did not systematically set forth an account of precedent.[60] He is far from alone in that regard; relatively few jurists or scholars, across any part of any spectrum, have sought to systematize their views on precedent. Instead, one normally sees a long list of factors that sometimes will and sometimes will not tug in this or that direction,[61] resulting in the bane of Justice Scalia's existence: "the 'ol 'totality of the circumstances' test."[62] No wonder he didn't want to talk about it that much.

The excerpts included in *The Essential Scalia* nonetheless reveal a few things of consequence about Justice Scalia's views on precedent.[63] On numerous occasions, Justice Scalia applied judicial precedent in a conventional manner, indistinguishable from the treatment afforded precedent by almost all justices (essentially everyone except Justice Thomas).[64] On other occasions, he creatively interpreted—or re-interpreted—prior decisions, in a fashion that is

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here is limited only to Justice Scalia's views on the use of prior judicial decisions as precedents.

[60] *See* John O. McGinnis, Scalia Failed to Create a Rule of Law for Precedent, LAW & LIBERTY (Oct. 12, 2016) [https://perma.cc/C6JK-YBN7].

[61] For a brief summary of the state of stare decisis in the Supreme Court, *see* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712-21 (2013).

[62] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

[63] For more focused accounts of Justice Scalia's expressed thoughts on precedent, *see* P. Thomas Distanislao, III, *The Highest Court: A Dialogue Between Justice Louis Brandeis and Justice Antonin Scalia on Stare Decisis*, 51 U. RICH. L. REV. 1149, 1172-73 (2017); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1705-08 (1991).

[64] *See, e.g.*, Scalia, *supra* note 4, at 63, 66-67, 105-06, 220-22.

also familiar to anyone who reads a nontrivial number of Supreme Court opinions.[65] On perhaps more occasions than some other justices, he was prepared to overrule precedents when they failed to provide what he regarded as judicially manageable rules[66] and/or represented a blatant usurpation of power.[67] This set him apart only marginally from other justices.

The vast majority of Justice Scalia's express or close-to-the-surface discussions of judicial precedent occurred in constitutional cases. But to a formalist, the differences between constitutional and statutory cases are far smaller than the similarities;[68] both classes of cases involve the ascertainment of the communicative meaning of putatively authoritative texts. And in Justice Scalia's first term on the Court, a unified theory of precedent in those textual cases began to emerge.

Perhaps Justice Scalia's most notable expressions on judicial precedent in constitutional cases concerned the so-called dormant commerce clause, under which the Court invalidates state regulations that, in the Court's view, discriminate against or unduly burden interstate commerce, even in the absence of a conflict between the state regulation and a valid federal statute.[69] As a matter of

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[65] *See, e.g.*, *id.* at 118, 188-89

[66] *See, e.g.*, *id.* at 71-75, 87.

[67] *See, e.g.*, *id.* at 154-58, 210-11.

[68] Non-formalists, to be sure, might draw sharp distinctions between statutory and constitutional stare decisis, grounded in the functionally-based relative ease of amending statutory texts, *see* Allegheny Defense Project v. FERC, 964 F.3d 1, 23 (D.C. Cir. 2020) (en banc) (Henderson, J., concurring in the judgment and dissenting in part) (collecting cases), even to the point of making statutory stare decisis conclusive or near-conclusive. *See, e.g.*, Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989). And formalists would likely draw sharp distinctions between constitutional and statutory cases on the one hand and common law cases on the other.

[69] *See* South Dakota v. Wayfair, Inc., 138 S.Ct. 2080, 2090-91 (2018) ("Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce.").

original meaning, the Article IV Privileges and Immunities Clause[70] arguably generates something like the antidiscrimination prong of this doctrine. The portion of the doctrine that polices state regulations for undue burdens on interstate commerce, however, could be correct only if Congress's power to regulate commerce among the several States[71] were an *exclusively* federal power[72]—in which case, it would not matter whether the state regulation unduly, or even duly, burdened interstate commerce, as there would simply be no state power to regulate interstate commerce *period*. There is a good argument that the Constitution, as a matter of original meaning, does in fact divest the States of any power to regulate interstate commerce.[73] Of course, given modern (mis)constructions of the Interstate Commerce Clause, "an exclusive commerce power would negate almost all state authority,"[74] so that that option is doctrinally off the table in the modern world, however correct it may be as an original matter. Taking as given that there is some overlap between state and federal powers to regulate interstate commerce, the doctrinal result has been a patchwork mess of balancing tests, ad hoc decisions, and judicial policy judgments which read as though it were specifically designed to give Justice Scalia indigestion. It is no

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[70] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[71] *Id.* at art. I, § 8, cl. 3.

[72] Instances of such exclusive federal power are not uncommon. *See* Steven G. Calabresi & Gary Lawson, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 595-96 (2020).

[73] *Id.* at 692-94.

[74] *Id.* at 694. *See also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part) ("Now that we know interstate commerce embraces such activities as growing wheat for home consumption, Wickard v. Filburn, 317 U.S. 111, (1942), and local loan sharking, Perez v. United States, 402 U.S. 146 (1971), it is more difficult to imagine what state activity would survive an exclusive Commerce Clause than to imagine what would be precluded.").

surprise that in a 2015 dissenting opinion,[75] excerpted in *The Essential Scalia,*[76] Justice Scalia called the dormant commerce clause doctrine "a judicial fraud" in which "we must make the rules up as we go along."[77]

In that opinion, Justice Scalia declared, as he had done on several occasions beforehand,[78] that "[f]or reasons of *stare decisis,* I will vote to set aside a tax under the negative Commerce Clause if (but only if) it discriminates on its face against interstate commerce or cannot be distinguished from a tax this Court has already held unconstitutional."[79] The first part of that dictate represents the view that the Constitution does in fact prohibit States from discriminating against interstate commerce, not by virtue of the Commerce Clause, but by virtue of the Article IV Privileges and Immunities Clause, so that the precedent ends up, however indirectly, correctly construing the Constitution.[80] The second part of the dictate represents an account of precedent with deep implications.

Those implications were made clear in the first case in which Justice Scalia set out his views on the dormant commerce clause, decided during his first term on the Court. In *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue,*[81] Justice Scalia dissented from the Court's insistence that state taxes had to conform to a principle of "internal consistency," in which the effect of a state tax is judged by reference to the tax's hypothetical effects if it were to be adopted by

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[75] Comptroller of the Treasury of Maryland v. Wynne, 575 U.S. 542, 571 (2015) (Scalia, J., dissenting).

[76] *See* Scalia, *supra* note 4, at 85-87.

[77] *Id.* at 86.

[78] *See, e.g.*, Am. Trucking Ass'ns., Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Scalia, J., concurring in the judgment).

[79] *Wynne*, 575 U.S. at 578.

[80] *See Tyler Pipe Indus.*, 483 U.S. at 265 (Scalia, J., concurring in part and dissenting in part).

[81] 483 U.S. 232 (1987).

every State.[82] In foreshadowing the view of precedent that he expressed in 2015, Justice Scalia wrote:

> In sum, to the extent that we have gone beyond guarding against rank discrimination against citizens of other States . . . , the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.[83]

So, exactly how does this passage lead to the conclusion, implicit in Justice Scalia's *Int'l Brotherhood* concurrence, that incorrect precedents should govern only when directly controlling on the specific facts of the next case?

The answer lies in a simple but powerful idea: precedent is a device for guiding adjudication; it is *not* a means for ascertaining the communicative meaning of a textual instrument.[84] Texts mean what they mean regardless of what any particular interpreter says about them. One can choose to give some measure of legal effect to prior interpretations that one considers wrong, but that does not make those wrong interpretations somehow right *as interpretations*. A prior decision can thus be *interpretatively* wrong but *adjudicatively* correct or binding. As Christopher Green has eloquently put it, drawing on Justice Scalia's analogy to adverse possession:

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[82] *See id.* at 254 (Scalia, J., concurring in part and dissenting in part).

