

JUSTICE SCALIA ON FEDERALISM AND SEPARATION OF POWERS

2016 National Lawyers Convention*

Judge Pryor: Good afternoon. This Panel will discuss Justice Scalia on federalism and separation of powers. Now, Justice Scalia's views on this subject were fairly well known. In 2008, he authored a foreword to a symposium on the separation of powers as a safeguard of federalism in the *Notre Dame Law Review*.¹ His Foreword, entitled *The Importance of Structure in Constitutional Interpretation*, left no doubt what Justice Scalia's view on the subject was.² I'd like to read a couple of paragraphs of what Justice Scalia said in that foreword.

In the days when I taught constitutional law, the University of Chicago Law School had two constitutional courses. One was entitled Individual Rights and Liberties and focused primarily upon the guarantees of the Bill of Rights. The other (I forget the title of it) focused upon the structural provisions of the Constitution, principally the separation of powers and federalism. That was the course I taught—and I used to refer to it as *real* constitutional law. The distinctive function of a constitution, after all, is to constitute the political organs, the governing structure of a state. Many of the personal protections against the state taught in constitutional law courses here—restrictions upon unlawful searches and seizures, for example—used to be taught in Europe as part of administrative law. They were, to be sure, made part of our Constitution (though most of them as an appendage to the original document). And that was no doubt desired. But it is a mistake to think that the Bill of Rights is the defining, or even the most important, feature of American democracy. Virtually all the countries of the world today have bills of rights. You would not feel your freedom secure in most of them

* This Panel was held on November 17, 2016, during the 2016 National Lawyers Convention in Washington, D.C. The panelists included: Professor John S. Baker, Jr., Professor Emeritus at Louisiana State University Law School and a Visiting Professor at Georgetown University Law Center; the Honorable Ron DeSantis, U.S. House of Representatives, Florida 6th District; Mr. Roger Pilon, Vice President, Legal Affairs, Cato Institute; the Honorable Luther Strange III, Attorney General, Alabama; Professor Jonathan Turley, The George Washington University Law School; moderated by the Honorable William H. Pryor Jr., U.S. Court of Appeals for the Eleventh Circuit.

For an audio and video recording of the complete panel, please visit the Federalist Society's website. Justice Scalia on Federalism and Separation of Powers, Federalist Soc'y (Nov. 23, 2016), <https://fedsoc.org/commentary/videos/justice-scalia-on-federalism-and-separation-of-powers-audio-video>.

¹ Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1417 (2008) [hereinafter *The Importance of Structure*].

² *Id.*

Consider, for example, the following sterling provisions of a modern bill of rights:

Every citizen . . . has the right to submit proposals to state bodies and public organizations for improving their activity and to criticize shortcomings in their work . . . Persecution for criticism is prohibited. Persons guilty of such persecution shall be called to account.

[C]itizens . . . are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets, and squares at the disposal of the . . . people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio.

. . . .

Citizens . . . are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship, or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.³

Justice Scalia wrote:

Wonderful stuff. These were provisions of the 1977 Constitution of the Union of Soviet Socialist Republics. They were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-life. They are what the Framers of our Constitution called “parchment guarantees,” because the *real* constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored. Structure is everything.⁴

Justice Scalia often said that while he always tried to get the Bill of Rights cases correct, he cared most about the constitutional structure cases.⁵ He occasionally taught a course called “Separation of Powers.”⁶ His

³ *Id.* at 1417–18 (quoting KONSTITUTSIJA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] arts. 49–50, 52).

⁴ *Id.* at 1418.

⁵ *Nomination of Judge Antonin Scalia: Hearings Before the Comm. on the Judiciary*, 99th Cong. 32 (1986) (statement of Hon. Antonin Scalia, U.S. Court of Appeals for the District of Columbia Circuit).

⁶ See Rosalie Berger Levinson, *Remembrances of Justice Scalia and Reflections on His Jurisprudence*, 50 VAL. U. L. REV. 619, 619 (2016) (discussing the author’s memory of a Separation of Powers class she taught with Justice Scalia); Neil Siegel, *Is Judge Gorsuch an Originalist, or Is He (Like Justice Scalia) a Living Constitutionalist?*, AM. CONST. SOC’Y FOR L. AND POL’Y (Mar. 22, 2017), <https://www.acslaw.org/acsblog/is-judge-gorsuch-an-originalist-or-is-he-like-justice-scalia-a-living-constitutionalist> (discussing the author’s memory of service as Justice Scalia’s assistant in teaching a Separation of Powers class).

opinions on the structural issues of separation of powers and federalism often cited *The Federalist Papers*.⁷ He routinely urged law students and lawyers to read the whole of *The Federalist*.⁸ This Panel looks at Justice Scalia's federalist focus on the importance of separation of powers and federalism as structural protections of liberty. And, as usual, the Federalist Society has assembled a terrific panel to discuss these issues. I will introduce each of the panelists in the order in which they will speak. They will each speak about eight minutes, will then have some responses to each other, and then we'll begin entertaining questions from the floor.

Our first speaker, very fittingly, is Professor John Baker. Dr. Baker has been a visiting professor at Georgetown Law School and is a visiting professor at Peking University School of Transnational Law.⁹ He is Professor Emeritus of Law at the Louisiana State University Law School.¹⁰ He has also taught at a number of other law schools, I should note, including Tulane.¹¹ Professor Baker received his J.D. with honors at the University of Michigan Law School and his Bachelor of Arts Magna Cum Laude from the University of Dallas.¹² He also earned a Ph.D. from the University of London.¹³ For several years, Professor Baker taught the course for the Federalist Society on separation of powers with the late Justice Scalia.¹⁴

⁷ *E.g.*, *Printz v. United States*, 521 U.S. 898, 913–14 (1997) (showing Scalia citing THE FEDERALIST NOS. 27, 36 (Alexander Hamilton), NO. 44 (James Madison)); *Tafflin v. Levitt*, 493 U.S. 455, 470 (1990) (Scalia, J., concurring) (showing Scalia citing THE FEDERALIST NO. 82 (Alexander Hamilton)); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (showing Scalia citing THE FEDERALIST NO. 47 (James Madison)); *see also* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 297 (2005) (stating that “Scalia cited *The Federalist* in twenty-two opinions”).

⁸ Antonin Scalia, *Q&A with Justice Antonin Scalia*, <https://www.c-span.org/video/?307035-1/justice-antonin-scalia-19362016>, 9:11–10:05 (C-SPAN television broadcast July 19, 2012) (expressing disapproval of students leaving school without having “read *The Federalist Papers*”); Antonin Scalia, *Constitutional Role of Judges*, <https://www.c-span.org/video/?301909-1/constitutional-role-judges>, 18:00–19:00 (C-SPAN 3 television broadcast Oct. 5, 2011) [hereinafter *Constitutional Role of Judges*] (expressing his disappointment that only around five percent of law students he has asked have “read the *Federalist Papers* cover to cover”).

⁹ *Visiting Faculty*, PEKING U. SCH. OF TRANSNAT'L L., <http://stl.pku.edu.cn/faculty/visiting-faculty/> (last visited Aug. 20, 2017).

¹⁰ *Id.*

¹¹ *Id.*

¹² *John S. Baker Biography*, LSU L., <https://www.law.lsu.edu/directory/profiles/john-baker/> (last visited Aug. 20, 2017).

¹³ *Id.*

¹⁴ *Id.*

Our second speaker is Professor Jonathan Turley. It's going to be Tulane day. Professor Turley is a nationally recognized legal scholar, who has written extensively on a variety of subjects.¹⁵ He began his teaching career at Tulane Law School and then joined the George Washington University faculty in 1990, and in 1998, became the youngest chaired professor in the school's history.¹⁶ In addition to his teaching career, Professor Turley is the Founder and Executive Director of the Project for Older Prisoners.¹⁷ He has written more than three dozen academic articles that have appeared in a number of leading law journals, including those of Cornell, Duke, Georgetown, Harvard, and Northwestern, among others.¹⁸ Most recently, he completed a three-part study of the historical and constitutional evolution of the military system.¹⁹ Because of his background, he has served as a consultant to Homeland Security on constitutional issues and is a frequent witness before the House and Senate.²⁰ Professor Turley received his undergraduate degree from the University of Chicago and his law degree from Northwestern University, and his first job out of law school was a law clerk on the United States Court of Appeals for the Fifth Circuit, where yours truly was clerking for a judge that year as well.²¹ So we go way back.

Our next speaker is Luther Strange. He is the Attorney General of Alabama, a high post in government.²² Before his election, General Strange practiced law in Birmingham, Alabama, and, before establishing his own law firm, was a partner with Bradley Arant Boult Cummings.²³ He is the Chairman of the Republican Attorneys General Association.²⁴ He also served as the court-appointed coordinating counsel for the Gulf

¹⁵ *Jonathan Turley Biography*, GW L., <https://www.law.gwu.edu/jonathan-turley> (last visited Aug. 20, 2017).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Aff. #1 of Jonathan Turley, 5–6, Oct. 20, 2010, No. S-097767, <https://jonathanturley.files.WordPress.com/2010/11/turley-affidavit.pdf> (showing that Professor Turley clerked in the Fifth Circuit from 1987 to 1988); *Hon. William H. Pryor Jr.*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., <http://www.ca11.uscourts.gov/judges/hon-william-h-pryor-jr> (last visited Aug. 29, 2017) (showing that Judge Pryor clerked in the Fifth Circuit from 1987 to 1988).

²² *Meet Luther*, ATTY GEN. LUTHER STRANGE, <http://www.lutherstrange.com/meet-luther/> (last visited Aug. 20, 2017).

²³ *Id.*

²⁴ *Attorney General Luther Strange Becomes New Chairman of Republican Attorneys General Association*, ST. OF ALA. (Nov. 14, 2016), <http://ago.state.al.us/news/944.pdf>.

Coast States in the historic *Deepwater Horizon Oil Spill* litigation.²⁵ General Strange is well educated. He received both his undergraduate and law degrees from Tulane.²⁶ He was a scholarship basketball player while earning his undergraduate degree at Tulane.²⁷ In June of this year, he was inducted into the Tulane Law School Hall of Fame.²⁸

We will then hear from Roger Pilon. He is the founding Director of Cato's Center for Constitutional Studies.²⁹ He is also the founding publisher of the *Cato Supreme Court Review* and the inaugural holder of Cato's B. Kenneth Simon Chair in Constitutional Studies.³⁰ Before joining Cato, Roger held several senior posts in the Reagan Administration, including at State and Justice, and was a national fellow at Stanford's Hoover Institution.³¹ Roger holds a B.A. from Columbia University, an M.A. and Ph.D. from the University of Chicago, and a J.D. from the George Washington University School of Law.³²

And, finally, we will hear from Congressman Ron DeSantis. Since being elected to the United States House in 2012, Congressman DeSantis of Florida has served on the Judiciary, Foreign Affairs, and Oversight and Government Reform committees.³³ He is the Chairman of the Oversight Committee's subcommittee on National Security and the Vice Chairman of the Judiciary Committee's subcommittee on the Constitution and Civil Justice.³⁴ He earned a Bachelor of Arts Magna Cum Laude and was the captain of the varsity baseball team at Yale, continuing the athletic theme.³⁵ He also graduated with honors from Harvard Law School.³⁶ While at Harvard, he earned a commission in the United States Navy as

²⁵ *Alabama Attorney General Luther Strange Honored by Tulane Law School: Inducted into Tulane Law School Hall of Fame*, ST. OF ALA. (June 3, 2016), <http://ago.state.al.us/news/847.pdf>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Roger Pilon: Vice President for Legal Affairs*, CATO INST., <https://www.cato.org/people/roger-pilon> (last visited Aug. 25, 2017).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *List of Standing Committees and Select Committee and Their Subcommittees of the House of Representative of the United States: One Hundred Fifteenth Congress*, U.S. HOUSE OF REPRESENTATIVES 21, 26, 30 (Aug. 1, 2017), http://clerk.house.gov/committee_info/scsoal.pdf.

³⁴ *Id.* at 26, 31.

³⁵ *Ron DeSantis: Full Biography*, U.S. HOUSE OF REPRESENTATIVES, <https://desantis.house.gov/full-biography> (last visited Aug. 25, 2017).

³⁶ *Id.*

a JAG Officer.³⁷ During his active duty Navy service, he served as a Military Prosecutor, supported operations at the Terrorist Detention Center in Guantanamo Bay, Cuba, and deployed to Iraq during the 2007 troop surge as an advisor to a United States Navy SEAL Commander in support of counterinsurgency operations in Iraq.³⁸ He has also performed duties as a Federal Prosecutor, taught courses on military law, and written on constitutional issues.³⁹ He's currently a Lieutenant Commander in the United States Navy Reserve.⁴⁰ Thank you for your service.

We will begin with Professor Baker.

Professor Baker: Thank you, Judge. During this convention, you will hear a number of references to Justice Scalia's lone dissent in the 1988 decision in the Independent Counsel case, *Morrison v. Olson*.⁴¹ That dissent went from being largely dismissed to being universally celebrated.⁴² Ed Whelan, in a piece in the *National Review* online last month in September, chronicled the movement of Linda Greenhouse to a conversion.⁴³ Ms. Greenhouse now describes Justice Scalia's dissent as "prescient"⁴⁴—which means "apparent knowledge of things before they happen or come into being."⁴⁵ Similarly, liberal columnist Richard Reeves praised Justice Scalia for his foresight by dissenting in *Morrison*, back when Independent Counsel Ken Starr was investigating President

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Representative Ron DeSantis*, FIN. SERVS. INST., http://www.financialservices.org/uploadedFiles/FSI_Content/Events/Ron-DeSantis.pdf (last visited Aug. 25, 2017).

⁴⁰ *Id.*

⁴¹ 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

⁴² See Terry Eastland, *Scalia's Finest Opinion: A Look Back at His Influential Dissent on the Independent Counsel Law*, WKLY. STANDARD (Mar. 21, 2016), <http://www.weeklystandard.com/scalias-finest-opinion/article/2001510> (explaining the shift in political support away from the independent counsel law and toward the stance taken by Scalia).

⁴³ Ed Whelan, *Greenhouse's Reversal of Judgment*, NAT'L REV. (Sept. 12, 2016, 1:37 PM), <http://www.NATIONALREVIEW.com/bench-memos/439958/greenhouse-morrison-olson>.