[83] *Id.* at 265 (Scalia, J., concurring in part and dissenting in part).

[84] The exception would be if the instrument specifically incorporates some idea of precedent as a tool for its own interpretation.

> Deciding that it is more important that some issues are more importantly [sic] settled than settled correctly does not alter the criterion for what answers are actually correct. The Constitution still means what it means, and interpreters subject to an adverse-possession rule need neither surrender their convictions about its meaning through the equivalent of an intellectual lobotomy, nor believe that interpreters are free to shift and morph the meaning of the Constitution without any constraint. Precisely because it is part of constitutional construction, and not constitutional interpretation, an adverse-possession model for adherence to incorrectly-decided precedent would merely limit the power of present interpreters to give effect to their interpretations; it would not affect their interpretations as such.[85]

Hence, for Justice Scalia, "precedents do not 'fix' or 'liquidate' (to use the in-vogue Madisonian term) the Constitution's communicative meaning. They might, however, generate vested expectations, and if one treats those expectations as vested *rights,* then there is an adjudicative basis for leaving those vested rights untouched."[86]

Justice Scalia's analogy to adverse possession helps explain this account of the nature and limits of precedent. If someone adversely possesses property, that act does not change the communicative meaning of the grant that created the now-adversely-possessed interest. The grant, as a matter of communicative meaning, still conveyed the property to the previous possessor. As far as the grant is concerned, nothing has changed simply because a wrongdoer has been a wrongdoer for a long enough period of time. As a matter of adjudication, however, the law of adverse possession chooses to

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[85] Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403 (2014).

[86] Gary Lawson, *A Private Law Framework for Subdelegation, in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE ---, --- (Peter J. Wallison & John Yoo eds., 2021)

ignore the ordinary legal consequences of the grant. Importantly, adverse possession of one interest in a grant has no effect, either communicative or legal, on the other interests in the grant. Adverse possession of a present interest, for example, has no effect on future interests created by the same instrument. Nor would an objectively faulty judgment allowing adverse possession of the present interest entail or justify later objectively faulty judgments regarding the meaning or status of future interests. The meaning of the grant is one thing; its legal effect is another. Adverse possession affects the grant's legal effect, but it does not affect the grant's communicative meaning.

Justice Scalia's comments in *Tyler Pipe* extend this model to judicial precedent in constitutional cases. When courts choose precedent over constitutional meaning, they are allowing a past wrong to prevail over the formally valid "title" represented by the Constitution's objective communicative meaning. There are many reasons why someone in real-world adjudication might choose past practices over textual meaning, just as there are many reasons why someone in real-world adjudication might choose long possession over granted title. Indeed, many of the arguments often advanced in favor of precedent—stability, reliance, cost-savings, and so forth—are also arguments that are often made in defense of adverse possession.[87] But in the end, precedent is not a tool for the interpretation of texts, any more than is the law of adverse possession. Rather, it is a reason for choosing to ignore the correct

[87] For a compendium of arguments in favor of adverse possession, *see* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419 (2001). For similar compendia of arguments in favor of precedent, *see* THE LAW OF JUDICIAL PRECEDENT (Bryan A. Garner ed., 2016); Randy J. Kozel, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017). To be clear: I am not endorsing the arguments for either precedent or adverse possession. Indeed, I am a somewhat notorious critic of the former (and no huge fan of the latter). *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007). I am simply pointing out their similarities.

interpretation of texts in certain circumstances. Justice Scalia recognized this point, and it grounds the rest of his approach to precedent in textual cases.

Once one understands that precedent does not ascertain, much less change, the objective meaning of texts, the role of precedent gets determined by the role that one thinks that texts should play in adjudication. One very powerful normative model of decision-making, to which Justice Scalia mostly subscribed, treats putatively authoritative texts, such as the Constitution and duly enacted statutes, as actually authoritative. On this model, the text always serves as a reference point for evaluating decisions made in the name of that text.[88] The text, in other words, is hierarchically superior to statements made about the text by any particular interpreters. An adherent to this view might consider treating some textually incorrect prior decisions as settled law by virtue of the expectations that have grown up around them, but such a person would not regard those textually incorrect decisions as reference points for ascertaining the meaning of the texts. Wrong decisions might be left in place, but they would not be used as jumping-off points for further reasoning about texts that could justify the generation of future errors. Just as the reach of adverse possession stops with the physical and temporal borders of the wrongfully possessed land, one can say that the reach of incorrect textual interpretations stops at the boundaries of the prior decision. Operationally, this amounts to saying to incorrect precedents: "Hitherto shalt thou come, but no further."[89]

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[88] *See* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006). Again, to be clear: I am not endorsing this model of adjudication; I am merely describing it.

[89] At the risk of tedium: My point here is to describe this position, not to defend it. Persons who value certain forms of social order, or who simply prefer past decisions to the texts that they misinterpret, will likely find fault with this limited account of precedent. *See, e.g.*, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1182-83 (2006). An evaluation of this model of adjudication is a topic for another day and another scholar.

If that model holds for constitutional interpretation, does it hold for statutory interpretation as well? There is no obvious formalist reason why it would not. Accordingly, in the same term in which he analogized constitutional precedent to adverse possession, Justice Scalia wrote his concurring opinion in *Int'l Brotherhood of Electrical Workers, Local 340*. The upshot of that opinion was to reason to the outcome of the case *from the statute* rather than *from prior decisions issued in the name of the statute*. If the particular facts of those prior decisions did not directly and specifically dictate the outcome in the present case, that outcome must be evaluated by reference to the statute rather than the prior decisions. If some of those prior decisions were wrong (and Justice Scalia surely regarded at least some of the prior interpretations of section 8(b)(1)(B) as wrong), one might choose to leave them in place, just as one might leave in place an adverse possessor. But, one would not treat them as reference points for reasoning about new applications of the statute. The prior decisions operate as a side constraint on the results that one reaches by direct interpretation of the statute, but they do not mediate the interpretative process itself.

This account of precedent, of course, leaves unanswered the key question how one knows when prior decisions "cannot be distinguished"[90] from the case at hand. That is a question that plagues all theories of precedent, in any context, and Justice Scalia's analogy to adverse possession does not simplify the inquiry. But, it does *constrain* the inquiry considerably. One performs only a limited act of interpretation with regard to judicial opinions: one ascertains the scope of their precise holding. One does not then go on to ascertain or interpret their interpretations of authoritative texts. Those texts speak for themselves.

That is quite a lot to draw out of a short opinion that no other Supreme Court opinion has ever cited. But, if one understands what

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[90] *Wynne*, 575 U.S. at 57

Justice Scalia was saying in *Int'l Brotherhood of Electrical Workers, Local 340,* one will understand much about Justice Scalia's jurisprudence—and about jurisprudence more broadly.

II. "EYES DOWN, ROUND AND ROUND, LET'S ALL SIT AND WATCH THE MONEY GO ROUND, EVERYONE TAKES A LITTLE BIT HERE AND A LITTLE BIT THERE . . . , AND IT COMES OUT HERE, WHEN THEY'VE ALL TAKEN THEIR SHARE."[91]

Zuni Public School Dist. No. 89 v. Dep't of Education[92] is an album cut in the same way that Elton John's "Funeral for a Friend/Love Lies Bleeding" are[93] album cuts from *Goodbye Yellow Brick Road*: they were never released as singles, but everyone knows of them, and they have gotten more airplay over the years than have many "hit" singles from other artists. *Zuni* is similarly less obscure than *Int'l Brotherhood of Electrical Workers, Local 340*—partly because the *Zuni* case involves the controversial *Chevron* doctrine and partly because it contains one of Justice Scalia's most memorable phrases, in which he described the majority's interpretation of a statute as "sheer applesauce."[94] Nonetheless, I am aware of only one law review article that pays serious attention to *Zuni* as a case,[95] and Justice Scalia's dissenting opinion was not excerpted in *The Essential Scalia*. That omission was entirely sensible, not only because the case is factually complex but also because Justice Scalia's views come out most clearly only when

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[91] THE KINKS, *The Moneygoround*, LOLA VERSUS POWERMAN AND THE MONEYGOROUND, PART ONE (Reprise 1970).

[92] 550 U.S. 81 (2007).

[93] They are two distinct songs, but they are almost always played together – much like "Heartbreaker" and "Living Loving Maid (She's Just a Woman)" from *Led Zeppelin II*, "Sgt. Pepper's Lonely Hearts Club Band" and "With a Little Help from My Friends" from *Sgt. Pepper's Lonely Hearts Club Band*, and "Brain Damage" and "Eclipse" from *Dark Side of the Moon*. There are other examples of frequently paired songs; making a fuller list is left as an exercise for the reader/listener.

[94] *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 113 (Scalia, J., dissenting) ("The sheer applesauce of this statutory interpretation should be obvious.").

[95] *See* Osamudia R. James, *Breaking Free of Chevron's Constraints:* Zuni Public School District No. 89 v. U.S. Department of Education, 56 U. KAN. L. REV. 147 (2007).

they are contrasted with the views of other justices that are expressed in other opinions issued in the case. When that full context is brought to bear, however, *Zuni* may be the single best indicator of Justice Scalia's thoughts on statutory interpretation, and it therefore deserves a spot in this essay.

The story behind the case is mercifully a bit shorter, though perhaps no less convoluted, than the story behind *Int'l Brotherhood of Electrical Workers, Local 340*. Many public school districts throughout the United States are funded largely through local property taxes. It is well understood that this funding mechanism can create vast resource disparities among school districts with widely varying tax bases. While state-law challenges to such funding disparities are commonplace, the United States Supreme Court has thus far closed the door to federal constitutional challenges to reliance on local taxes for school funding,[96] so that such taxes remain a principal source of revenue for many local public school agencies.

On some occasions, the federal government itself is one potential source of inter-district disparities in resources. In many States that that were not part of the land transferred to the United States in 1783 by the Treaty of Paris,[97] the United States is a major landowner, with Native American tribes also owning significant percentages of land. For example, the federal government owns more than one-third of the land in New Mexico,[98] while Native American tribes own an additional ten percent.[99] Because States cannot tax federal or Native American land without the consent of those sovereigns, roughly half the land in New Mexico is off limits to state or local taxation. Much of that land is in rural areas, which means that rural counties and school districts are likely to face a property tax base in which a large

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[96] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[97] Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

[98] *See* BALLOTPEDIA, Federal Land Policy in New Mexico [https://perma.cc/GBH2-392V].

[99] *See* ENCYCLOPEDIA.COM, New Mexico [https://perma.cc/P3SV-5C4R].

portion of the land—quite possibly far more than half in those areas—is not subject to taxation. A double-whammy comes from the obligation of the local public school districts to provide free education to children who live on that non-taxable land, whether it be federal land (such as military bases) or tribal land. Public school districts with a large federal or tribal presence thus face heightened educational resource demands coupled with potentially drastic restraints on their ability to raise funds.

Although the federal government was aware of (and took modest steps toward addressing) this problem from a very early date,[100] Congress first systematically responded to these concerns in 1950 by passing a statute "[t]o provide financial assistance for local educational agencies in areas affected by Federal activities."[101] The current version of the statute's statement of purpose provides:

> In order to fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that promotes control by local educational agencies with little or no Federal or State involvement, because certain activities of the Federal Government, such as activities to fulfill the responsibilities of the Federal Government with respect to Indian tribes and activities under section 4001 of Title 50 [dealing with military personnel], place a financial burden on the local educational agencies serving areas where such activities are carried out, and to help such children meet the same challenging State academic standards, it is the purpose of this subchapter to provide financial assistance to local educational agencies that—

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[100] *See* NAT'L ASS'N OF FEDERALLY IMPACTED SCHOOLS, THE BASICS OF IMPACT AID 7 (2016).

[101] Act of Sept. 30, 1950, Pub. L. No. 81-874, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 7701-14).

> (1) experience a substantial and continuing financial burden due to the acquisition of real property by the United States;
>
> (2) educate children who reside on Federal property and whose parents are employed on Federal property;
>
> (3) educate children of parents who are in the military services and children who live in low-rent housing;
>
> (4) educate heavy concentrations of children whose parents are civilian employees of the Federal Government and do not reside on Federal property; or
>
> (5) need special assistance with capital expenditures for construction activities because of the enrollments of substantial numbers of children who reside on Federal lands and because of the difficulty of raising local revenue through bond referendums for capital projects due to the inability to tax Federal property.[102]

The statute contains criteria for determining the amounts of payments to local educational agencies.[103] For fiscal year 2020, appropriations for such payments exceeded one billion dollars.[104]

In a world of unintended consequences, however, action often begets reaction. Even in States that rely on local property taxes for the lion's share of public school funding, there is typically some measure of centralized state funding to try to address the problem of resource-poor districts. Suppose that you are a State in 1950 that has been providing assistance to districts within your State that face the federal or tribal double-whammy of student demand and non-taxable property. The federal government now agrees to offset some portion of the costs imposed by the federal presence. Do you continue to

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[102] 20 U.S.C. § 7701 (2018).
[103] *See id.* § 7703.
[104] *See id.* § 7714(b).

provide the same level of centralized state aid? Surely not. Why impose on your own taxpayers when you can have taxpayers—present or future—in other States foot the bill for you? Thus, a predictable result of the federal impact aid law was a reduction in state aid to poor school districts in States that receive such federal funding.

A federal court in 1968—in a decision that Justice Scalia likely would have regarded as "sheer applesauce"—read into the federal impact aid statute a prohibition on state reductions in aid to local districts predicated on the receipt of federal impact aid money.[105] The closest thing to such a provision in 1968 was a 1966 amendment to the impact aid statute providing:

> The amount which a local educational agency in any State is otherwise entitled to receive . . . for any fiscal year shall be reduced in the same proportion (if any) that the State has reduced for that year its aggregate expenditures (from non-Federal sources) per pupil for current expenditure purposes for free public education . . . below the level of such expenditures per pupil in the second preceding fiscal year.[106]

This provision tied federal aid to overall state educational spending but did not specifically address a State's inter-district allocation of funds. Nonetheless, under the non-textual modes of statutory interpretation that broadly prevailed in that era, the federal impact aid statute was assumed by the court to forbid States from offsetting local agencies' receipt of federal money with reductions in state aid to impacted local educational agencies.

In 1974, building on the assumption that the statute implicitly contained the foregoing prohibition on reductions in state aid to impacted school districts, Congress carved out an exception to that (phantom) prohibition for States that were attempting to equalize

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[105] *See* Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968).

[106] Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 203, 80 Stat. 1212.

expenditures among districts.[107] The prohibition and the exception were formally codified in 1994,[108] so that the statute now explicitly provides that States generally may not take into account federal impact aid money when determining "(A) the eligibility of a local educational agency for State aid for free public education; or (B) the amount of such aid,"[109] but that "[a] State may reduce State aid to a local educational agency . . . if the Secretary [of Education] determines, and certifies . . . , that the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State."[110]

One big question under this now-explicit (or, if one prefers, now-real) statute is how to determine whether a State has "a program of State aid that equalizes expenditures" for education, such that State offsets in aid will not lead to cut-offs in federal funding. The statute provides criteria for making that determination:

> [A] program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.[111]

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[107] *See* Education Amendments of 1974, Pub. L. No. 93-380, § 304, 88 Stat. 531.

[108] *See* Improving America's Schools Act of 1994, Pub. L. No. 102-382, § 8009, 108 Stat. 3518.

[109] 20 U.S.C. § 7709(a)(1) (2018).

[110] *Id.* § 7709(b).

[111] *Id.* § 7709(b)(2)(A).