⁴⁴ Linda Greenhouse, *Reversal of Fortune for Bill Clinton and Kenneth Starr*, N.Y. TIMES (Sept. 1, 2016), <https://www.NYTimes.com/2016/09/01/opinion/the-president-the-prosecutor-and-the-wheel-of-fortune.html>.

⁴⁵ *Prescience*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1135–36 (4th ed. 1999) ("apparent knowledge of things before they happen or come into being").

Clinton.⁴⁶ I think there was a connection there: Starr's investigation seemed to cause some rethinking among liberals.

For the most part, however, liberal commentators have not praised Justice Scalia's opinions.⁴⁷ Most often, detractors have used the word "uncompromising" in a negative way to describe the Justice.⁴⁸ Of course, admirers, as you heard from Justice Alito this morning, use the word "uncompromising" in a very praiseworthy sense when talking about Justice Scalia.⁴⁹ What the usual detractors do not understand is that Justice Scalia was able to be prescient, farsighted, and prophetic, precisely because he was uncompromising in looking backwards.

Now, of course, virtually everyone knows that Justice Scalia looked back to the public meaning of the words of the Constitution as understood at the time they were drafted.⁵⁰ Also, most here in this convention will know that Justice Scalia's originalism was tied to constitutional structure, as Judge Pryor just talked about. But how many of you, even here, realize that his understanding of structure came largely from *The Federalist Papers*?⁵¹ That's what I want to discuss, and I'll make three points: first, the importance Justice Scalia placed on *The Federalist Papers*; second, how Justice Scalia's understanding of the constitutional structure, primarily separation of powers, as explained in *The Federalist*, undergirds

⁴⁶ Richard Reeves, *Let Us Praise Scalia and Condemn Starr*, BUFF. NEWS (Aug. 14, 1998), <http://BUFFALONEWS.com/1998/08/14/let-us-praise-scalia-and-condemn-starr/>.

⁴⁷ See Dhalia Lithwick, *Why Liberals Loved to Hate Antonin Scalia*, SLATE (Feb. 14, 2016, 11:00 AM), http://www.Slate.com/articles/news_and_politics/jurisprudence/2016/02/why_liberals_loved_to_hate_antonin_scalia.html (criticizing Scalia's opinions, including *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting)); Michael Tomasky, *That Antonin Scalia Dissent was Really Dumb*, DAILY BEAST (July 25, 2015, 5:25 AM), <http://www.theDAILYBEAST.com/that-antonin-scalia-dissent-was-really-dumb> (criticizing Scalia's opinion in *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting)).

⁴⁸ See, e.g., David G. Savage, *Scalia's Uncompromising Style at Times Limited His Impact on the Supreme Court*, L.A. TIMES (Feb. 20, 2016, 6:00 AM), <http://www.LATimes.com/nation/la-na-scalia-legacy-20160220-story.html> (criticizing Scalia's uncompromising positions as impeding his ability to make more influential majority opinions).

⁴⁹ Kevin Daley, *Justice Alito Calls the Late Scalia "Uncompromising,"* DAILY CALLER (Nov. 17, 2016, 11:57 AM), <http://DAILYCALLER.com/2016/11/17/justice-alito-remembers-scalia-he-was-uncompromising/>.

⁵⁰ Antonin Scalia, *Common-Law Courts in a Civil System: Federal Courts and the Law*, in A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

⁵¹ See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (citing THE FEDERALIST NO. 47 (James Madison)) (supporting his view of separation of powers); Scalia, *Constitutional Role of Judges*, *supra* note 8 (citing THE FEDERALIST generally in support of the idea that the Constitution was designed to prevent the legislature from excessively legislating).

his approach to the text of the Constitution; and third, time permitting, I'll mention something about federalism.

First, on the importance of *The Federalist*, as you've already heard,⁵² Justice Scalia routinely asked students and lawyers in meetings or groupings, "Have you read *The Federalist*?" and then some hands would go up, and he would say, "No, I mean the whole *Federalist*!" and most of the hands would go down. His materials in the course that we taught together and that he also taught every summer on separation of powers always began with *The Federalist Nos. 47 and 48*. Those are the main ones on separation of powers, although separation of powers runs throughout the essays of *The Federalist*.⁵³ Usually after we got done with that, then he would go into an explanation and condemnation of the Progressives' attack on separation of powers. For example, he would deride a reference by Justice Cardozo to separation of powers as, "[a] fetich."⁵⁴ The last time we taught together, he made a sustained argument—one might say diatribe—against Woodrow Wilson who had dismissed separation of powers as being terribly outmoded.⁵⁵

Early on in our relationship, I asked him when it was that he came to pay attention to *The Federalist*. He said it was when he headed the Justice Department's Office of Legal Counsel.⁵⁶ As he said, there was often no case law on some of the important issues he was dealing with during the Ford Administration.⁵⁷ Where would he turn? Well, like the Founders, the first generation, and the Marshall Court, Scalia turned to the text of the Constitution. In many ways, however, the text is like a building plan; it doesn't always explain exactly how things fit together. In reading certain texts, it may not always be obvious how they relate when they

⁵² See sources cited *supra* note 8.

⁵³ THE FEDERALIST NOS. 47–48 (James Madison); see, e.g., THE FEDERALIST NO. 51, at 256 (James Madison) (Lawrence Goldman ed., 2008) (describing the importance of the separation of powers principle); THE FEDERALIST NO. 69, at 337 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (describing the powers of the executive); THE FEDERALIST NO. 78, at 379–80 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (explaining the importance of an independent judicial branch).

⁵⁴ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148–49 (1922).

⁵⁵ WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–57 (Columbia paperback ed. 1961).

⁵⁶ *Biographies of the Robes: Antonin Gregory Scalia*, PBS, http://www.pbs.org/wnet/supremecourt/future/robes_scalia.html (last visited Aug. 31, 2017).

⁵⁷ See *Morrison v. Olson*, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (showing influence of THE FEDERALIST on Scalia's view of executive power); *Nomination of Judge Antonin Scalia: Hearings Before the Comm. on the Judiciary*, 99th Cong. 77 (1986) (statement of Hon. Antonin Scalia, U.S. Court of Appeals for the District of Columbia Circuit) (explaining that during his time as the head of the Office of Legal Counsel, there was no case law concerning executive privilege).

could be viewed as fitting together in different ways. Understanding a text often requires relating it to the context. To understand the Justice's originalism and his textualism, one must realize it stands against the background of separation of powers as explained in *The Federalist*.

Justice Scalia would shred the understanding of *Marbury* as presented by some law professors. Such professors have taught over the years that judicial review is the great invention of Chief Justice Marshall in the course of figuring out very cleverly how to get around President Jefferson.⁵⁸ As Lee Otis has written about her class with then-Professor Scalia, he would explain how reading the text of the Constitution, which is declared to be the supreme law, requires judges to ignore laws that contravene the Constitution. Now, this explanation can give textualists some problems because there's nothing in the text that directly mentions judicial review or clearly enough suggests that this might be among the Courts' powers. Scalia's textualism involves putting together the pertinent parts of the Constitution, which regarding judicial review means looking at the supremacy clause⁵⁹ and the Court's jurisdiction.⁶⁰ Thus, judicial review does derive directly from the text. In our seminars, the Justice would make it even simpler. He would just say, "Marshall plagiarized No. 78 of *The Federalist*."

In fact, you can take most of the landmark opinions of the Marshall Court, and see that even though they did not cite *The Federalist*, the opinions largely reflect *The Federalist* explanation of the Constitution. This question of whether judicial review is or isn't in the text as explained in *The Federalist* has to do with the legitimacy and limits of judging. Think about it. There are many conservatives who dispute that judicial review is legitimate. And if you believe that judicial review is not legitimate, then the choice you appear to have is between judges either being slightly illegitimate and restrained or being fully illegitimate and unrestrained.⁶¹ You know, it's kind of like being pregnant; it is difficult to restrain from going from partially to fully pregnant. If, however, you understand separation of powers as the Justice did, then there are times when you are

⁵⁸ See Glenn Harlan Reynolds, *Marbury's Mixed Messages*, 71 TENN. L. REV. 303, 304 (2004) (explaining that law school professors generally teach that *Marbury* was "a bit of rather clever sleight-of-hand" in reliance on works such as William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969)).

⁵⁹ U.S. CONST. art. VI, cls. 2–3 (establishing the Constitution as "the supreme Law of the Land" and binding all federal and state officers to an oath to support the Constitution).

⁶⁰ U.S. CONST. art. III, § 2, cls. 1–3.

⁶¹ See Robert H. Bork, *The End of Democracy?: Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996), <https://www.FIRSTTHINGS.com/article/1996/11/003-the-end-of-democracy-our-judicial-oligarchy> (arguing that the Supreme Court is illegitimate due to a decaying tendency inherent in the power of judicial review).

forcefully, uncompromisingly, limiting the power of one of the other two branches. That doesn't make a judge an activist, and he really didn't use that term. For the Justice, it was a question of following the text—but the text as tied to the structure.

Two, his citations to *The Federalist* were not just window dressing. There was an article in the *William & Mary Law Review* in which a professor suggested that almost every time a Supreme Court Justice cites *The Federalist*, it's really much about nothing.⁶² That was not the case with the Justice, which one can see by reading, analyzing, and comparing, for instance, the opinions in *Morrison v. Olson*—the majority opinion written by the Chief Justice versus the dissent by Justice Scalia.⁶³ What you will see—first of all, what's remembered—are all the great one-liners, and we heard this one at lunch: “[T]his wolf comes as a wolf.”⁶⁴ He also said, “It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*.”⁶⁵ He used those memorable phrases in order to grab the readers' attention in order for them to understand the seriousness of the issues. What stands out is that his arguments are so much more compelling as compared to the way other justices write.

In many ways, the Chief Justice in that case might seem to be more the “textualist,” because he starts out with the Appointments Clause.⁶⁶ He doesn't start with the doctrine of separation of powers. He then goes on to the Executive's power of removal.⁶⁷ But there is no clause in the Constitution about removal of officers confirmed by the Senate. The traditional understanding of removal as stated in the *Myers* case,⁶⁸ but undermined in *Humphrey's Executor*,⁶⁹ goes back to what is known as the decision of 1789.⁷⁰ In Congress, James Madison objects to proposed language in the creation of an Executive branch position which would

⁶² See Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 313–15 (2005) (arguing that, though cited frequently, THE FEDERALIST rarely influences the outcome of cases).

⁶³ Compare 487 U.S. 654, 659–97 (1988) (failing to cite THE FEDERALIST in support of the majority opinion), with *id.* at 697–734 (Scalia, J., dissenting) (citing THE FEDERALIST eleven separate times as foundational support for his opinion).

⁶⁴ *Id.* at 699 (Scalia, J., dissenting).

⁶⁵ *Id.* at 726.

⁶⁶ *Id.* at 670 (majority opinion).

⁶⁷ *Id.* at 671.

⁶⁸ *Myers v. United States*, 272 U.S. 52 (1926).

⁶⁹ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁷⁰ First Annals of Congress, 515 (June 17, 1789).

grant authority to the Senate to remove the appointee.⁷¹ Madison does so in terms of separation of powers and he prevails.

Chief Justice Rehnquist, however, dismisses the importance of Madison's understanding. Only at the very end of his opinion, one for all of the justices except Scalia, does the Chief Justice raise the issue of "whether, taken as a whole, the Act violates the Separation of Powers [doctrine]."⁷² Justice Scalia's dissent is the flip of that. He starts with the principle of separation of powers; then he works through it.⁷³ His is a completely different approach in terms of the starting point. Now, this approach may pose a problem for some textualists, because they might say: "Where is separation of powers even in the Constitution?" There's no such term there. That term does appear in the 1780 Constitution of Massachusetts.⁷⁴ It doesn't appear in our Constitution. The term doesn't appear because the text is a blueprint; it's not an explanation. Articles I to III begin by assigning to each branch one of the three powers: legislative, executive, or judicial, which collectively manifest the doctrine of separation of powers. *The Federalist* provides the explanation of the blueprint.⁷⁵

I am not going to spend much time on federalism. Although the Justice cared about federalism—and I think generally got those decisions right—he didn't focus on federalism the way he did on separation of powers. Why? Well, he said one time that the Seventeenth Amendment, which allowed for the direct election of Senators, basically killed federalism.⁷⁶ He also said that if the American people won't protect—

⁷¹ *Id.* at 674–75 ("The August 6, 1787, draft of the Constitution reported by the Committee of Detail retained Senate appointment of Supreme Court Judges, provided also for Senate appointment of ambassadors, and vested in the President the authority to 'appoint officers in all cases not otherwise provided for by this Constitution.'" (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1, at 183, 185 (Max Farrand ed., 1911))).

⁷² *Id.* at 685.

⁷³ *Id.* at 697–99 (Scalia, J., dissenting).

⁷⁴ See MASS. CONST. pt. 1, art. XXX (concerning the "Separation of legislative, executive and judicial departments").

⁷⁵ See, e.g., THE FEDERALIST NO. 47, at 240–41 (James Madison) (Lawrence Goldman ed., 2008) (explaining that separation of powers requires that no one body or man should hold more than one branch of power at a time but does not require that branches may not have some control over one another); THE FEDERALIST NO. 48, at 245–46 (James Madison) (Lawrence Goldman ed., 2008) (explaining that merely separating the powers of government through drawing clear lines is not sufficient to prevent tyranny); THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) (explaining that checks and balances between the separate branches is necessary to prevent the tyranny of any one branch).

⁷⁶ Robert P. George, FACEBOOK (Nov. 11, 2015), <https://www.facebook.com/robert.p.george.39/posts/10207209683733068>.

meaning through their representatives—federalism, don't expect federal judges to preserve federalism.⁷⁷

More importantly, some of the important federalism cases are also separation of powers cases. Think of the sovereign immunity Eleventh Amendment cases.⁷⁸ Those cases pit the states versus the federal government. Consider Congress' enactment of Obamacare. Federalism and the separation of powers are closely related to one another in these cases. If Congress exceeds its powers to the detriment of the states and the Supreme Court rules in favor of the states, the states may view the case as a victory for federalism, but it is also a case involving separation of powers as between the Congress and the Supreme Court.⁷⁹

In conclusion, Justice Scalia's lone dissent in *Morrison*⁸⁰ against the dilution of presidential constitutional powers, as given in Article II,⁸¹ ultimately has been vindicated. It will be interesting to see whether the constitutional limits on the expansion of presidential power will be vindicated. Although Justice Scalia died before the 4-4 split in *United States v. Texas*,⁸² on the issue of President Obama's order allowing deferred action on the illegal aliens, I don't think that there's much doubt about how Justice Scalia would have voted in that case. I wouldn't be surprised to see certain justices, who have generally taken a "flexible approach" to separation of powers, suddenly become uncompromising about separation of powers as applied to limits on presidential power during the presidency of Donald Trump.