There is also a proviso on the application of those criteria: "In making a determination under this subsection, the Secretary shall— (i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State."[112]

The meaning of this set of statutory provisions is stunningly obvious. The Secretary of Education is supposed to determine, for any given State, whether the difference between the highest and lowest level of district-based per-pupil expenditures is twenty-five percent or lower. In making that calculation, one disregards, in Olympic judging fashion, those districts with the highest five percent and lowest five percent level of per-pupil expenditures. If, for example, a State has eighty-nine school districts, one would ignore the four (five percent of eighty-nine) districts with the highest and lowest per-pupil expenditures, look at the eighty-one districts that remain, and see if the highest per-pupil expenditures in any district exceed the lowest level in any district by more than twenty-five percent. If the answer to that question is "no," then the State has an equalization program within the meaning of the statute, and such a State could then take account of federal monies when determining its own level of local aid. This is not a difficult problem of interpretation. The only wiggle room comes from the possibility of calculating the percentile numbers in a slightly different fashion: Perhaps, one could say that because ten percent of the eighty-nine districts is 8.9, one should round that up to nine and round up 4.5 (one-half of nine) at the top and bottom of the distribution to five, and thus exclude ten rather than eight districts from the final list for comparison of per-pupil expenditures by district. That would be a bit of stretch, but it is not an impossible one given the statutory text. But, that is as far as the statute could conceivably let anyone go in excluding districts from the equalization calculation.

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[112] *Id.* § 7709(b)(2)(B)(i).

The federal government, to the surprise of nobody familiar with administrative law or government in general, came up with a wholly different way to make the calculations required by the statute. In 1976, the Commissioner of Education within the Department of Health, Education and Welfare (the Department of Education had not yet been created and HEW had not yet been renamed the Department of Health and Human Services) adopted rules that excluded districts from the equalization program calculations based on the number of *pupils* rather than the number of *school districts* by "identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of these agencies."[113] In response to commenters who pointed out that the statute rather plainly required the calculation to be based on districts rather than pupils, the Commissioner responded:

> [I]t is the Commissioner's view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of the disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.[114]

The Commissioner's view might well be sound as a matter of policy. But the statute plainly makes local educational agencies (meaning

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[113] *See* Interim Regulations for Treatment of Payments Under State Equalization Programs, 41 Fed. Reg. 26,320, 26,329 (1976).

[114] *Id.* at 26,324.

school districts) rather than pupils the relevant objects of inquiry. Nonetheless, the 1976 calculation method was carried forward in subsequent regulations, including regulations following the 1994 formal codification of the equalization program exception and its mode of calculation.[115]

For fiscal year 2000, the Secretary of Education applied the pupil-based methodology to New Mexico. Instead of knocking eight or ten districts off the list of the State's eighty-nine districts before comparing the highest and lowest per-pupil expenditures by district in that State, the Secretary knocked off twenty-three—more than a quarter of the total number of school districts in the State. That is because the "top" seventeen districts and the "bottom" six districts, measured by student population, rather than by per-pupil expenditures, each collectively contained less than five percent of the State's student population. Using the sixty-six districts remaining after these twenty-three were disregarded, the Secretary concluded that New Mexico had an equalization program and could reduce aid to local districts based on the receipt of federal money. If the calculation was instead performed with eighty-one or seventy-nine districts, New Mexico would not have had an equalization program as defined by the statute and regulations.[116]

As was explained by the petitioning school districts:

> The Zuni Public School District is a New Mexico public school district located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State school districts.[117]

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[115] The current version of the regulatory calculation method is found at 34 C.F.R. pt. 222, App.

[116] *See Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 88-89.

[117] Br. Pet'rs at 2, Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 550 U.S. 81 (2007) (No. 05-1508), 2006 WL 3350569, at *2.

Those districts thus rely heavily on federal and/or state aid for funding. The Secretary of Education's ruling that New Mexico had an equalization program in place opened the door for New Mexico to reduce its state aid to those districts (which it presumably would do, on the theory that politicians can buy votes more efficiently in densely rather than sparsely populated areas[118]). The school districts' real beef was with the State of New Mexico, but they presumably had no effective remedy at state law if their state funding was cut, so they sued to overturn the Secretary of Education's equalization program ruling. A Tenth Circuit panel affirmed the Secretary's decision,[119] and the *en banc* Tenth Circuit divided 6-6, leaving the affirmance in place.[120] The Supreme Court took the case.

A five-justice majority affirmed the Secretary's decision. The majority's interpretative methodology teed up Justice Scalia for one of his most memorable and important opinions.

The school districts, understandably enough, hammered away at the plain language of the statute, which speaks of local educational agencies rather than pupils as the basic units of analysis for making calculations about equalization programs. But, the majority began elsewhere:

> Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one. For

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[118] *See* In re Zuni Pub. Sch. Dist. No. 89 & Gallup-McKinley Pub. Sch., U.S. Dep't of Educ., Office of Hearings and Appeal Hearing, No. 99-81-1 (2000), *reprinted in* Joint Appendix, Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., No. 05-1508, at 8, 64 (argument of counsel for Gallup-McKinley) ("the money which the state has taken which is basically a substitute for property tax for the lack of private land in McKinley County they're using for operational purposes.").

[119] *See* Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 393 F.3d 1158 (10th Cir. 2004).

[120] *See* Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 437 F.3d 1289 (10th Cir. 2006) (en banc).

> one thing, the matter at issue—*i.e.*, the calculation method for determining whether a state aid program "equalizes expenditures"—is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide.
>
> For another thing, the history of the statute strongly supports the Secretary . . . .
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> . . . .
>
> Finally, viewed in terms of the purpose of the statute's disregard instruction, the Secretary's calculation method is reasonable, while the reasonableness of a method based upon the number of districts alone (Zuni's proposed method) is more doubtful.[121]

"Thus," said the Court, "the history and purpose of the disregard instruction indicate that the Secretary's calculation formula is a reasonable method that carries out Congress' likely intent in enacting the statutory provision before us."[122]

"But what of the provision's literal language?"[123] In a discussion too lengthy to summarize here, which contained extensive analyses of the meaning of terms like "percentile," "per," and "populations," but *none of which directly addressed the basic fact that the statute's unit of analysis is local educational agencies rather than pupils,* the majority found the language of the statute ambiguous enough to give the Secretary *Chevron* deference and uphold the agency's determination. The Court, in particular, drew

> reassurance from the fact that no group of statisticians, nor any individual statistician, has told us directly in briefs, or indirectly through citation, that the language before us

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[121] *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 90-91 (citations omitted).
[122] *Id.* at 93.
[123] *Id.*

> cannot be read as we have read it. This circumstance is significant, for the statutory language is technical, and we are not statisticians.[124]

Two justices—Justices Kennedy and Alito—joined the majority opinion but would have started the analysis with the language of the statute rather than with extra-textual concerns.[125] Justice Stevens also joined the majority opinion but emphasized in a separate opinion "that a judicial decision that departs from statutory text may represent 'policy-driven interpretation' . . . [but] [a]s long as that driving policy is faithful to the intent of Congress (or, as in this case, aims only to give effect to such intent) . . . the decision is also a correct performance of the judicial function."[126] He explained:

> This happens to be a case in which the legislative history is pellucidly clear and the statutory text is difficult to fathom. Moreover, it is a case in which I cannot imagine anyone accusing any Member of the Court of voting one way or the other because of that Justice's own policy preferences.
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> Given the clarity of the evidence of Congress' "intention on the precise question at issue," I would affirm the judgment of the Court of Appeals even if I thought that petitioners' literal reading of the statutory text was correct.[127]

Thus, Justice Stevens was openly prepared to disregard the statutory language in pursuit of perceived congressional intentions. The agency was openly prepared to disregard the statutory language in pursuit of what the agency regarded as good policy. The majority was a bit less open about exactly what it was doing. If one extrapolates from Justice Breyer's general approach to statutory

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[124] *Id.* at 99-100.
[125] *See id.* at 107 (Kennedy, J., concurring).
[126] *Id.* at 105 (Stevens, J., concurring).
[127] *Id.* at 106-07 (footnote omitted).

interpretation, one might characterize the majority opinion's interpretive approach as following two steps: (1) ascertain whether the agency's position represents a reasonable policy choice and then (2) determine whether that policy choice is expressly and unmistakably forbidden by the statute.[128] The latter methodology does not openly disregard the statutory language, but it treats the language essentially as a side constraint on other, more primary modes of interpretation.

Enter Justice Scalia. The table was nicely set for him by the administrative law judge from the initial challenge within the Department of Education, who had the following exchange with counsel for the Department of Education:

> [JUDGE LEWIS]: And I've got a real problem if I have to decide this thing if I have to choose between what's in the statute and what's in the regulation. If you can show me the statute's ambiguous then under normal rules of construction you can then move over to the regulations which then interpret an ambiguous statute.
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> . . . .
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> The problem is I don't see the ambiguity of the statute.
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> MR. SMITH: The only way I can do that is by reference to the statutory purpose. We've tried to provide evidence in the record to indicate that to give the disparity test utility this is the only possible interpretation.
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> . . . .
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> JUDGE LEWIS: But the only thing that we have from Congress is what Congress said in the statue.

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[128] This is essentially the position advanced by Justice Breyer in portions of his dissenting opinion in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 180-81 (2000) (Breyer, J., dissenting).

> MR. SMITH: Well –
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> JUDGE LEWIS: And if we go with Justice Scalia he would say, That's it.[129]

And, indeed, Justice Scalia (writing for three other justices as well) said, "That's it." More precisely, he said that "today's decision is nothing other than the elevation of judge-supposed legislative intent over clear statutory text."[130] The majority, he wrote, provides "page after page of unenacted congressional intent and judicially perceived statutory purpose"[131] when the text of the statute was plain. As for the majority's long detour into dictionary definitions of "percentile" and concerns about technical language, Justice Scalia retorted: "This case is not a scary math problem; it is a straightforward matter of statutory interpretation. And we do not need the Court's hypothetical cadre of number-crunching *amici* to guide our way."[132] As predicted by the ALJ, this was an easy case for Justice Scalia:

> There is no dispute that for purposes relevant here " 'percentile' refers to a division of a distribution of *some* population into 100 parts.' " *Ante,* at 95. And there is further no dispute that the statute concerns the percentile of "per-pupil expenditures or revenues," for that is what the word "such" refers to . . . .[133] The question is: Whose per-pupil expenditures or revenues? . . . At first blush, second blush, or twenty-second blush, the answer is abundantly clear: local

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[129] *See* In re Zuni Pub. Sch. Dist. #89 & Gallup-McKinley Pub. Sch., U.S. Dep't of Educ., Office of Hearings and Appeal Hearing, No. 99-81-1 (2000), *reprinted in* Joint Appendix, Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., No. 05-1508, at 29-30.

[130] *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 108 (Scalia, J., dissenting).

[131] *Id.*

[132] *Id.* at 111 (citation omitted).

[133] It is a bit surprising that Justice Scalia, the master stylist, did not say "for that is to what the word 'such' refers."

> educational agencies [LEAs]. . . . The attribute "per-pupil expenditur[e] or revenu[e]" is assigned to LEAs -- there is no mention of student population whatsoever. And thus under the statute, "per-pupil expenditures or revenues" are to be arrayed using a population consisting of LEAs, so that percentiles are determined from a list of (in New Mexico) 89 per-pupil expenditures or revenues representing the 89 LEAs in the State. It is just that simple.[134]

Justice Scalia's patience, whatever was left of it, ran out when the majority echoed an argument put forward by New Mexico by insisting that "nothing in the English language prohibits the Secretary from considering expenditures *for each* individual pupil in a district when instructed to look at a district's 'per-pupil expenditures.' "[135] In other words, as New Mexico put it: "Each and every student in an LEA and in a state may be treated as having his or her own 'per-pupil' expenditure or revenue amount,"[136] so that in New Mexico there would be 317,777 "per-pupil expenditures or revenues" for the Secretary of Education to rank for purposes of determining the 5th and 95th percentiles of expenditures.[137] Justice Scalia's memorable response was:

> The sheer applesauce of this statutory interpretation should be obvious. It is of course true that every student in New Mexico causes an expenditure or produces a revenue that his LEA either enjoys (in the case of revenues) or is responsible for (in the case of expenditures). But it simply defies any semblance of normal English usage to say that every pupil has a "*per-pupil* expenditure or revenue" . . . . It is simply irrelevant that "[n]o dictionary definition ... suggests that

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[134] *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 111-12 (Scalia, J., dissenting).

[135] *Id.* at 97-98.

[136] Br. Resp't at 36, Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 550 U.S. 81 (2007) (No. 05-1508), 2006 WL 3740364, at *36.

[137] *See id.* at 37.

> there is any *single* logical, mathematical, or statistical link between [per-pupil expenditures or revenues] and . . . the nature of the relevant population." *Ante,* at 96. Of course there is not. It is the *text* at issue which must identify the relevant population, and it does so here quite unambiguously: "*local educational agencies* with per-pupil expenditures or revenues." § 7709(b)(2)(B)(i) (emphasis added).[138]

In a portion of the dissent joined by Chief Justice Roberts and Justice Thomas, though not by Justice Souter (who joined the rest of it[139]), Justice Scalia took on Justice Stevens' open embrace of choosing purposes and intentions over statutory text:

> [O]nce one departs from "strict interpretation of the text" (by which Justice Stevens means the actual meaning of the text) fidelity to the intent of Congress is a chancy thing. The only thing we know for certain both Houses of Congress (and the President, if he signed the legislation) agreed upon is the text. Legislative history can never produce a "pellucidly clear" picture of what a law was "intended" to mean, for the simple reason that it is never voted upon—or ordinarily even seen or heard—by the "intending" lawgiving entity, which consists of both Houses of Congress and the President (if he did not veto the bill). See U.S. Const., Art. I, §§ 1, 7. Thus, what judges believe Congress "meant" (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, *i.e., should* have meant. In *Church of the Holy Trinity,* every Justice on this Court disregarded the plain language of a statute that forbade the hiring of a clergyman from abroad because, after

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[138] *Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 113 (Scalia, J., dissenting).
[139] *See id.* at 123 (Souter, J., dissenting).

> all (they thought), "this is a Christian nation," 143 U.S., at 471, so Congress could not have meant what it said. Is there any reason to believe that those Justices were lacking that "intellectua[l] honest[y]" that Justice Stevens "presume[s]" all our judges possess? Intellectual honesty does not exclude a blinding intellectual bias. And even if it did, the system of judicial amendatory veto over texts duly adopted by Congress bears no resemblance to the system of lawmaking set forth in our Constitution.
>
> Justice Stevens takes comfort in the fact that this is a case in which he "cannot imagine anyone accusing any Member of the Court of voting one way or the other because of that Justice's own policy preferences." I can readily imagine it, given that the Court's opinion begins with a lengthy description of why the system its judgment approves is the *better* one. But even assuming that, in this rare case, the Justices' departure from the enacted law has nothing to do with their policy view that it is a bad law, . . . [w]hy should we suppose that in matters more likely to arouse the judicial libido—voting rights, antidiscrimination laws, or environmental protection, to name only a few—a judge in the School of Textual Subversion would not find it convenient (yea, *righteous!*) to assume that Congress *must* have meant, not what it said, but what he knows to be best?[140]

All of Justice Scalia's key principles of statutory interpretation that are presented so well by Sutton and Whelan—his disdain for searching for subjective legislative intentions outside of the text,[141] the priority of text over policy concerns,[142] and his doubts about using legislative history to overturn textual meaning[143]—are on

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[140] *Id.* at 116-18 (Scalia, J., dissenting) (citations omitted).
[141] *See* Scalia, *supra* note 4, at 26-29.
[142] *See* 550 U.S. at 251-52, 258-59, 267.
[143] *See id.* at 268-79.

display in this opinion. When Justice Scalia and Bryan Garner were preparing *Reading Law: The Interpretation of Legal Texts*,[144] they solicited former Scalia clerks for suggestions of cases to illustrate their approach to statutory interpretation. I immediately shot back: *Zuni Public School Dist. No. 89 v. Dep't of Education.* Now you know why.