Thank you very much.

⁷⁷ See Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG.: AEI J. ON GOV'T & SOC'Y (Dec. 6, 1979), <http://www.aei.org/publication/the-legislative-veto-a-false-remedy-for-system-overload/> (arguing that it was when citizens stopped thinking of the federal government as one of limited, enumerated powers that the courts stopped doing so as well).

⁷⁸ *E.g.*, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Hans v. Louisiana*, 134 U.S. 1 (1890); see also RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 106–14 (2006) (discussing Justice Scalia's decisions and analysis of state sovereign immunity cases).

⁷⁹ See Scalia, *The Importance of Structure*, *supra* note 1, at 1418 (arguing that the separation of powers and federalism are both closely related in that both form the structure of the constitutional order and together provide protection for individual liberty).

⁸⁰ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

⁸¹ U.S. CONST. art. II, §§ 1–3.

⁸² See 136 S. Ct. 2271, 2271–72 (2016) (mem.) (per curiam) (affirming the lower court decision 4-4 on June 23, 2016); Rebecca Kaplan, *Supreme Court Justice Antonin Scalia Found Dead in Texas*, CBS NEWS (Feb. 13, 2016, 8:22 PM), <https://www.CBSNEWS.com/news/supreme-court-justice-antonin-scalia-found-dead-in-texas/> (reporting that Antonin Scalia was found dead on Feb. 13, 2016).

Professor Turley: First of all, I'd like to thank the Federalist Society again for the honor to speak with you today. It's a particular honor to appear with my former co-clerk, Judge Pryor. You know, the strongest memory I actually have of him from when we clerked together on the Fifth Circuit is when my judge and his judge sat on the same panel, and there was one case that was just an unbelievably sexy constitutional case. John Minor Wisdom was already senior status, and so my judge technically was the head of the panel. My judge would often defer because he's a very, very, nice guy, and I spent the week saying, "You've got to grab the case. You're both going to be on the same side. Don't let Wisdom get the case. Just grab it. Please, for the love of God, please."

So I'm walking with him towards conference, and I'm saying, "All you need to do is grab the case. Just say you'll grab the case. He'll let you grab the case." I come around the corner, and there's Pryor talking to Wisdom feverishly, and Pryor looked up with the most menacing look I've ever seen in my life, and sure enough, they wrote the opinion, and I've been bitter about it ever since. So thank you for this cathartic moment.

Judge Pryor: Pure fiction.

Professor Turley: Yeah, anyway! It's a great honor to speak about Justice Scalia. You know, Scalia and I shared a Sicilian heritage.⁸³ I'm half Sicilian, half Irish, much like his kids, which I reminded him of when he would make fun of me. When Justice Scalia passed away, *The Washington Post* called me and said, "Do you have any memories you'd like to share?" And the only one that came to mind was when we were at this dinner for a Sicilian Senator, and we were standing by this bay window, and Justice Scalia was holding forth for us on a story, and the Sicilian security guards kept on trying to move us away from the window, and Scalia wouldn't move.⁸⁴ And the security guard, finally the guy turns to me and says, "Why won't he move? We're afraid there's a hit team that's looking for the Sicilian Senator, and we're afraid that they're in danger at this window." And I said, "You know, the reason is that Justice Scalia is telling a story, and I'm pretty sure that he'd rather die than end the story, but I know he'd rather one of us die."

⁸³ See JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 13 (1st ed. 2009); Jonathan Turley, *Scalia's Greatest Strength, His Steadfastness, Was Also His Greatest Weakness*, WASH. POST. (Feb. 14, 2016), https://www.WashingtonPost.com/posteverything/wp/2016/02/14/scalias-greatest-strength-his-steadfastness-was-also-his-greatest-weakness/?utm_term=.3089c2b73ce2 (noting that Jonathan Turley "was raised in a Sicilian family").

⁸⁴ Turley, *supra* note 83.

But the fact is I thought about that story only because people have been trying to move Scalia to the left or right his entire life. He never did move. He was one of the few justices that could honestly say that he changed the court more than the court changed him, and the reason is because he came to the court with a very profound sense of the Constitution and its history. One of the things that I think gave him that foundation, that legacy, was that he based his opinions heavily steeped in *The Federalist Papers*.⁸⁵ He also had a formalist approach to the Constitution, which I'm going to mention in a second. I share that approach. I'm sort of in a minority among academics in believing in a formalist approach to separation of powers. Most academics view that view as naïve and simplistic. In fact, I just gave a speech at Georgetown, where one of the questions was, "Well, you do accept, right, that words have no objective meaning?"⁸⁶ And there was a time when a statement like that would have left me entirely confused, but then I remembered I was at Georgetown. So the fact is that the original deal that was struck with the American people is those words did have meaning, and while some of my colleagues view it as a precious lie, it was the original lie that the American people were given. And Scalia saw it that way, and it added a depth and coherence to his opinions.

For me, the most indicative and profound opinion that he wrote was in *Printz*,⁸⁷ and that, of course, was an early methodological demonstration of what became quite familiar as Scalia's analysis. He famously said in that opinion, "Because there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice."⁸⁸ When you look back on that statement and you see what came after it, you realize how profound that was. He tended to run home. He tended to run home to *The Federalist Papers*.⁸⁹ He tended to run home to the texts and to the original meaning.

⁸⁵ See sources cited *supra* note 7.

⁸⁶ See *Tara Smith to Discuss Objectivity in Judicial Review at Georgetown University Law Center*, AYN RAND INST. (Nov. 04, 2016), <https://ari.aynrand.org/blog/2016/11/04/tara-smith-to-discuss-objectivity-in-judicial-review-at-georgetown-university-law-center> (announcing a speaking event at Georgetown concerning objectivity in judicial review in which Jonathan Turley was a panelist on November 8, 2016, just nine days before this panel).

⁸⁷ *Printz v. United States*, 521 U.S. 898, 900 (1997).

⁸⁸ *Id.* at 905.

⁸⁹ See, e.g., *id.* at 910–11, 913–15 (relying upon THE FEDERALIST as support for his understanding of the independence of state officers from federal control); *Tafflin v. Levitt*, 493 U.S. 455, 469–70 (1990) (Scalia, J., concurring) (relying upon THE FEDERALIST for support of his understanding of what is required to limit a state court's concurrent jurisdiction); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (relying upon THE FEDERALIST as a source for his understanding of the separation of powers).

And in that decision, of course, in *Printz*, you had this wonderful clash between Scalia and Souter over *The Federalist Papers*, and they debated the meaning of numbers 27, 36, 44, and 45.⁹⁰

What was interesting is that even Souter acknowledged that the meaning within those *Federalist Papers* would or should be given great weight in the analysis of the case.⁹¹ This case dealt with having state officials who would be required to carry out federal functions or duties.⁹² So what happened was this wonderful exchange and, quite frankly, Scalia, in my view got the better of the exchange as to what was meant by this structure, and it was Scalia who would often talk about the dual sovereignty of federalism, this concrete notion of the relationship of the federal government to the states.⁹³ And that sense of clarity, that formalistic approach, was also evident in *Morrison*, as was just discussed.⁹⁴ I'm not going to discuss it further, since it was just discussed by John. But in that case, I'll simply note that once again, when he answered the question, which he said that opinion was one of his most difficult, he went back to *The Federalist Papers* and quoted *The Federalist No. 51*, when Publius said, "As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified."⁹⁵ And so he was very conscious of these lines, and that's one of reasons I like his work so much.

I happen to believe that words do have meaning in the Constitution, despite my own personal policies and interests. I think there are parts of the Constitution that have static meaning. They must have static meaning. There are others that might be a little more fluid, but when it comes to the separation of powers and federalism, those are static concepts that should not change through time. And in that sense, Scalia was the rock that would bring us back to that original meaning. And so Scalia did, in fact, refuse to compromise, because he had principles, and that's particularly why he will have a legacy. There are many justices that came before him and, I'm afraid, that could follow, that will not be able to make that claim. He was coherent and he was consistent, because he had

⁹⁰ Compare *Printz*, 521 U.S. at 911–12, 914 (opinion of Scalia, J.) (arguing that those papers do not state that state legislatures and officers may be subject to federal direction), with *id.* at 970–75 (Souter, J., dissenting) (arguing that those papers do justify the government directing the actions of state officers and that they are bound to do so).

⁹¹ *Id.* at 971 (Souter, J., dissenting).

⁹² *Id.* at 902 (majority opinion).

⁹³ *E.g.*, *Setser v. United States*, 566 U.S. 231, 241 (2012); *Printz*, 521 U.S. at 918–19; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

⁹⁴ See *supra* note 73 and accompanying text.

⁹⁵ *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, at 257–58 (James Madison) (Lawrence Goldman ed., 2008)).

principles. People often criticized him as dogmatic, but you're supposed to be dogmatic on principles, because if you're not, you're what we call unprincipled.

So when he passed, I felt that not only did we lose a judicial icon, but also a wonderful human being. I don't know anybody that ever knew Scalia that didn't like him. He was remarkably likeable. He would try to get into a fight with anybody over any subject, because he really liked law students. If there was a pet in the room, he tried to argue with the pet, because he was vivacious. He was intellectually alive, and that's what comes out of these opinions. And he was a great believer in a formalist separation, not just in the separation of powers, but in terms of federalism.⁹⁶ And so when he left, I remember thinking about a wonderful Quaker saying that said, "I shall pass this way but once; any good that I can do, or any kindness . . . , let me do it now. Let me not defer or neglect it, for I shall not pass this way again."⁹⁷

Scalia didn't wait. He didn't compromise. He did what he could. And he remained confident about it and committed to it, and because of that, his like may not come this way to pass for some time, but there are many people who do cherish the legacy that he left, respect the principles that he represented, and will carry on those very same principles in the future, I believe.

Thank you very much.

Alabama Attorney General Strange: Thank you, Jonathan. It's just an incredible honor to be here, and I want to thank the Federalist Society for inviting me, including me in this distinguished group of colleagues and friends and people I admire and people I've known for a long time. It's wonderful to be the Attorney General of the State of Alabama in this time in our nation's history—to be a conservative Attorney General from any state—and I get to follow in the footsteps in an office that was really formed by my close friend, Jeff Sessions, and my close friend, Bill Pryor, who really set an example that I have tried to follow in my years in the office, the six years that I've been there—six very active years.⁹⁸

⁹⁶ See *supra* notes 92–95 and accompanying text.

⁹⁷ JAMES KELLER, *TO LIGHT A CANDLE: THE AUTOBIOGRAPHY OF JAMES KELLER, FOUNDER OF THE CHRISTOPHERS* 257 (1st ed. 1963) (quoting Stephen Grellet) (internal quotation marks omitted); 1 STEPHEN GRELLET, *MEMOIRS OF THE LIFE AND GOSPEL LABORS OF STEPHEN GRELLET* 29 (Benjamin Seebohm ed., 1860) (establishing Grellet's affiliation with the Quaker religion).

⁹⁸ Strange was elected as Alabama's Attorney General in 2010 and won reelection in 2014. In 2016, he was appointed to fill the United States Senate seat vacated by Senator Jeff Sessions, who accepted appointment to the office of Attorney General of the United States.

I met Bill many years ago at the advice of Jeff Sessions. He said, “You need to encourage young conservatives who want to run for office and be involved in the debate,” and I didn’t know what that really meant. I had volunteered for Senator Sessions during a great political upset in Alabama, and so somehow or another, I guess nobody else would do it or could do it. I ended up being the chairman of Bill’s election campaign when he took Jeff’s place, and I will never forget walking the halls. We stayed up all night on election night, and the judge knows the exact total of his victory, but it was something like . . . how many votes was it?

Judge Pryor: 6,767.⁹⁹

Alabama Attorney General Strange: 6,767 out of over . . . ?¹⁰⁰

Judge Pryor: 1.2 million votes.¹⁰¹

Alabama Attorney General Strange: Suffice it to say, it was close. As a matter of fact, Associated Press hadn’t called it. We were up literally all night, walking the back room of the ballroom, wringing our hands, and we just finally decided that we were going to declare victory and make them prove that we didn’t win, and, of course, he did win, and the rest is history.

When Bill was Attorney General, when Judge Pryor was Attorney General, in this country not long ago, really, there were twelve Republican Attorneys General in the United States.¹⁰² Now there are twenty-nine

Luther Strange: United States Senator for Alabama, U.S. SENATE, <https://www.strange.senate.gov/content/about-luther> (last visited Aug. 17, 2017); Greg Garrison, *Luther Strange Stands Tall in U.S. Senate Race, Shadowed by Bentley Appointment*, AL.COM (June 9, 2017, 7:05 AM), http://www.AL.com/news/index.ssf/2017/06/strange_stands_tall_in_us_sena.html (last updated June 9, 2017, 5:11 PM).

⁹⁹ 642,403 votes were cast for Pryor and 635,636 for his opponent. Thus, Pryor defeated his opponent by a difference of 6,767 votes. See *1998 Attorney General Election Results—Alabama*, U.S. ELECTION ATLAS, <http://uselectionatlas.org/RESULTS/state.php?fips=1&year=1998&f=0&off=9&elect=0> (last visited Aug. 18, 2017).