III. "IT'S THE SAME OLD STORY, IT'S THE SAME OLD DREAM. IT'S POWER MAN, POWER MAN, AND ALL THAT IT CAN BRING"[145]

Justice Scalia's most famous majority opinion is surely *District of Columbia v. Heller,*[146] which recognized that the Second Amendment guarantees against the federal government an individual right to possess firearms.[147] However, when asked a few years ago to name his most *important* majority opinion, I came up with a different answer: *Crawford v. Washington*,[148] which reformed case law under the Sixth Amendment's Confrontation Clause[149] to bring the case law in line with a plausible reading of the constitutional text.[150] I describe at some length elsewhere the doctrinal and methodological significance of *Crawford*,[151] and the case is appropriately excerpted in

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[144] Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

[145] THE KINKS, *Powerman*, LOLA VERSUS POWERMAN AND THE MONEYGOROUND, PART ONE (Reprise 1970).

[146] 554 U.S. 570 (2008).

[147] The Court later extended that doctrine to include a right against the States under the Fourteenth Amendment. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).

[148] 541 U.S. 36 (2004).

[149] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

[150] As is explained below, the case law before *Crawford* bore no plausible relationship to the text of the Sixth Amendment. *See* Gary Lawson, *Confronting* Crawford: *Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 U. CHI. L. REV. 2265, 2274-76 (2017).

[151] *See id.*

The Essential Scalia.[152] But for the present essay, I want to look at one of *Crawford*'s many lesser-known sequels: *Melendez-Diaz v. Massachusetts*.[153] In some ways, *Melendez-Diaz* provides perhaps the clearest window into Justice Scalia's theory of judicial role, and it helps identify some ambiguities in terms like "conservative" that bedevil many commentators from a wide range of perspectives. It was never a plausible candidate for inclusion in a "greatest hits" volume, because it contains no Scalia-esque rhetorical flourishes, and the case's jurisprudential implications are very much beneath the surface. But when one looks carefully at the case, one finds—to mix Disney metaphors—that there is a whole new world under the sea.

The Sixth Amendment prescribes: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." [154] If one person, or a document or recording of some kind, relates in court what someone said out of court that tends to incriminate a criminal defendant, does thatmake the person who does not actually appear in court to make their statement a "witness[] against" the defendant? Has the defendant been able to "confront" that someone, who testifies in the trial only in the shadow-like form of their hearsay statement? These are the questions rather plainly and directly posed by the text of the Confrontation Clause.

For most of the United States' first two centuries, those questions were not seriously posed in court, because the Sixth Amendment Confrontation Clause was a non-player in the constitutional world and thus was not a noteworthy object of interpretation. Federal criminal prosecutions were a rare event (hence the phrase, well known to those of my generation, "don't make a federal case out of it"), so few occasions arose even to ask what kinds of out-of-court statements used as evidence in those prosecutions might implicate a defendant's right to confront witnesses. The overwhelming majority

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[152] *See* Scalia, *supra* note 4, at 215-19.
[153] 557 U.S. 305 (2009).
[154] U.S. CONST. amend. VI.

of criminal prosecutions were state prosecutions, and for the 194 years after the ratification of the Sixth Amendment, the Confrontation Clause was understood not to apply to the States. It is fair to say that until the middle of the twentieth century, there was no body of case law that merited the label "Confrontation Clause jurisprudence."

In 1965, the Supreme Court "incorporated" the Sixth Amendment confrontation right against the States.[155] Combined with the increasing federalization of crime, the post-1965 era saw a dramatic rise in the number of Confrontation Clause cases facing the federal courts.[156] Fifteen years later, in *Ohio v. Roberts*,[157] the Supreme Court put an end—at least temporarily—to most of that litigation by declaring:

> [W]hen a hearsay declarant is not present for cross-examination at trial, . . . his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[158]

While this sounds like the work of a legislative committee drafting a statutory evidence code, it was presented by the Court as an account (I cannot bring myself to use the word "interpretation") of the Sixth

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[155] *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).

[156] *See* Lawson, *supra* note 12, at 2275 n.41 ("A simple search of the [WESTLAW] federal-courts database for 'confronted /2 witnesses' shows 115 hits for all time before 1965 and 114 hits from 1965 to 1980. A search for 'confrontation clause,' a term that does not appear to have been in much use in premodern times, yields 477 hits for 1965 to 1980.").

[157] 448 U.S. 56 (1980).

[158] *Id.* at 66.

Amendment.[159] This account of the Confrontation Clause asked neither of the two questions posed by the clause's text. Instead, it asked the non-textual policy question whether the evidence offered by the prosecution is, in the judgment of the Court, reliable enough to be used in a criminal trial,[160] with reliability determined largely by reference to non-constitutional evidence law.

A quarter century after *Roberts,* the Supreme Court started asking the questions actually made relevant by the Confrontation Clause. As Justice Scalia explained in *Crawford*:

> To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[161]

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[159] As I have elsewhere summarized the substance of the Court's position in Roberts:

> In other words: If evidence was admitted by virtue of a hearsay exception that the justices on the Court circa 1980 would have learned about in law school half a century earlier, it automatically counts as "reliable" and its admission therefore does not violate the Confrontation Clause. If it is admitted pursuant to some newfangled hearsay exception (for example, the "catch-all" exception represented by Federal Rule of Evidence 807 and included in some state rules of evidence), then the Court will decide case by case whether the evidence is sufficiently reliable to be admitted over a Confrontation Clause exception. In all instances, the clause is read to exclude unreliable or untrustworthy evidence and nothing more.

Lawson, *supra* note 12, at 2275-76.

[160] To be sure, that policy question could, in principle, potentially find constitutional footing in the Fifth and Fourteenth Amendments' due process of law clauses in certain cases. But the application of any such due-process-of-law principle would be case-specific rather than general, and there is no chance that the applications would track the vagaries of non-constitutional evidence law.

[161] *Crawford*, 541 U.S. at 61.

Crawford thus rejected the *Roberts* framework in favor of an approach that asks (1) whether the person whose statement is used against a defendant is a "witness" within the meaning of the Sixth Amendment and, if so, (2) whether that "witness" was "confronted" by the defendant. People are witnesses under the Sixth Amendment, said the Court in *Crawford*, if they

> "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.[162]

(The quoted definition of "testimony" came from Noah Webster's 1828 dictionary.) Once someone is identified as a witness, confrontation requires that the person appear in court to be cross-examined if they are available to appear. If they are not available, with the concept of unavailability essentially tracking the definition that applies under non-constitutional evidence law, [163] their statement cannot be used as evidence of its truth against the defendant unless there was some prior opportunity for the defendant to cross-examine the witness—as could happen, for example, if the declarant died but gave testimony subject to cross-examination by the defendant at a previous trial or deposition.[164]

Once the Court settled on the *Crawford* framework, further questions immediately arose about what kinds of statements counted as "testimony" that would make the declarants of those statements

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[162] *Id.* at 51 (citations omitted).

[163] *See* FED. R. EVID. 804(a) (defining witnesses as unavailable if they successfully invoke a privilege, refuse to testify even when threatened with contempt, testify to being unable to remember the subject matter of their statement, are dead or ill, or cannot be located to be subpoenaed).

[164] *See, e.g.*, Mattox v. United States, 156 U.S. 237 (1895).

constitutional "witnesses." Two years after *Crawford* (which is almost immediately in Supreme Court time), the Court addressed some of these issues in the companion cases of *Davis v. Washington* and *Hammon v. Indiana*, [165] which distinguished calls for help (not testimonial so not constitutional witnessing) from statements designed primarily to establish or prove past facts (testimonial so constitutional witnessing). The Court also established, in *Giles v. California,* [166] that it is possible for a defendant to forfeit the constitutional confrontation right by wrongfully preventing a declarant from appearing in court, but only if the defendant *intends* to render the declarant unavailable to testify (so that if you accidentally run over the declarant with your truck, that does not count as forfeiting your confrontation right).

All three of the majority opinions in these post-*Crawford* cases that fleshed out the Court's new Confrontation Clause framework were written by Justice Scalia. *Giles*, which concerned a somewhat arcane question with relatively few applications, was 6-3, with a two-Justice concurrence, but *Davis* and *Hammon,* which were the Court's first efforts to clarify the key contours of the *Crawford* framework, were close to unanimous. The only separate opinion came from Justice Thomas, who agreed in broad principle with *Crawford*'s framing of the relevant questions but thought that the category of constitutional "witnesses" was narrower than the majority's and included only statements that have a level of formality and solemnity greater than, for example, on-the-scene police interrogations.[167]

Justice Scalia also wrote the majority opinion in *Melendez-Diaz v. Massachusetts*,[168] the Court's fourth sequel to *Crawford*. But this time

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[165] 547 U.S. 813 (2006).

[166] 554 U.S. 353 (2008).

[167] *See Hammon*, 547 U.S. at 836-37 (Thomas, J., concurring in the judgment in part and dissenting in part). In *Crawford*, the police conducted a recorded interview in the police station. In *Hammon*, the police interviewed a suspected crime victim in her home after responding to a report of a domestic disturbance. Justice Thomas considered the statements in *Crawford* but not the statements in *Hammon* to be testimonial statements subject to the Confrontation Clause.

[168] 557 U.S. 305 (2009).

the Court fractured 5-4, leaving a split that has not been formally resolved to this day. That doctrinal split, while of considerable significance to the administration of criminal justice, is less important than the jurisprudential split that generated it.

Luis Melendez-Diaz and Thomas Wright were arrested and found to be in possession of some plastic bags filled with a substance resembling cocaine. The bags were submitted to a Massachusetts crime lab for analysis, and the lab produced a sworn, notarized report declaring the contents of the bags to be cocaine.[169] Melendez-Diaz was tried and convicted of cocaine distribution and trafficking. The Massachusetts courts rejected his claim that use of the lab reports violated his rights under the Confrontation Clause.[170]

For Justice Scalia and a majority of the Court, this was a very easy case:

> There is little doubt that the documents at issue in this case fall within the "core class of testimonial statements" . . . . The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths." Black's Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Crawford, supra,* at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The fact in question is that the substance found in the possession of Melendez–Diaz and his codefendants was, as the

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[169] *See id.* at 307-08.

[170] The statements in the lab report describing the test results were obviously hearsay, but they were admissible under state evidence law by virtue of a now-repealed statute declaring them admissible.

> prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial . . . .
>
> Here, moreover, not only were the affidavits " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " *Crawford, supra,* at 52, but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance, Mass. Gen. Laws, ch. 111, § 13. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose – as stated in the relevant state-law provision – was reprinted on the affidavits themselves.
>
> In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to " 'be confronted with' " the analysts at trial.[171]

Apart from a few repetitive or clarifying sentences, which I deleted, that was the entirety of the majority's reasoning in *Melendez-Diaz*; everything else was a response to the dissent. Nor was anything else necessary for "this rather straightforward application of our holding in *Crawford*."[172] As Justice Thomas pointed out in his brief concurring opinion,[173] affidavits—or sworn certificates that are functionally the same as affidavits—are obviously testimonial statements, and the makers of affidavits are obviously constitutional "witnesses against" defendants when the affidavits are used by the prosecution in criminal trials. Who could possibly think otherwise?

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[171] *Melendez-Diaz*, 557 U.S. at 310-11 (citations omitted).
[172] *Id.* at 312.
[173] *See id.* at 329-30 (Thomas, J., concurring).

Four justices. Justice Kennedy wrote a biting dissenting opinion, joined by Chief Justice Roberts, Justice Breyer, and Justice Alito, that drew a sharp distinction "between laboratory analysts who perform scientific tests and other, more conventional witnesses . . . ."[174] The Court, said the dissent, is generating "formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause . . . [with] vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence."[175] The result is "to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway."[176]

The dissent spent much energy describing the likely consequences of the Court's opinion[177] and exploring how applying the Confrontation Clause to producers of scientific evidence will not serve the supposed purposes of the clause.[178] But, as the dissent itself notes, "[a]ll of the problems with today's decision . . . would be of no moment if the Constitution did, in fact, require the Court to rule as it does today."[179] So why would the Constitution not require confrontation of persons who produce forensic evidence against defendants? Because, according to the dissent, such persons are not really "witnesses against" the defendant. The dissent maintained that a witness—or, rather, what it called a "typical witness"—is "one who perceived an event that gave rise to a personal belief in some aspect of the defendant's guilt."[180] Laboratory analysts perceive and report events, such as test results, but they do not generally formulate

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[174] *Id.* at 330 (Kennedy, J., dissenting).

[175] *Id.* at 331-32.

[176] *Id.* at 333.

[177] *See, e.g.*, *id.* at 341 ("the Court imposes enormous costs on the administration of justice"); *id.* at 342 ("Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process.").

[178] *See, e.g.*, *id.* at 338-40.

[179] *Id.* at 343.

[180] *Id.* at 344.

personal beliefs about the defendant. They may not even know to whom the tests they perform pertain. Thus, said Justice Kennedy, the Court need not treat them as witnesses subject to the Confrontation Clause.

That is the only textual, non-policy-based argument produced by the dissent. And, it is a really lousy argument. Suppose that Congress passes a statute allowing the prosecution, if it thinks it will be an effective trial strategy, to bring in forensic analysts to testify in court at criminal trials *without any opportunity at trial for the defense to cross-examine those analysts*. The analyst in court is reciting the same information that would be recited in a written report. Is that statute constitutional? Obviously yes, on the dissent's view, because the Confrontation Clause only applies to "witnesses," and if witnesses only include people with personal views about the application of their evidence to specific defendants, the analyst will not count as one, even if the analyst appears in court. The sheer applesauce of this constitutional interpretation should be obvious. Anyone who provides the government an account of events that the prosecution uses to help convict a defendant is obviously a "witness[] against" the defendant, whether or not they know that their account of events specifically implicates the defendant.[181] People who provide the government statements that are solemn and formal enough to count as testimony under *Crawford* know that they are potentially incriminating *someone* even if they do not specifically know who that someone might be. The notion that the Constitution refers only to a subset of the universe of such people is pretty obviously contrived—which is no doubt why the dissent spent the vast bulk of its energy on the perceived consequences of applying the Confrontation Clause to providers of forensic evidence.

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[181] Does that mean that clerks who certify copies of official documents introduced against defendants are constitutional "witnesses"? *See id.* at 347-48. Justice Scalia tried to dismiss this example as a narrow historical anomaly involving authentication rather than creation of a record, but it is hard to see why someone who authenticates a piece of evidence necessary for the prosecution's case is not a "witness[] against" the defendant. *See id.* at 322-23 (majority opinion). Score one for the dissent.

Those consequences would widely be viewed as—with apologies to Justice Breyer—"conservative." They include overturning widely accepted practices and precedents,[182] generating uncertainty about the law,[183] and, most prominently, letting obviously guilty criminals go free on technicalities.[184] Concerns for tradition, certainty, stability, and law and order are well-nigh constitutive of at least some conceptions of what it means to be a legal "conservative."

Justice Scalia was certainly a fan of tradition, certainty, stability, and law and order. But, he was also a fan of the Constitution. What happens when those commitments conflict?