¹⁰⁰ See *id.*

¹⁰¹ The actual number of votes cast was 1,278,071—642,403 for Pryor and 635,636 for his opponent. See *id.*

¹⁰² Twelve states had a Republican Attorney General as of 1999. See *Republican Attorneys General Association*, BALLOTPEDIA, https://ballotpedia.org/Republican_Attorneys_General_Association#cite_note-video-3 (last visited Aug. 23, 2017).

after last Tuesday's election.¹⁰³ Twenty-nine conservative Republicans. I was proud to be elected the chairman of that group last week in our meeting at Austin. You know, two weeks ago—actually, the Thursday of the election—Kim Strassel, who is going to be here Saturday morning to sign her book, which I urge you to do, wrote an article in *The Wall Street Journal*, and talked about the conservative Republican Attorneys General of the United States being the “last line of defense” in the protection of the Constitution and the rule of law.¹⁰⁴ Of course, the world changed then, and frankly, my remarks today changed a little bit after that election. We're no longer the last line of defense. We're now the tip of the spear.

It's been a historic time to be an Attorney General. The oath we take—all elected officials take—is to uphold the Constitution of the United States, of your respective state, and to uphold the rule of law.¹⁰⁵ Politicians come and go—some we'd like to go sooner than others—but they all eventually go. It's what preserves our liberties, our freedoms, our rights, our opportunities, and our economy. Everything that we enjoy in this country is the Constitution and the rule of law. Mark Brnovich, in the previous panel said it very nicely. He discussed how we don't get to pick and choose the laws we like and don't like, the ones you want to enforce and not enforce; how there is a democracy set up for that purpose, and it works extraordinarily well, if we protect it and preserve it.¹⁰⁶

Now, we're talking about federalism today, and we'll hear from Congressman DeSantis and others about what we understand about horizontal federalism, the balance of power in our country. One of the things that I've hoped, for quite some time now, is that Congress would reassert, find a way to reassert, its proper role in our balance of power here in Washington. I think a lot of power has been given away. That's led to a lot of problems that we've had to address. I have great hope about that, but there's also the vertical separation of the states versus the federal government, and that's where we Attorney Generals have been very active in the last six years—really eight years. I don't have the precise number, but dozens of lawsuits have been filed by conservative Attorneys General across this country against the Obama Administration over the last number of years for violating the rule of law, for exceeding

¹⁰³ *About RAGA, REPUBLICAN ATT'YS GEN. ASS'N*, <http://www.RepublicanAGs.com/about> (last visited Aug. 18, 2017).

¹⁰⁴ Kimberley A. Strassel, *Conservatism's Last Line of Defense*, WALL ST. J. (Nov. 7, 2016), <https://www.WSJ.com/articles/conservatism-last-line-of-defense-1478565032>.

¹⁰⁵ *E.g.*, U.S. CONST. art. II, § 1, cl. 8; ALA. CONST. art. XVI, § 279; 5 U.S.C. § 3331 (2017).

¹⁰⁶ *The Battle for the Gig Economy*, FEDERALIST SOC'Y (Nov. 23, 2016), <http://www.fed-soc.org/multimedia/detail/the-battle-for-the-gig-economy-audiovideo>.

the powers that Congress granted to them,¹⁰⁷ and we've stood in the breach, and we've won, and I mentioned the "last line of defense."¹⁰⁸

I'll just mention three cases that sort of illustrate the point. One has to do with bathrooms.¹⁰⁹ I really never thought when I was elected Attorney General that I would be litigating in Federal Court about bathrooms, but the Department of Education in its wisdom decided that all schools should allow all people, depending on their own definition of their sexual orientation, to use the bathroom of their choice or face the loss of federal funds.¹¹⁰ That was done on May 13th of 2016.¹¹¹ On May 25th, eleven states challenged that ruling in federal court,¹¹² and on August 21st, a nationwide injunction was secured,¹¹³ three months after the initial action. I'll just editorialize here, because I was curious when that issue was brought to my attention, and I asked one of our school administrators, I said, "Is this a problem? Is this really a significant problem that requires a federal mandate?" You might not be surprised, if you live in the real world, that this supervisor said, "Actually, that's not a problem at all. This occasionally happens in our school systems, and we did something really revolutionary. We have the teachers, parents, students, and administrators all sit down and see if we can work out an accommodation that works for everyone—and that's exactly what we've done. It is not a problem. It is a problem for 99.9% of the other parents who don't understand this when the federal government mandates something like that."¹¹⁴ So regardless of that, we were successful in that.

¹⁰⁷ *About RAGA*, *supra* note 103.

¹⁰⁸ Strassel, *supra* note 104.

¹⁰⁹ *Texas v. United States*, 201 F. Supp. 3d 810, 815–16, 836 (N.D. Tex. 2016). The State of Alabama joined as a plaintiff in this lawsuit. *See also infra* note 110.

¹¹⁰ Letter from Catherine E. Lahmon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice, to a Colleague (Mar. 13, 2016), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (on file with United States Department of Education); *see also Texas v. United States*, 201 F. Supp. 3d at 816 (discussing Texas's claims that the United States sent letters to schools nationwide, requiring schools to allow student access to facilities of their choosing, under the threat of losing Title IX funding); Mark Berman & Moriah Balingit, *Eleven States Sue Obama Administration Over Bathroom Guidance for Transgender Students*, WASH. POST (May 25, 2016), https://www.WashingtonPost.com/news/post-nation/wp/2016/05/25/texas-governor-says-state-will-sue-obama-administration-over-bathroom-directive/?utm_term=.ae494d35d957.

¹¹¹ *See Lahmon*, *supra* note 110.

¹¹² Complaint for Declaratory and Injunctive Relief at 1, *Texas v. United States*, 201 F. Supp. 3d 810 (No. 7:16-cv-00054-O), 2016 WL 3023276, at 1.

¹¹³ *Texas v. United States*, 201 F. Supp. 3d at 836.

¹¹⁴ Polls conducted in May 2016 showed that most Americans believed that either local or state governments should decide school bathroom policies. *See Most School Parents*

Immigration—it was mentioned earlier. The President issued his order in November of 2014 to legalize millions of immigrants in this country.¹¹⁵ Less than two weeks later, seventeen states filed a lawsuit challenging that action,¹¹⁶ and then on June 23rd of 2016, two years later, in a 4-4 tie, the Supreme Court put an end to the President's effort.¹¹⁷

And then the last one I'll mention, because it's particularly relevant to our discussion about Justice Scalia, the Clean Power Plan rule—tremendously important to my state, to many states in this country. The Environmental Protection Agency issued their rule in October of 2015.¹¹⁸ On that same day, more than twenty-four states filed a challenge to that rule in federal court,¹¹⁹ and on February 9th, the Supreme Court stayed

Oppose Transgender Bathroom Policy, RASMUSSEN REP. (May 17, 2016), http://www.RASMUSSENREPORTS.com/public_content/lifestyle/general_lifestyle/may_2016/most_school_parents_oppose_transgender_bathroom_policy?utm_source=newsletter&utm_medium=email&utm_campaign=DailyNewsletter (only twenty-four percent thought the federal government should be responsible for setting bathroom policies in elementary and secondary schools); see also Nick Gass, *Poll: Transgender Bathroom Laws Split Americans*, POLITICO (May 19, 2016, 09:23 AM), <http://www.POLITICO.com/story/2016/05/poll-transgender-bathroom-laws-223356> (revealing that a greater percentage of Americans believe that transgender people should be required to use the restroom corresponding to their genders at birth); CBS News Politics, *CBS-NYT Poll Toplines: Transgender Bathrooms, SCOTUS, Obama Approval*, SCRIBD (May 17, 2016), <https://www.SCRIBD.com/doc/313143772/CBS-NYT-poll-toplines-Transgender-bathrooms-SCOTUS-Obama-approval> (only thirty-five percent of Americans thought the federal government should decide which bathroom transgender student should use).

¹¹⁵ Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Leon Rodriguez, Dir. of U.S. Citizenship and Immigration Servs., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (on file with U.S. Dep't of Homeland Sec.), available at https://www.DHS.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; *Departments of State, Homeland Security Launch Executive Action on Immigration*, DEP'T OF HOMELAND SEC. (Jan. 5, 2015), <https://www.dhs.gov/news/2015/01/05/departments-state-homeland-security-launch-executive-action-immigration-know-facts>.

¹¹⁶ Complaint for Declaratory and Injunctive Relief at 1, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-00254), 2014 WL 6806231, at 1; Catalina Camia, *Texas Leads 17 States in Suing Obama Over Immigration*, USA TODAY (last updated Dec. 3, 2014, 8:24 PM), <https://www.USATODAY.com/story/news/politics/2014/12/03/obama-immigration-lawsuit-texas/19851141/>.

¹¹⁷ *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (per curiam), *affg*, 809 F.3d 134 (5th Cir. 2015).

¹¹⁸ Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

¹¹⁹ Timothy Cama, *Two Dozen States Sue Obama over Coal Plant Emissions Rule*, THE HILL (Oct. 23, 2015, 08:51 AM), <http://THEHILL.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule>.

the Clean Power Plan rule,¹²⁰ which was quite extraordinary. That was the last vote, official act, of Justice Scalia, so it was critically important.¹²¹

We owe so much to his legacy. My final hope here that I'll express is that the Congress and the new administration will find a person who will fill the role that he has played in his shoes in the coming days, months, and, as they deliberate that, we Republican Attorneys General look forward to that, because I'll get back to where I started. Regardless of who the President is, or who is in Congress, we will continue to take our role seriously, which is to defend the Constitution and uphold the rule of law in this country. I really, again, appreciate this opportunity to be here, and I look forward to your questions in our discussion. Thank you.

Mr. Pilon: Well I, too, want to thank the Federalist Society for inviting me here to discuss Justice Scalia's views on federalism and the separation of powers. When Dean Reuter called me to see if I'd be interested in speaking, he said he wanted some balance on the panel. "Balance?" I thought. "Well you must have read my foreword to the new *Cato Supreme Court Review*, which was titled "*Justice Scalia's Originalism: Original or Post-New Deal?*"¹²² Given that title, I think you know where that article went. So I'm going to bring something of a discordant note here. I hate to be the skunk at the garden party—well, actually, I don't, now that I think about it—but I loved Nino. Every time I ran into him, we got into an argument. He loved to argue—just loved it. If you took one position, he'd take the other, and then you'd flip sides. It was just great fun to argue with him.

But for our subject here today, which is *structural* protections for liberty, he was absolutely right that the structural protections are the main protections for liberty,¹²³ and he was correct also that the Bill of

¹²⁰ The Supreme Court stayed the Clean Power Plan in multiple, separate rulings on the same day. *Basin Elec. Power Coop. v. EPA*, 136 S. Ct. 998, 998–99 (2016) (mem.); *Murray Energy Corp. v. EPA*, 136 S. Ct. 999, 999 (2016) (mem.); *Chamber of Commerce v. EPA*, 136 S. Ct. 999, 999 (2016) (mem.); *North Dakota v. EPA*, 136 S. Ct. 999, 999–1000 (2016) (mem.); *West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016) (mem.).

¹²¹ Ian Millhiser, *The Simply Breathtaking Consequences of Justice Scalia's Death*, THINKPROGRESS (Feb. 13, 2016, 11:27 PM), <https://ThinkProgress.org/the-simply-breathtaking-consequences-of-justice-scalias-death-2ab3d3aa740/>.

¹²² Roger Pilon, *Foreword: Justice Scalia's Originalism: Original or Post-New Deal?*, 2016 CATO SUP. CT. REV. vii, vii (2016), <https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2016/9/2016-supreme-court-review-foreword.pdf>.

¹²³ SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE 3 (Kevin A. Ring ed., Regnery Publ'g, Inc. 2004) (a selection of Justice Scalia's most famous dissents with commentary by Kevin A. Ring).

Rights was “an afterthought,” as he often said.¹²⁴ Unfortunately, however, he too often ignored the changes the Civil War Amendments made to the structural protections, because he too little regarded the theory that undergirds the Constitution, and that led him to place democracy over liberty.¹²⁵

That undergirding theory, state-of-nature theory, can be seen in the Preamble,¹²⁶ before that in the Declaration,¹²⁷ and before that, of course, in Locke’s *Second Treatise*.¹²⁸ But Scalia wouldn’t go there. Ever the positivist, he dismissed it as “philosophizing,”¹²⁹ unlike what he called the Constitution’s “operative provisions.”¹³⁰

His method was textualism, originalism, and structuralism—all salutary, if you follow it, which he didn’t always do. But those tools, of course, are often insufficient when you get to broad or vague text. At that point, you have to have a *theory* of the matter; you have to know where you’re going, and know in particular what the presumption is. A judge can’t simply throw up his arms and say, “Let the people decide,” unless the text clearly points that way. The Constitution, after all—*this* Constitution, which a judge takes an oath to uphold—was written not simply to empower officials, but to limit them as well toward liberty, not simply toward power, as the Preamble and the Declaration make clear.¹³¹ The bedrock principle, in short, is liberty.

Reflecting the state-of-nature reasoning of the *Second Treatise* and the Declaration,¹³² the Preamble begins by recognizing that sovereignty rests with the people.¹³³ Government doesn’t give the people their

¹²⁴ Antonin Scalia, Opening Statement on American Exceptionalism to a Senate Judiciary Committee (Oct. 5, 2011), <http://www.AmericanRhetoric.com/speeches/antonin Scaliaamericanexceptionalism.htm>; see also Committee on the Judiciary, *Considering the Role of Judges Under the Constitution of the United States*, U.S. SENATE (Oct. 5, 2011, 02:30 PM), <https://www.judiciary.senate.gov/meetings/considering-the-role-of-judges-under-the-constitution-of-the-united-states> (exhibiting a video of Justice Scalia’s opening remarks before the United States Senate).

¹²⁵ Michael D. Ramsey, *Beyond the Text: Justice Scalia’s Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1967–70 (2017).

¹²⁶ U.S. CONST. pmb.; Charles S. Desmond, *Natural Law and the American Constitution*, 22 FORDHAM L. REV. 235, 235–36, 239 (1953).

¹²⁷ Desmond, *supra* note 126, at 235–36.

¹²⁸ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122–27 (Thomas Cook ed., Hafner Publ’g Co. 1947) (1690).

¹²⁹ Scalia, *supra* note 50, at 134.

¹³⁰ *Id.*

¹³¹ See Pilon, *Justice Scalia’s Originalism*, *supra* note 122, at ix–x.

¹³² *Id.* at ix–xi.

¹³³ *Id.* at ix–x.

rights.¹³⁴ They already have rights, their natural rights.¹³⁵ They create government to secure those rights.¹³⁶ Toward that end, the Framers structured powers.¹³⁷ They divided powers between the federal and the state governments, leaving most power with the states;¹³⁸ and they separated powers functionally at the federal level, pitting power against power, as *The Federalist* shows throughout.¹³⁹ Most important, though, they limited federal power through the enumeration of Congress's legislative powers, aimed at a few national concerns.¹⁴⁰

And to make that crystal clear, when they added the Bill of Rights, they concluded with the Ninth Amendment, which states plainly that we retained all the rights we never surrendered,¹⁴¹ and the Tenth Amendment, which makes equally plain that the federal government has only the powers we gave it.¹⁴² In a nutshell, the Constitution establishes a government of delegated, enumerated, and thus limited powers, further limited by our rights, both enumerated and unenumerated.¹⁴³

For all its virtues, as we all know, the original design was seriously flawed by the document's oblique recognition of slavery. The Civil War Amendments fixed that by fundamentally changing, among other things, our federal-state relations. Of particular importance for our purposes, after defining federal and state citizenship, the Fourteenth Amendment's Privileges or Immunities Clause made rights good against the federal government,¹⁴⁴ including natural rights protected under the Ninth Amendment,¹⁴⁵ good against the states as well, save for those rights peculiarly related to distinct federal and state functions.¹⁴⁶

¹³⁴ *Id.* at ix.

¹³⁵ *Id.*

¹³⁶ *Id.* at x.

¹³⁷ U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹³⁸ THE FEDERALIST NO. 45, at 232 (James Madison) (Lawrence Goldman ed., 2008).

¹³⁹ *Id.*; THE FEDERALIST NO. 51, at 256–57 (James Madison) (Lawrence Goldman ed., 2008).

¹⁴⁰ THE FEDERALIST NO. 45, at 232 (James Madison) (Lawrence Goldman ed., 2008).

¹⁴¹ U.S. CONST. amend. IX.

¹⁴² *Id.* amend. X.

¹⁴³ Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006).

¹⁴⁴ U.S. CONST. amend. XIV, § 1; see also *Privileges or Immunities*, HERITAGE FOUND., <http://www.Heritage.org/constitution/#!/amendments/14/essays/169/privileges-or-immunities> (last visited Sept. 2, 2017) (explaining the different views of how the Privileges or Immunities Clause was meant to operate and its current meaning as interpreted by the Supreme Court in the *Slaughter-House Cases*).

¹⁴⁵ HERITAGE FOUNDATION, *supra* note 144.

¹⁴⁶ See *Slaughter-House Cases*, 83 U.S. 36, 79–80 (1873) (Suggesting that certain rights “which owe their existence to the Federal government” are peculiarly related to federal

But we all know what happened to that clause in the infamous *Slaughterhouse Cases*¹⁴⁷—and what happened six decades later, when the New Deal Court turned that carefully wrought structure on its head by eviscerating the enumerated powers doctrine in 1937,¹⁴⁸ bifurcating the Bill of Rights and crafting a bifurcated theory of judicial review in 1938,¹⁴⁹ and jettisoning the non-delegation doctrine in 1943.¹⁵⁰ So rather than rehearse those developments here, I'll return to Justice Scalia's view.

A textualist cannot, of course, ignore the plain text, but Scalia does. I'll start with a few powers cases where he tends to be better than with rights cases. In fact, I'll start with an anecdote. I invited Nino over to Cato in 1993 with the idea of pressing him on the demise of the doctrine of enumerated powers.¹⁵¹ Before we got into that, however, he said, "Where's the wine?" "This is lunch!" I said. "So?" he answered. So we had to send an intern out to get a bottle of wine, and that loosened our respective tongues, as if either of us needed it, and we proceeded from there. And I did say to him at one point, "Nino, when are you ever going to revive the doctrine of enumerated powers?" "Oh, Roger, we lost that battle a long time ago," he answered. "Well thank you for that counsel of despair," I laughed.

functions, such as the right of access to seaports. Unfortunately, the *Slaughter-House* majority went little further, thus ignoring the main purport of the Privileges or Immunities Clause.).

¹⁴⁷ *Id.* at 77.

¹⁴⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22, 25, 30–32 (1937) (upholding the National Labor Relations Act of 1935, which empowered the National Labor Relations Board to regulate unfair labor practices "affecting commerce," as a valid exercise of the federal power to regulate interstate commerce); see also Roger Pilon, *Madison's Constitutional Vision: The Legacy of Enumerated Powers*, in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 25, 35–36 (John Samples ed., Cato Inst. 2002) (2003) (explaining the holding of *Jones & Laughlin* and its long-term effects).

¹⁴⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); Pilon, *Madison's Constitutional Vision*, *supra* note 148, at 36.

¹⁵⁰ See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding the delegation of authority to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require); see also A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 454–56 (2017) (explaining that *Nat'l Broad. Co.* and an earlier case "wholly defanged" the non-delegation doctrine); Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L. J. 239, 264–65 (2005) ("Since 1936, the Supreme Court has not invalidated any federal legislation on the grounds that it violates the nondelegation doctrine.").

¹⁵¹ Roger Pilon, *Scalia and the Supreme Court: What the Justice Would Want Now*, CATO INST. (Feb. 19, 2016), <https://www.cato.org/publications/commentary/scalia-supreme-court-what-justice-would-want-now>; see generally Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 26–27, 92 (2005) (arguing that the doctrine of enumerated powers has never been reflected in actual practice); Pilon, *Madison's Constitutional Vision*, *supra* note 148, at 25–26, 30–36 (explaining how the doctrine of enumerated powers has changed throughout different eras of United States history).

But two years later, when *Lopez*¹⁵² came down, reviving the doctrine after fifty-eight years in the wilderness, he was on the right side,¹⁵³ as he was in *Morrison* when that decision came down five years later.¹⁵⁴ So too before that in *Printz*,¹⁵⁵ where he wrote for the Court, as Jonathan Turley said, holding that Congress had no power to dragoon state officials into carrying out federal functions.¹⁵⁶ But eight years later, in *Raich*, the California medical marijuana case,¹⁵⁷ he read the commerce power so broadly that Madison, in *The Federalist No. 42*,¹⁵⁸ and Marshall, in *Gibbons*,¹⁵⁹ would never have recognized it, as Justices Thomas and O'Connor made plain in their separate dissents.¹⁶⁰ But in *Sibelius*¹⁶¹ and *King*,¹⁶² the two big Obamacare cases, he redeemed himself again, albeit in dissent.¹⁶³

Even in the correctly decided powers cases, however, the Court has only scratched the surface of the enumerated powers problem. We're far down the road of massive unconstitutional government, and I'm the last to think that the Court by itself is going to reverse that problem any time soon. But it can start, as at last it's doing.

In the rights cases, however, it's more promising, except that here, Scalia is altogether uneven. In the interest of time, I'll focus simply on the state police power cases, where most of the confusion arises. Consistent with the underlying theory of political legitimacy that I sketched earlier, the police power we enjoy in the state of nature—Locke's "Executive

¹⁵² *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁵³ *See id.* at 550, 567 (Justice Scalia joined the majority opinion, which concluded that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States . . . requir[ing] us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.") (citations omitted).

¹⁵⁴ *United States v. Morrison*, 529 U.S. 598, 600–02 (2000) (Justice Scalia joined the majority opinion, which concluded under the rationale of *Lopez* that Congress lacked the authority to create a civil remedy for victims of gender-motivated violence).

¹⁵⁵ *Printz v. United States*, 521 U.S. 898, 902 (1997).

¹⁵⁶ *Id.* at 935.

¹⁵⁷ *Gonzales v. Raich*, 545 U.S. 1, 34–41 (2005) (Scalia, J., concurring).

¹⁵⁸ THE FEDERALIST NO. 42 (James Madison).

¹⁵⁹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹⁶⁰ *Raich*, 545 U.S. at 2220–29 (O'Connor, J., dissenting); *id.* at 2229–39 (Thomas, J., dissenting).

¹⁶¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁶² *King v. Burwell*, 135 S. Ct. 2480 (2015).

¹⁶³ *Id.* at 2497–2507 (Scalia, J., dissenting); *Sebelius*, 132 S. Ct. at 2642–50 (Scalia, J., dissenting).

Power,”¹⁶⁴ which we delegate to government—is mainly there to secure our rights.¹⁶⁵ Thus, it’s bounded by the rights that there are to be secured.¹⁶⁶ And the question then, from *Lochner* to *Lawrence* and many cases in between, is simply this: What rights, if any, are being secured by the statute at issue?¹⁶⁷ What rights are protected, for example, by a law criminalizing the sale and use of contraceptives, or marrying someone of another race?¹⁶⁸ If the state can point to no such rights, that settles it. The judge doesn’t have to discover any *unenumerated* rights; it’s the *state* that has to identify rights it’s protecting under its police power.¹⁶⁹ If it can’t make that case convincingly, it loses.

As with enumerated powers, then, where there is no power, by implication there is a right.¹⁷⁰ Hamilton, Wilson, and others objected to adding a Bill of Rights because they saw it was impossible to enumerate all of our rights and dangerous to enumerate only some.¹⁷¹ Thus, *structural* limits were meant to secure our liberty: power pitted against

¹⁶⁴ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 124–25 (Thomas Cook ed., Hafner Publ’g Co. 1947) (1690); *see also* Lee Ward, *Locke on Executive Power and Liberal Constitutionalism*, 38 CAN. J. POL. SCI. 719, 723 (2005) (examining Locke’s “state of nature” principle).

¹⁶⁵ *See* LOCKE, *supra* note 164, at 124–25 (explaining that all people have, in a state of nature, a right to punish violations of the law of nature in order to protect their natural rights and restrain offenders).

¹⁶⁶ *See id.* (explaining that the executive power may be carried into effect in order to secure rights against a transgressor).

¹⁶⁷ At issue in *Lochner* was a New York labor law restricting the right of an employer and an employee to enter into a contract for labor. In particular, the law made it a misdemeanor for any baker to require an employee to work more than sixty hours per week. *Lochner v. New York*, 198 U.S. 45, 51–53 (1905). In *Lawrence*, the Court held that the Fourteenth Amendment protects the right of adults to engage in private, consensual sexual activity, and that therefore Texas’s law criminalizing “deviate sexual intercourse with another individual of the same sex” was unconstitutional. *Lawrence v. Texas*, 539 U.S. 558, 562–64, 567, 578 (2003).

¹⁶⁸ *See Eisenstadt v. Baird*, 405 U.S. 438, 440–42 (1972) (distribution and use of contraceptives); *Loving v. Virginia*, 388 U.S. 1, 1–4 (1967) (interracial marriage).

¹⁶⁹ *See supra* notes 164–65 and accompanying text.

¹⁷⁰ *See* U.S. CONST. amend. IX–X (the Tenth Amendment reserves all powers not delegated to the federal government to the states or the people, and the Ninth Amendment acknowledges the existence of unenumerated rights; by implication from these two, where the federal government has no power, the people are free to do as they please unless regulated by the states).

¹⁷¹ THE FEDERALIST NO. 84, at 475–76 (Alexander Hamilton) (Lawrence Goldman ed., 2008); 1 James Wilson, *State House Yard Speech* (1787), *reprinted in* COLLECTED WORKS OF JAMES WILSON 171, 171–72 (Kermit L. Hall & Mark D. Hall eds., 2007).

power;¹⁷² the enumeration of federal powers;¹⁷³ and later, a narrow reading of the state police power consistent with the privileges or immunities we enjoyed as citizens of the United States.¹⁷⁴

Indeed, did we have *no* rights prior to adding a Bill of Rights? Of course not. Again, where there is no power, there is a right. But did we then *lose* rights when we *added* a Bill of Rights—all the unenumerated rights we enjoyed prior to that? That’s the implication if judges are to secure only enumerated rights, as many conservatives today—including Justice Scalia—have argued. The Ninth Amendment was written to dispel that reading. A textualist can hardly ignore it, or ignore its complement vis-à-vis the states, the Privileges or Immunities Clause of the Fourteenth Amendment.

So why do so many conservatives indulge that reading? Responding, understandably, to the perceived judicial activism of the Warren and Burger Courts, Bickel, Bork, Scalia, and others focused on the “counter-majoritarian difficulty” and the need, accordingly, for judges to indulge the “passive virtues.” But in so doing, they ignored the *majoritarian* difficulty, which deeply concerned the Framers. The Framers stood for liberty first, majoritarianism second, as only one means toward liberty. Their main means was structure, including the revised principled federalism of the Civil War Framers.

We tend today to think of federalism as states protecting liberty vis-à-vis the federal government, but it cuts the other way, too: *federal* protection against *grassroots* tyranny. And that’s what Justice Scalia too little appreciated. His work securing originalism was invaluable, and he will long be remembered for that. But let’s secure the whole of originalism—including the revised federalism of the Civil War Framers.

Thank you.

Congressman DeSantis: Well, good afternoon. It’s great to be here. You know, Judge Pryor came and visited the Harvard Law campus back in my day, and I don’t think he was a judge yet.¹⁷⁵ I think it was

¹⁷² THE FEDERALIST NO. 51, at 256–57 (James Madison) (Lawrence Goldman ed., 2008).

¹⁷³ U.S. CONST. art. I, §§ 1, 8.

¹⁷⁴ See *Lochner v. New York*, 198 U.S. 45, 52–54, 56–58, 64 (1905) (prohibiting “unreasonable, unnecessary and arbitrary” exercises of state police power interfering with an employer or employee’s right to contract for labor as violative of the “liberty of the individual” under the Fourteenth Amendment).

¹⁷⁵ President George W. Bush appointed then-Alabama Attorney General William Pryor to fill a vacancy on the Eleventh Circuit Court of Appeals in 2004. *Hon. William H. Pryor Jr.*, THE FEDERALIST SOC’Y, <https://www.fed-soc.org/experts/detail/william-h-pryor-jr> (last visited Sept. 17, 2017). Congressman DeSantis graduated from Harvard Law School in

controversial. A lot of the Harvard faculty thought he would commence a reign of terror on the bench. Once I heard that, it was probably the best seal of approval I could possibly imagine—short of an endorsement from Justice Scalia himself. Sure enough, he’s proven to be a great judge, so it’s an honor to be here with him.