On some occasions, Justice Scalia chose what might be called rule-of-law values over the Constitution, as Steve Calabresi and I have detailed (and critiqued) elsewhere.[185] But, in general, Justice Scalia was more inclined than the typical judge to view the Constitution as hierarchically superior to other perceived values. That is certainly true in the case of the "conservative" Justice Kennedy and Chief Justice Roberts, and less certainly but still arguably true in the case of the "conservative" Justice Alito. (It is trivially true of Justice Breyer, who no one would call "conservative" by any plausible criteria.) This highlights a crucial ambiguity in what it means to be a "conservative" judge.

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[182] *See id.* at 330 (Kennedy, J., dissenting) ("The Court sweeps away an accepted rule governing the admission of scientific evidence . . . [that] extends across at least 35 States and six Federal Courts of Appeals.").

[183] *See id.* at 331 ("The Court dictates . . . as a matter of constitutional law, an as-yet-undefined set of rules governing what kinds of evidence may be admitted without in-court testimony. . . . Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text.").

[184] *See id.* at 342 ("Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process."). *See also id.* at 333 (applying confrontation rights to laboratory personnel "threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway."); *id.* at 336-38.

[185] *See* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2015).

One possible meaning of a "conservative" judge is someone who, in accordance with some version of the attitudinal model of judging,[186] consistently reaches outcomes that are consistent with a policy program that is either conventionally labeled "conservative" or would be endorsed by some number of people who self-identify as "conservative." In the context of *Melendez-Diaz*, a legal rule that frees guilty criminals in the name of procedural formalities that almost never make a difference would likely not appeal to a "conservative" judge in this sense.

A second possible meaning of "conservative" focuses less on outcomes and more on judicial philosophy. A "conservative" judge might be associated with some notion of "judicial restraint," in which judges should only rarely and reluctantly call into question the legal validity of executive or legislative action, by utilizing something like James Bradley Thayer's precept that courts "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one – so clear that is not open to rational question." [187] Judges on this model are "conservative" when they do very little. A decision revolutionizing trial practices more than two centuries after the founding would likely not find favor with "conservatives" of this stripe.[188]

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[186] Attitudinal models hypothesize "that justices decide cases on the basis of their personal attitudes about social policy and not on the basis of any genuine fidelity to law." Michael J. Gerhardt, Book Review, *Attitudes about Attitudes*, 101 MICH. L. REV. 1733, 1733 (2003). There is a variety of such models. Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016). They obviously have some non-trivial measure of predictive value or they would not have survived this long, but an assessment of any or all of those models is beyond my pay grade.

[187] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). For critiques of Thayerianism, *see* Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U.L. REV. 1419 (2019); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1274-79 (1996).

[188] Indeed, Chief Justice Rehnquist and Justice O'Connor did not join the majority opinion in *Crawford* and would have decided the case without overruling *Ohio v. Roberts*. *See* 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment) ("I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed

A third possible meaning of "conservative" in the legal context "is someone who believes in a variant of original meaning for interpreting constitutions and statutes and who views the common law as a device for securing social coordination within a spontaneous order – all overlaid with a strong respect for the Anglo-American, Rule of Law tradition."[189] Because the original meaning of the Constitution rather plainly sets the Constitution above competing sources of law,[190] a judge who is "conservative" in this sense is probably better described as *constitutionalist,* for the Constitution prevails over *either* preferred policy outcomes *or conceptions of the judicial role that are not themselves grounded in the Constitution*. For a constitutionalist judge, if ideal law consists of clear rules but the Constitution prescribes mushy standards, too bad for ideal law. Similarly, if good social order requires swift and sure punishment for criminals, but the Constitution puts wooden and formalistic roadblocks in the path of prosecutors, too bad for good social order.

Justice Scalia's opinions in *Crawford* and *Melendez-Diaz* were constitutionalist, but not judicially "conservative" in either of the first two senses of that term noted above. Justice Kennedy's dissent in *Melendez-Diaz* was conservative in both of the first two senses, but it was not constitutionalist. By the same token, Justice Scalia's consistent refusal to enforce the constitutional non-subdelegation doctrine[191] was not conservative in the first sense, was conservative in the second sense, but was not constitutionalist and therefore not conservative in the third sense. His insistence that governmental

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by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.").

[189] Gary Lawson, *Conservative or Constitutionalist?*, 1 GEO. J.L. & PUB. POL'Y 81, 81 (2002).

[190] *See* Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 36-38 (2011).

[191] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Mistretta v. United States, 488 U.S. 361, 415-15 (1989) (Scalia, J., dissenting).

policies that take account of race are always and everywhere unconstitutional because the Constitution demands color-blindness[192] is conservative in the first sense, not conservative in the second sense, and probably not conservative/constitutionalist in the third sense.[193]

The point is not to argue that Justice Scalia was purely inconsistent. He was inconsistent to a point, but less so than are many in this business. [194] The point is only that the term "legal conservative" or "judicial conservative" is ambiguous. It can mean different things to different people at different times. The ongoing saga of *Melendez-Diaz* and the Confrontation Clause[195] is a stark reminder of this.

Why does it matter? Partly it matters because clear communication is a good thing, and keeping clear how one uses potentially equivocal terms like "conservative" is therefore intellectually important. And, partly it matters because, in

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[192] *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 397, 315 (2013) (Scalia, J., concurring) ("I adhere to the view I expressed in Grutter v. Bollinger: 'The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.'" (quoting Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part))).

[193] I doubt whether the fiduciary principle that validly generates a doctrine of "federal equal protection" requires strict color-blindness by the federal government. *See* Gary Lawson & Guy Seidman, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 166-67 (2017). I am less confident about the appropriate interpretation of the Fourteenth Amendment. *See* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 74-77 (2013).

[194] And even the best artists are sometimes inconsistent. The Bruce Springsteen who produced the magnificent *The River* followed it up with the unlistenable *Nebraska*.

[195] Two years after *Melendez-Diaz*, the four dissenting justices in that case wrote: "Seven years after its initiation, it bears remembering that the Crawford approach was not preordained." Bullcoming v. New Mexico, 564 U.S. 647, 684 (2011) (Kennedy, J., dissenting). The same four justices sought sharply to limit the scope of *Melendez-Diaz* in *Williams v. Illinois*, 567 U.S. 50 (2012) (plurality opinion), in which they let the government do an end-run around *Melendez-Diaz* by having expert witnesses testify based on hearsay statements in DNA reports rather than introduce those statements directly. Justice Thomas provided the fifth vote to send Williams to prison on the ground that the DNA reports, produced by a private lab, were not sufficiently formal or solemn to be testimonial. *See id.* at 102 (Thomas, J., concurring in the judgment).

application, different conceptions of what it means to be a "conservative" judge entail different allocations of governmental power.

A constitutionalist judge puts power in the hands of the Constitution. That choice can take away power from the judge who prefers an outcome different from the one prescribed by the Constitution. It can also take power away from executives and legislators—perhaps to a significantly greater extent than would be considered desirable by a Thayerian "conservative" judge. Constitutionalism and judicial restraint sometimes go together and sometimes do not; that is an empirical question that depends on the actual meaning of the Constitution in various contexts. Thayerian conservatism and constitutionalism are both less empowering of judges than an attitudinal conservatism, which essentially tells judges to reach politically pleasing outcomes (such as not letting guilty crooks go free on technicalities).

The debate in *Melendez-Diaz* (and the subsequent Confrontation Clause cases) between Justice Scalia and Thomas on the one hand[196] and the other "conservative" justices on the other says a great deal about the meaning of modern "conservative" legal thought. It highlights why, in order to understand some of the most important currents in modern law, one needs the essential Scalia – and *The Essential Scalia*.

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[196] Justice Scalia and Justice Thomas had their own internal debate about how broadly or narrowly to understand what it means to be a constitutional "witness[]," but that debate is less significant than the larger debate between the two of them and the other "conservative" justices about the basic framework for thinking about confrontation.