You know, when I think about Congress’s role in the constitutional system, I think of a little anecdote. A constituent asked me about an issue with municipal trash cleanup in her neighborhood, and I responded: “You know, it’s an important issue, but I’m your federal representative in the United States Congress. We deal with federal issues.” And she said, “Yeah, I know. I just thought I’d start at the bottom of the totem pole and work my way up.” And the thing is, there’s a truth to that, not just because Congress is a punching bag. I think Congress stands today as the weakest of the three branches in our constitutional system. I think Justice Scalia was always very, very, articulate about identifying the structural Constitution as the number one protector of individual liberty—that you would have these different branches; they would compete with one another; they would be zealous about guarding their powers; and that, even more than the Bill of Rights, would preserve and protect individual liberty.¹⁷⁶

It’s interesting to consider the Founders’ views. If you read Madison and *The Federalist*, generally, we hear about three coequal branches of government.¹⁷⁷ The Founders didn’t envision them necessarily to be equal—I think they envisioned them to compete.¹⁷⁸ But Madison said in republican government, “the legislative authority necessarily predominates.”¹⁷⁹ In fact, although the Revolution was a revolt against executive authority, the impulse that inspired the Constitution was that the founders saw runaway legislatures in the states at the time. Therefore, they wanted to have a government of, by, and for the people.¹⁸⁰

2005. *DeSantis, Ron*, (1978 -), BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000621> (last visited Sept. 17, 2017).

¹⁷⁶ Scalia, *The Importance of Structure*, *supra* note 1, *passim*.

¹⁷⁷ *E.g.*, Chuck Grassley, *Coequal Branches of Government*, SCOTUSBLOG (Mar. 1, 2016, 7:00 AM), http://www.SCOTUSBlog.com/2016/03/coequal-branches-of-government/Branches_of_the_Government,_THE_WHITE_HOUSE, <https://clintonwhitehouse4.archives.gov/WH/New/html/branches.html> (last visited Sept. 17, 2017); PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 5, 12–14, 18 (2009).

¹⁷⁸ THE FEDERALIST NO. 51, at 256–57 (James Madison) (Lawrence Goldman ed., 2008).

¹⁷⁹ *Id.* at 257.

¹⁸⁰ President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863); *see* THE FEDERALIST NO. 51, at 256–58 (James Madison) (Lawrence Goldman ed., 2008) (explaining

They didn't want it to simply be a tyranny of the majority. They knew that the Congress would be powerful, but they wanted to have other branches that would also check it.¹⁸¹ But even with those checks, they just thought that the branch that was the closest to the people—at least the House—would have the most power.¹⁸²

And, of course, if you look at the original constitutional design, just look at Congress's power: the power of the purse, and obviously the power to legislate.¹⁸³ You can prevent an administration from stocking the government with its choice of personnel by not confirming people.¹⁸⁴ You can impeach civil officers, the President, and the Vice President.¹⁸⁵ You can circumscribe the jurisdiction of the courts.¹⁸⁶ You don't even need to create lower courts; you can abolish them.¹⁸⁷ So they understood that the Presidency would be powerful, particularly in foreign affairs, but the powers of the presidency were really more of a check on the legislature considering how they envisioned it.¹⁸⁸ Yes, Hamilton said an executive can "undertake extensive and arduous enterprises for the public benefit,"¹⁸⁹ but if the Congress isn't providing funding for those enterprises, then they're going to amount to nothing.¹⁹⁰

that the legislature would be the most powerful branch and that therefore strong structural checks were needed to prevent legislative overreach).

¹⁸¹ See THE FEDERALIST NO. 51, at 256–58 (James Madison) (Lawrence Goldman ed., 2008).

¹⁸² See THE FEDERALIST NO. 58, at 289 (James Madison) (Lawrence Goldman ed., 2008) (describing the importance of the power of the purse in the hands of the House as the direct representatives of the people).

¹⁸³ U.S. CONST. art. I, § 1; *id.* art. I, § 7, cl. 1; *id.* § 8, cls. 1–2, 5.

¹⁸⁴ See *id.* art. II, § 2, cl. 2 (establishing the requirement of advice and consent by the Senate to presidential appointments).

¹⁸⁵ *Id.* art. I, § 2, cl. 5; *id.* § 3, cl. 6.

¹⁸⁶ *Id.* art. I, § 8, cl. 9; *id.* art. III, §§ 1–2.

¹⁸⁷ *Id.* art. III, § 1; see also *Abolition of Courts*, JUSTIA US L., <http://law.JUSTIA.com/constitution/us/article-3/02-inferior-courts.html> (last visited Sept. 22, 2017) (explaining how Congress interpreted the power to create lower courts as implying the power to abolish them as early as 1802).

¹⁸⁸ See THE FEDERALIST NO. 73, at 360–61 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (explaining the importance of the veto power as a check on legislative overreach); THE FEDERALIST NO. 76, at 371–72 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (explaining the advantages of vesting the appointment power in the president as opposed to Congress).

¹⁸⁹ THE FEDERALIST NO. 72, at 354, 356 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

¹⁹⁰ See, e.g., *Nat'l Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998) (recognizing Congress's broad power to set spending priorities even according to criteria that would be impermissible in other contexts); Act of Jan. 5, 1971, Pub. L. No. 91-652, §§ 3, 5, 7(a), 84 Stat. 1942, 1942–43 (1971) (limiting foreign assistance spending to specific purposes); Act of Nov. 19, 1969, Pub. L. No. 91-121, §§ 203, 401(a), 403, 405(b), 407(a),

The courts, of course, Hamilton said, were incontestably the weakest of the three branches of the government.¹⁹¹ They have “neither force nor will but merely judgment.”¹⁹² An important role? Absolutely, but you’re not able to legislate from the bench.¹⁹³ The current practice, I think, is that the executive by far is the most powerful. Then, the courts. The courts probably have as much legislative authority as we do.¹⁹⁴ Certainly they have more power over the Constitution.¹⁹⁵

Part of the reason the executive has gained so much power is through congressional neglect.¹⁹⁶ Congress will legislate, and they’ll say, “Well, we really can’t deal with these thorny issues, so bureaucracy, you figure it out,” and the bureaucracy effectively legislates very important policy determinations.¹⁹⁷ For example, the *Hobby Lobby* case went to the Supreme Court to challenge a requirement that was not written into the statute; that was a Department of Health and Human Services regulation.¹⁹⁸ And obviously I think congressional neglect has also paved the way for administrative overreach, so if a statute is ambiguous—or lengthy—and it’s been on the books for decades—the administrative agencies, and executive branch going beyond that, have taken liberties to legislate vast new policies that have a tremendous effect on American society and the American economy.¹⁹⁹

In my first State of the Union, when I was elected in 2012, President Obama came and told Congress that he wanted Congress to do what he

409(b)–(f), 83 Stat. 206, 206–10 (1969) (limiting Vietnam-era defense appropriations to specific purposes).

¹⁹¹ THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

¹⁹² *Id.*

¹⁹³ *See id.* at 382–83 (stating that courts may not substitute their will for judgment).

¹⁹⁴ *See* Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 1 (1978) (arguing that the Supreme Court is at times a sort of legislative body).

¹⁹⁵ *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (holding that the court has judicial review over constitutional interpretation); *see also* *About the Court: The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Sept. 25, 2017) (explaining that the Supreme Court has final judgment regarding constitutionality, thus affording the judicial branch supreme power in interpreting the constitution).

¹⁹⁶ A. Christopher Bryant, *Presidential Signing Statements and Congressional Oversight*, 16 WM. & MARY BILL RTS. J. 169, 176 (2007).

¹⁹⁷ *See* Clyde Wayne Crews, Jr., *Mapping Washington’s Lawlessness 2016: A Preliminary Inventory of “Regulatory Dark Matter”* 4 (Competitive Enter. Inst., Issue Analysis 2015 No. 6, Dec. 2015), <https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf> (demonstrating this through an overview of the regulatory process).

¹⁹⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2754 (2014).

¹⁹⁹ Crews, *supra* note 197, at 4.

said. If we didn't enact it, then he was going to do it on his own.²⁰⁰ And, you know, we had just gotten sworn in a couple weeks before. I thought, "That's not exactly how it's written down in the Constitution," but the thing that bothered me the most about it was not that the President was asserting that authority, because the Founders presumed that each branch would try to exceed its constitutional limits.²⁰¹ What bothered me was when I looked to the left, every single Democrat in that chamber stood and cheered him when he said it,²⁰² so they were willing to put their personal political viewpoints ahead of their duty to defend their own institution, which I think is defending the Constitution.²⁰³

So it's a problem both ways. The executive branch overreach and congressional accountability; we did this with the Internal Revenue Service in terms of dealing with the targeting.²⁰⁴ Obviously the Justice Department was not going to do anything; we knew that from the beginning. But at the least we could conduct oversight, at least get documents. The IRS destroyed emails that were subpoenaed.²⁰⁵ The commissioner made multiple false statements.²⁰⁶ He has admitted the statements were false.²⁰⁷ They didn't do basic due diligence, like even look at Lois Lerner's Blackberry.²⁰⁸

²⁰⁰ See Brad Plumer, *READ: Obama's 2014 State of the Union Address*, WASH. POST (Jan. 28, 2014), https://www.WashingtonPost.com/news/wonk/wp/2014/01/28/read-obamas-2014-state-of-the-union-address/?utm_term=.392545275bcd (stating that "wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do").

²⁰¹ See THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) (stating that "you must first enable the government to control the governed; and in the next place oblige it to control itself").

²⁰² See Plumer, *supra* note 200 (showing the Democratic side applauding President Obama's remarks at timestamp 12:50).

²⁰³ See U.S. CONST. art. VI, cl. 3 (requiring Congress to take an oath to defend the Constitution).

²⁰⁴ Kelly Phillips Erb, *IRS Targeting Scandal: Citizens United, Lois Lerner and the \$20M Tax Saga That Won't Go Away*, FORBES (June 24, 2016, 11:22 AM), <https://www.Forbes.com/sites/kellyphillipserb/2016/06/24/irs-targeting-scandal-citizens-united-lois-lerner-and-the-20m-tax-saga-that-wont-go-away/#7f1b9775bcd1>.

²⁰⁵ Impeaching John Andrew Koskinen, Commissioner of the IRS, for High Crimes and Misdemeanors, H.R. Res. 828, 114th Cong. (2016).

²⁰⁶ *Id.*

²⁰⁷ See Debra Heine, *Koskinen Admits to Making False Statements About Email Destruction*, P.J. MEDIA (Sept. 21, 2016), <https://PJMEDIA.com/trending/2016/09/21/koskinen-says-false-statements-about-email-destruction-were-honest-mistake/> (admitting to making statements that later were proven false).

²⁰⁸ H.R. Res. 828.

But what happens? Nothing! So to me, the lesson that the bureaucracy takes from Congress's fecklessness is "Destroy the stuff! Don't worry about it, because there's nothing that's going to happen to you if the head of the executive branch concurs in doing what you're doing." Of course the courts have also helped the executive become more powerful by deferring to what the administrative agencies do.²⁰⁹ To me, I think you should apply the laws as written, not defer to the executive branch, because that allows the administrative state to get bigger.²¹⁰

Regarding Justice Scalia, nobody has been more influential for law students, for lawyers, or for judges if you're on the center-right. I just wish his wisdom would make its way more into the halls of the United States Congress, because Scalia understood that you have to defend your own turf. One of the things that frustrates me is, some of my colleagues, if we're debating a bill, will answer the questions of "Is it constitutional? Do we have this power? Does it conflict with the Bill of Rights?" with "Well, we'll let the courts figure that out." You know, we do whatever we vote for, whatever we think is good, unless and until the courts stop us.

The problem with that is the courts can only decide cases or controversies,²¹¹ so basically for anything that does not lead to a lawsuit, you're basically saying there's not going to be anyone that's going to stand up for the Constitution? Our duty is to defend the Constitution and to act in conformance with the Constitution.²¹² I've always said if there's a bill that's not constitutional, my duty is to vote against it, regardless of what the courts may or may not do.²¹³ It's not just the Congress. I mean, President Bush when he signed McCain-Feingold, talked about how he felt it was unconstitutional, but he went on to say that it was up to the courts to figure that out.²¹⁴ That's not the way you're supposed to do it. If

²⁰⁹ David Kemp, *Chevron Deference: Your Guide to Understanding Two of Today's SCOTUS Decisions*, JUSTIA (May 21, 2012), <https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/>.

²¹⁰ Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, HERITAGE FOUND. (May 7, 2015), <http://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and>.

²¹¹ U.S. CONST. art. III, § 2, cl. 1.

²¹² *Id.* art. VI, cl. 3.

²¹³ See Michael Stokes Paulson, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2714 (2003) (explaining the theory of constitutional supremacy, which argues that all three branches of government have equal authority to interpret the meaning of the Constitution).

²¹⁴ George W. Bush, *Statement on Signing the Bipartisan Campaign Reform Act of 2002*, AM. PRESIDENCY PROJECT (Mar. 27, 2002), <http://www.Presidency.ucsb.edu/ws/?pid=64503>.

you're not convinced it's constitutional, you've got to err on the side of exercising your authority to defend the Constitution.²¹⁵

So I think Justice Scalia was kind of frustrated with Congress. The Obamacare program took funding that really was never appropriated.²¹⁶ So rather than Congress using our core power, the power of the purse,²¹⁷ what we did is we filed a lawsuit to try to vindicate that interest.²¹⁸ And, you know, we were able to move the ball forward a little bit. But I think Scalia would look at that and say, "Why are you running to the courts to do this? You guys should defend it yourself. You have the power. You have the power of the purse. You have the power to not confirm people. You have the power to impeach civil officers. Why don't you use those powers, rather than running for the court?" And I think at the end of the day, we're in this budget problem where we do these big omnibuses and we're not really able to solve that so we're not willing to take any political risk to really defend our turf. I think that is why we end up deciding, "Let's file a lawsuit, and let's do it."

It's an honor to be here. Justice Scalia really was a man for all seasons. He was one of the few people to really make an indelible mark not only on the law, but on political philosophy. I just wish everything that's been discussed on this panel and this conference could make its way into the halls of the Congress and that we'll reclaim our constitutional authority and get the constitutional system back into its proper form.

Thank you.

Judge Pryor: OK. I want to first invite our panelists to respond to each other from your seat. Hopefully your mics are now live for you to do that. I would expect that perhaps Professor Baker has some things he wants to say in response to Roger.

Professor Baker: Well, Roger thinks I'm going to attack him, but Roger and I debate every year. But I didn't find much to attack Roger on. But I want to follow up with what Jonathan Turley said about *Printz*.²¹⁹ It was really important that you did what you did on *Printz*, Jonathan. I just wanted to add that if you'd look at the separate opinion by Justice Breyer, the amazing thing is that Justice Breyer seems to be saying "Well, you know, I don't see why the federal government can't order local officials

²¹⁵ See Paulson, *supra* note 213, at 2714.

²¹⁶ U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

²¹⁷ See U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 9, cl. 7 (stating that Congress holds the exclusive power to tax).

²¹⁸ *Burwell*, 185 F. Supp. 3d at 174.

²¹⁹ *Printz v. United States*, 521 U.S. 898 (1997).

to do it. It's more efficient. In fact, they do it in Europe that way. It's more efficient."²²⁰

Now, if you read *The Federalist*, you will know that the crux of the whole problem and why we changed from a confederation is, in fact, in *The Federalist No. 15*—that whole point—you can't have one government telling another government what to do, because eventually it won't work.²²¹ See Brexit.²²²

Professor Turley: I was going to add, I don't disagree. Roger and I agree on most things anyways, so that's not a surprise, but the one area of Scalia's legacy which I do find problematic was his support for *Chevron*, that it was sort of anomalous.²²³ He continued to support the idea of *Chevron*, even as we had this rise of sort of the Fourth Branch, the rise of the administrative state.²²⁴ I think that he certainly indicated some misgivings about *Chevron*,²²⁵ but that was always the one part of his legacy that was most sharply discordant with his views, particularly with regards to sort of formalism, but that's what I would add in terms of criticism.

Professor Baker: I would just say on that, as Justice Alito said this morning, he was actually changing on that—one. And two, Roger mentioned the quote "post-New Deal originalism."²²⁶ Although he didn't specifically articulate it this way, once you have the Seventeenth Amendment, it changes.²²⁷ The Senate is no longer a protector of the states. That's what built the administrative state, and he's trying to figure out "How do you deal with this? How do you draw lines? And will the

²²⁰ See *id.* at 976–78 (Breyer, J., dissenting) (examining and comparing the United States to other countries in the world).

²²¹ THE FEDERALIST NO. 15, at 76–77 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

²²² The Data Team, *A Background Guide to "Brexit" from the European Union*, THE ECONOMIST (Feb. 24, 2016), www.Economist.com/blogs/graphicdetail/2016/02/graphics-britain-s-referendum-eu-membership.

²²³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 839 (1984).

²²⁴ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–18, 521 (examining modern rationality of the presumption of agency discretion while discussing the rise of the administrative state).

²²⁵ Adam White, *Scalia and Chevron: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), <http://YaleJReg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/>.

²²⁶ See Pilon, *Justice Scalia's Originalism*, *supra* note 122, at xxxi (explaining that post-new deal originalists read the Constitution "through the political prism that the New Deal justices . . . imposed on the document").

²²⁷ See *infra* text accompanying notes 254–56.

courts then end up replacing the administrative agencies and running everything?”

What most people just don't understand, especially lay people, is that the original Senate was a real structural protection for federalism. The Seventeenth Amendment became the driver behind the administrative state and the uncontrollable budgets.²²⁸ That is just not widely known. He understood that, and with that it is very difficult to reverse the dynamic, and he didn't think the courts were in the business of reversing that dynamic.

Judge Pryor: Roger?

Mr. Pilon: Yes, well the reason both John and Jonathan didn't find anything to attack in my remarks is because I spoke only true sentences!

Judge Pryor: Well, this is breaking down fast. I think we'll start with our questions from the floor. Now, I'm going to begin with my usual admonition. These are the panelists. They were invited to be our speakers today. We appreciate your presence here. We'd love to have your questions, but you weren't asked to be speakers today, so I want to ask for questions, and you can introduce it with a little bit, but please keep it as a question.

Audience Question 1: Ilya Shapiro from the Cato Institute, and to the extent you enjoyed Roger's essay on Scalia's originalism, I had to edit it, so you're welcome. Just kidding. I only had to introduce a couple of commas. It was very clear.

But anyhow, I'd like to invite speculation on Scalia's vote in *Raich*.²²⁹ Was that his accommodation of the post-New Deal regulatory state? Was it the drug war exception to the Constitution? Something else?

Professor Baker: I think it was his failure to agree with Justice Thomas on how properly to read the Commerce Clause, and I don't think—

Judge Pryor: Or was it the Necessary and Proper Clause?²³⁰

²²⁸ See John S. Baker, Jr., *Federalism and the Administrative State*, WASH. TIMES (July 12, 2015), <http://www.WashingtonTimes.com/news/2015/jul/12/celebrate-liberty-month-federalism-and-the-adminis/>.

²²⁹ *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring).

²³⁰ U.S. CONST. art. I, § 8, cl. 18.

Professor Baker: Well, both of them. And I think that it goes back to what I said: the New Deal is a watershed, but it affects not just the interpretation, per se, but it affects the dynamic, and I think he felt that there was no way to undo that.²³¹ I mean, when we would bring this up at sessions, he would say, “the vast majority of that [wrongly decided] stuff is water under the bridge.”²³²

Mr. Pilon: That’s also what he said when I raised the issue at that Cato lunch, as I mentioned.²³³ But while the issue may be “settled,” in some sense, and while the Court cannot itself rectify the mistakes of the last eight decades, the Court can at least take note of those mistakes and of the difficulty of squaring modern “constitutional law” with the Constitution itself, because the problems that law has produced—starting with our out-of-control nearly twenty trillion dollar debt²³⁴—aren’t going away. So the issues need to be addressed, which the Court can play its part in doing.

Professor Baker: Look, he fought more battles than anybody else, and I think that there were just some battles he didn’t. I mean, early on, when we would cover *Flast*²³⁵—those of you who heard this morning—when you heard Justice Alito and how Justice Scalia excoriated him for not saying that *Flast* should be overruled.²³⁶ Early on when we were teaching, I said, “Why don’t you overrule *Flast*?” and he said, “Well, my colleagues will never do it,” and he wasn’t even arguing for it at that time, and then he changed over time, and he was starting to argue for it.

Look, it comes down to the votes on the court. If there aren’t votes there to do something, it’s not going to get done. I mean, one time I had a

²³¹ See *Raich*, 545 U.S. at 33–43 (expressing misgivings about the expansiveness of the Commerce Clause power, yet not arguing to overturn Supreme Court precedent on the matter).

²³² Antonin Scalia, Address at the Federalist Society National Lawyers Convention at 36:39–36:43 (Nov. 22, 2008), <https://www.fed-soc.org/multimedia/detail/address-by-justice-antonin-scalia-audiovideo>.

²³³ *Id.* at 36:34–39:28 (referencing Scalia’s remarks over lunch at Cato in 1993).

²³⁴ See *The Daily History of the Debt Results*, TREAS. DIRECT (NOV. 16, 2016), <https://treasurydirect.gov/NP/debt/search?startMonth=11&startDay=16&startYear=2016&endMonth=11&endDay=16&endYear=2016> (showing over 19.8 trillion dollars in outstanding debt).

²³⁵ *Flast v. Cohen*, 392 U.S. 83 (1968).

²³⁶ See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 637 (2007) (Scalia, J., dissenting) (dissenting from Justice Alito’s opinion and stating that “[w]e had an opportunity today to erase this blot on our jurisprudence but instead have simply smudged it”).

case up there, and he said I could ask him afterwards why they didn't take it, and you know, the votes weren't there. That's what it came down to.

Mr. Pilon: Just a quick response to Ilya's question. It's hard to know what motivated Scalia in *Raich*, but if *The Federalist* is one of the central topics on this panel, if you're talking about the General Welfare Clause, the Commerce Clause, and the Necessary and Proper Clause, which are the three clauses through which the New Deal constitutional revolution took place, then you go back and look at *The Federalist Nos. 41, 42, and 44* respectively.²³⁷

Professor Baker: And 45.²³⁸

Mr. Pilon: Exactly—what Madison thought those clauses were all about.²³⁹ They weren't about the decision that came about in *Raich*.²⁴⁰

Professor Baker: But when not just people on the left, but overwhelmingly people on the right do not understand our structure—I mean, the latest vote, the latest poll on the Electoral College is that the vast majority of American people want to throw it out.²⁴¹ They have no idea of what that will do.

Mr. Pilon: Well, most people can't even tell you when the War of 1812 was fought.

Professor Baker: And they don't know what it did.

Judge Pryor: We're going to take a question from the right, this side that's to my right.

²³⁷ THE FEDERALIST NOS. 41, 42, 44, (James Madison) (Lawrence Goldman ed., 2008).

²³⁸ THE FEDERALIST NO. 45, (James Madison) (Lawrence Goldman ed., 2008).

²³⁹ See, e.g., THE FEDERALIST NO. 41, at 206–07 (James Madison) (Lawrence Goldman ed., 2008) (discussing the General Welfare Clause); THE FEDERALIST NO. 42, at 207–09 (James Madison) (Lawrence Goldman ed., 2008) (discussing the commerce clause), THE FEDERALIST NO. 44, at 224–26 (James Madison) (Lawrence Goldman ed., 2008) (discussing the Necessary and Proper Clause); THE FEDERALIST NO. 45, at 232 (James Madison) (Lawrence Goldman ed., 2008) (discussing powers left to the states).

²⁴⁰ *Gonzales v. Raich*, 545 U.S. 1 (2005).

²⁴¹ Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), http://www.Gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx?g_source=electoral%20college&g_medium=search&g_campaign=tiles.

Audience Question 2: Todd Zywicki from the Antonin Scalia Law School, and if you know me, I will show restraint and not ask about the Seventeenth Amendment. What I will ask about, though, is I was struck by Congressman DeSantis's remarks on *The Federalist*, and I was thinking about *The Federalist No. 62*, where they made the argument for bicameralism premised on the idea that the legislature is the real threat, and the remedy for this is to break the legislature into two parts and use bicameralism. I'd just be curious about the panel's reflections on bicameralism in the modern age as it perhaps relates to *The Federalist No. 62*. It's not a well-formulated question. Maybe you can do something interesting with it.

Judge Pryor: Well, at least it was a question.

Congressman DeSantis: What I've seen, I think, that's been different in how Madison and Hamilton would have envisioned it is they really thought that Congress would side with its institution, but in some of the budget fights we've had—you know, Congress actually passed a unified budget last year, 2015, for the first time in, I think, six years.²⁴² We started to do appropriation bills in the House, and they got to the Senate, and Harry Reid would filibuster the bills even being brought up.²⁴³ Basically no agencies were funded, we would go all the way to the funding deadline, and then the Senate would force some kind of omnibus or continued resolution. We had a minority in the Senate siding with the executive branch over a core power. The senators weren't able to figure that one out, but that is not what I think we should have been doing. The

²⁴² S. Con. Res. 11, 114th Cong. (2015); see also Bill Heniff, Jr., *Congressional Budget Resolutions: Historical Information*, CONG. RES. SERV. (Nov. 16, 2015), <https://www.senate.gov/CRSPubs/079ea4a5-491d-4ff0-933d-1e2eca3a4284.pdf> (last visited Sept. 25, 2016).

²⁴³ See, e.g., Rachael Bade & John Bresnahan, *Reid to Block Spending Bills*, POLITICO (July 4, 2015, 11:02 AM), <http://www.POLITICO.com/story/2015/06/senate-democrats-to-block-spending-bills-118641> (discussing Harry Reid's vow to block spending measures from reaching a floor vote); Burgess Everett, *Reid: McConnell a Filibuster 'Expert'*, POLITICO (June 17, 2015, 10:45 AM), <http://www.POLITICO.com/story/2015/06/harry-reid-mitch-mcconnell-spending-bills-119104> (explaining that Democrats will continue to filibuster appropriations bills until they can get Republicans to sit down at the bargaining table); Cathy Burke, *GOP Skeptical of Harry Reid's 'Promise' to Paul Ryan*, NEWSMAX (Dec. 23, 2015, 12:42 PM), <http://www.newsmax.com/Newsfront/harry-reid-gop-lawmakers-skeptical/2015/12/23/id/706931/> (explaining why Republicans are skeptical of Harry Reid's promise to cooperate on appropriations bills).

Senate should have been standing with the House to try to rein in the President. I think that is how it was originally designed.²⁴⁴

Professor Turley: Yeah, I would add that I think that many . . . I'm a Madisonian scholar, so it's hard for me to say he got anything wrong, but the one thing that I think he would have been astonished by, in fact, was the 2012 State of the Union that Congressman DeSantis was talking about. As a Madisonian scholar, I was in disbelief as the President stood up and said, you know, "because you've not carried out my reforms, I've decided to circumvent you and make you a functional nonentity,"²⁴⁵ and he got rapturous applause from half the chamber, and I think that Madison truly believed that institutional interests would overcome political alliances in that sense.²⁴⁶ I had the honor of representing the House of Representatives in the Affordable Care Act lawsuit, and I have to say I was surprised to see the level of democratic opposition. We were fighting over the power of the purse, the defining power of Congress, and so there is a strange thing going on that I think that Madison did not anticipate with regard to who the members are and how they've changed, and I think that is different.

You know, I went to Congress when I was a fourteen-year-old page, and there were people there—giants—who fought for the institution, not just people like Byrd and Javits and Moynihan. They often put away their political alliances and fought for the institutional integrity of both chambers. That's what's missing often today, and I hear that in your words.

Congressman DeSantis: Let's wait two months and see. I guarantee you'll have Democrats much more receptive to these arguments, and I think it's an open question about how Republicans are going to respond if there are similar actions taken. Are we going to defend the institution when the politically easy thing to do is probably just to fall in line behind the President? Hopefully the rubber doesn't meet the road on that and the President conducts himself in accordance, but I think that it will be interesting to see how it shakes out.

²⁴⁴ See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345, 1350 (1988) (arguing that if the executive is given spending authority, absent Congress allocating such funds, then the legislature will lose a primary check on the executive branch).

²⁴⁵ See Plumer, *supra* note 200 (addressing his [Barack Obama's] decision to establish policies outside of the normal legislative process whenever possible).

²⁴⁶ See THE FEDERALIST NO. 51, at 257–60 (James Madison) (Lawrence Goldman ed., 2008) (explaining that political ambition is counteracted by the separation of powers).

I will say, though, I think part of it is political. We saw with the election outcome, some people were shocked.²⁴⁷ They thought the Democrats would never lose the White House again, so I think part of it was “Hey, you know, the Republicans are not going to be in that spot, so us doing this, it’s not really setting bad precedent.” Now what happens? You support the bad precedent, and who comes up President? Donald Trump, whom many of them are concerned about. So, be careful. Never invest power into a person that you would not be comfortable with if your greatest enemy exercised that power.

Professor Baker: On that point, I just want to add that Professor Turley was the one who warned liberals before a House committee that if you don’t stop President Obama, you’re going to get a Republican in here one day who is going to do the same thing.²⁴⁸

Judge Pryor: Question.

Audience Question 3: Thank you, your Honor. I want to reassure Professor Baker that Idaho loves the Electoral College. We don’t want to give it up, but with a million and a half citizens, we have a problem with overregulation. We have 722 sets of regulations in Idaho that are pretty much strangling us, and so without the senatorial check, and given *Chadha*, which the case got rid of the legislative veto for a unicameral action,²⁴⁹ Idaho just passed a constitutional amendment to have a bicameral legislative veto,²⁵⁰ and so since we got the Seventeenth Amendment, is the legislative veto viable at the federal level on a bicameral basis? And I’m also wondering what Roger Pilon and Professor Baker in particular have to say about that.

Professor Baker: You want a legislative veto, two houses?

Audience Question 3: Oh, I would love to have it myself, but no. Yeah, the two houses together could get rid of executive branch overrules.

²⁴⁷ Anthony J. Gaughan, *Five Things That Explain Donald Trump’s Stunning Presidential Victory*, CONVERSATION (Nov. 9, 2016, 8:31 AM), <https://THECONVERSATION/five-things-that-explain-donald-trumps-stunning-presidential-election-victory-66891>.

²⁴⁸ *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing on H.R. 313 Before the H. Comm. on Rules*, 114th Cong. 19–20 (2014) (written statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University).

²⁴⁹ *INS v. Chadha*, 462 U.S. 919, 959 (1983).

²⁵⁰ H.J. Res. 5, 2016 Leg. (Idaho 2016).

Professor Baker: OK, but here's the problem with many people on the left and the right. They see a particular problem, and they look only at that problem, and they come up with a solution for that problem without thinking about the consequences, the new problems they're creating. You have to look at the whole body together and figure out what you're doing. Remember: the Seventeenth Amendment was passed with virtually no opposition by ordinary people on the right and the left,²⁵¹ except that the people on the left knew what they were doing. They were out to destroy separation of powers. Nobody made the arguments—structural arguments—and they made the same arguments that are today being made for term-limiting members of Congress, OK?²⁵² They thought it would make it bring Senators closer to the people.²⁵³ Nothing could be further from the truth. So you have to know something about the Constitution before you keep changing things in it. It's a matter of looking at what worked and why it worked, or to borrow a phrase, what really did make us a great country.

Mr. Pilon: Justice Scalia often said that the Sixteenth and Seventeenth Amendments, both passed in 1913 at the height of the Progressive Era, were the key to understanding the emerging divide.²⁵⁴ However, apart from the expanded power to tax afforded by the Sixteenth Amendment, neither of those amendments expanded the original enumerated powers of Congress. Congress didn't have a bit more power afterward than it had before, except as a practical and political matter due to those amendments, respectively.²⁵⁵ But now you had more powerful political forces calling for the demise of the enumerated powers doctrine. It fell finally to the Court in 1937 to eviscerate that doctrine.²⁵⁶

²⁵¹ See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 501, 545–47 (1997) (showing the populace's mass support for the Seventeenth Amendment).

²⁵² Saad, *supra* note 241.

²⁵³ See Bybee, *supra* note 251, at 535, 538 (explaining that the general public thought the direct election of senators would remove corruption and result in senators being more accountable to the people).

²⁵⁴ Tony Mauro, *The 17th Amendment Under Attack*, NAT'L L.J. (Nov. 22, 2010), <https://www.theconstitution.org/news/17th-amendment-under-attack>.

²⁵⁵ See U.S. CONST. amend. XVI–XVII (showing that Congress gained the power to lay and collect taxes on income without apportionment from the states and that the people now have the right to directly elect senators).

²⁵⁶ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937) (broadens the Commerce Clause by giving Congress the power to enact legislation when such legislation affects commerce, thus significantly expanding the scope of Congress's regulatory power).

Professor Baker: Right. But they would never have done it if senators were still protecting states, because they wouldn't have put up with it. The idea—

Mr. Pilon: That's a political point, not a legal one.

Professor Baker: No, but it changes the dynamic of power. What *The Federalist* explained is human nature and what motivates people. Today we think "policy." Well, wait a minute. Policies are executed by human beings, and what are their motives?

Mr. Pilon: True, but those structural changes do not alone explain the New Deal constitutional revolution. They gave the federal government the *means* for expanding, but not the *authority* to do so.²⁵⁷ That would come with the demise of the enumerated powers doctrine. And it would be implemented through the bifurcation of both the Bill of Rights and judicial methods.²⁵⁸

Judge Pryor: I'll take another question.

Audience Question 4: Thank you. I used to be the Chief of Federal Litigation for Miami-Dade County, and I'm now a city attorney, and I teach state and local government law.

Judge Pryor: What's your name?

Audience Question 4: Craig Leen. One issue that I see related to federalism I wanted to ask you about, and what Justice Scalia thought about it is, you know, in the early 1900's there was a case, *Hunter v. City of Pittsburgh*, that talked about how states really have authority over their local governments,²⁵⁹ and what's occurred to me and to many of my students when I teach them about state and local government laws is that the federal government exercises a lot of authority over counties and cities, both through 42 U.S.C. § 1983, through a number of other acts and

²⁵⁷ See Ronald Pestritto, *The Birth of the Administrative State: Where it Came from and What it Means for Limited Government*, HERITAGE FOUND. (Nov. 20, 2007), <http://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited> (arguing that the birth of the administrative state and expansion of government came from the New Deal).

²⁵⁸ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942); *United States v. Darby*, 312 U.S. 100, 118 (1941).

²⁵⁹ 207 U.S. 161, 178–79 (1907).

statutes, and through the administrative agencies,²⁶⁰ which I'm not making a normative judgment on that, but I find it very interesting, because if you truly have federalism but the federal government really is the one, for example, regulating city police departments or county police departments and not the state, do you really have federalism?

Mr. Pilon: You do, because as I said in my formal remarks, federalism cuts both ways.²⁶¹ It's not simply: the federal government has limited power and the states have the balance of power—*The Federalist No. 45*;²⁶² it's rather that the Civil War amendments changed that arrangement fundamentally.²⁶³ Now you've got federal power essentially to negate state actions that violate the rights of the state's own citizens.²⁶⁴ That's altogether different from federal power to give us Obamacare and what not. It's federal power to check the states that are running amok, and that's the other side of federalism that the Civil War Amendments brought into being, and that's the side that so many conservatives find uncomfortable, because they think of it as empowering the Court to find unenumerated rights.²⁶⁵ What I tried to argue was that, no, it empowers the court to ask the state, "What right is your police power protecting?" And when you look at everything from *Lochner*²⁶⁶ to *Pierce v. Society of Sisters*,²⁶⁷ *Meyer v. Nebraska*,²⁶⁸ *Griswold*,²⁶⁹ *Lawrence*,²⁷⁰ and more, you find that these state laws are essentially based on morals; they're not defending the rights of anyone.

²⁶⁰ 42 U.S.C. § 1983 (2012); see, e.g., Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); 20 U.S.C. § 6301 (2002); 20 U.S.C. § 1681(a), 1682 (1972).

²⁶¹ See *supra* notes 174–75 and accompanying text.

²⁶² THE FEDERALIST NO. 45, at 230–32 (James Madison) (Lawrence Goldman ed., 2008).

²⁶³ See U.S. CONST. amends. XIII–XV (fundamentally altering the traditional balance of power by providing power to the federal government to check state police power).

²⁶⁴ See *id.* amend. XIV, §§ 1 & 5 (authorizing courts and Congress to enforce the provisions of the amendment).

²⁶⁵ E.g., Allen Porter Mendenhall, *The Abuse of the Fourteenth Amendment*, IMAGINATIVE CONSERVATIVE (July 31, 2013), <http://www.theimaginativeconservative.org/2017/07/abuse-fourteenth-amendment-allen-porter-mendenhall.html>.

²⁶⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁶⁷ 268 U.S. 510 (1925).

²⁶⁸ 262 U.S. 390 (1923).

²⁶⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁷⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

Audience Question 5: Thank you, Judge. My name is Justin Pearson, and I'm an attorney at the Institute for Justice.

Judge Pryor: OK. Could you speak a little closer to the microphone so we can hear you better?

Audience Question 5: Sure. I'm an attorney at the Institute for Justice. My name is Justin Pearson, and my question is directed at Congressman DeSantis, and I want to preface this by saying that, Congressman, I really appreciated what you said about the duty of elected officials to not support unconstitutional legislation. My question to you, Congressman, is whether you think that is mutually exclusive with the role of courts to use the Constitution to serve as an additional bulwark against legislative encroachments, as Hamilton promised in *The Federalist No. 78*,²⁷¹ when elected officials fail to fulfill that duty?

Congressman DeSantis: I think that—and Justice Scalia would say this—look, this idea of judicial review, it's not that that we're smart philosopher kings and know these great policy questions; this is a lawyer's job. You have a constitutional text, you have a statutory text, and if they are harmonious, then fine. If there's a conflict, then your job is to identify the conflict and, of course, prefer the fundamental laws represented in the Constitution over the transient impulses of the people as represented in the statutes.²⁷² So that is absolutely legitimate. But I would also say that just because a court has found something to be constitutional, if as a legislator you honestly believe it's not constitutional and the court got it wrong, I still think you have a duty to vote against the statute. Now, many people say, "Well, the court ruled; I'm fine," and you won't be criticized for that. But courts don't always get it right, and we have to render our own judgment. It doesn't mean you don't follow court decisions, but at the same time, we're not under any obligation to vote for statutes that we honestly don't believe are constitutional.

Professor Baker: I would just add that a lot of times, people don't realize that you can have two separate viewpoints altogether between the Congress and the court. That is, when the court rules on something as to whether it's necessary and proper, they're ruling as to whether the Congress could find this necessary and proper.²⁷³ It doesn't mean as a

²⁷¹ THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

²⁷² Paulson, *supra* note 213, at 2714.

²⁷³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324–25, 420–21 (1819).

member of Congress that you have to say it's necessary and proper, and that is a constitutional issue.

Judge Pryor: Next question.

Audience Question 6: Roman Buhler with the Madison Coalition. Twenty-five years ago, I was Newt Gingrich's first Committee Counsel, and we thought Congress could fix everything, but I'd be interested in the opinion of the panel about an effort that's now going on coming up from the states. There are 900 state legislators, six governors, nineteen state legislative chambers, and the Republican National Committee's unanimous endorsement in language in the Republican platform,²⁷⁴ for a constitutional version of the Regulations from the Executive in Need of Scrutiny Act ("REINS Act"),²⁷⁵ that almost every House Republican voted for.²⁷⁶ It would require that Congress approve major new federal regulations, and the idea is that in the same way that states were able to force Congress to propose the Bill of Rights without a convention,²⁷⁷ and more recently the Twenty-Second Amendment on presidential term limits,²⁷⁸ that pressure from the states could persuade Congress to do what's in its own interest and reclaim the executive branch power, the Article I power that's been stolen by the executive branch. Your thoughts on Regulation Freedom Amendment and the strategy?

Professor Turley: You know, I'm generally against amending on issues like the REINS Act, because we should just pass the REINS Act.²⁷⁹ I think that it's important to use the Constitution for stuff that we cannot achieve legislatively. I testified recently in Congress, asking them again to bring up the REINS Act.²⁸⁰ I think the REINS Act is a very useful tool to get Congress back in the business of governing. I mean, there's a sort

²⁷⁴ *The Madison Coalition and the Regulation Freedom Amendment*, COLO. BUS. ROUND TABLE, (May 18, 2017), <http://www.COBRT.com/smart-regulation/the-madison-coalition-and-the-regulation-freedom-amendment/5/18/2017> [hereinafter *The Madison Coalition*].

²⁷⁵ Regulations from the Executive in Need of Scrutiny Act, H.R. Res. 427, 114th Cong. (2015).

²⁷⁶ Final Vote Results for Roll Call 482, H.R. Res. 427, 114th Cong. (2015).

²⁷⁷ *The Madison Coalition*, *supra* note 274.

²⁷⁸ U.S. CONST. amend. XXII.

²⁷⁹ H.R. Res. 427.

²⁸⁰ *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) (written statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University).

of not-so-noble lie that Congress is actually governing, when most, 99% of the agency decisions, are not being reviewed.²⁸¹ They're being increasingly done independently, and I think that is a serious danger for our democratic system. More and more of our decisions are being decided by an insulated group of agency officials where the public has no interaction with them, doesn't even know who they are. I mean, even trivial things like some unknown office declaring that the Redskins can't use the Redskins' name.²⁸² This is a raging debate. I'm not involved; I'm a Bears fan. But the fact is, you know, you had this unknown office step in and say: "All right. We're going to settle the question. You don't have trademark protections. You can't use that name."²⁸³ It's an example of what we talk about with the Fourth Branch. Largely that's insulated from Congress. Congress doesn't have the ability, the staff, to seriously look at agencies. That would change if we had something like the REINS Act,²⁸⁴ and I think you just pass the act or something like it, rather than amend the Constitution.

Mr. Pilon: I'd support a constitutional amendment of four words: "and we mean it."

Judge Pryor: Next question.

Audience Question 7: Hi, I'm Warren Belmar and I'm a recovering attorney with one question: is there any vitality left to *Schechter Poultry*,²⁸⁵ and if not, why not?

Professor Baker: Well, according to Justice Scalia, there wasn't. He used to say that was the only case and its companion case in which they ever applied that, and that it wouldn't be applied again, but that's before he started rethinking *Chevron*.²⁸⁶

²⁸¹ *IV Review of Agency Decisions*, U.S. CTS. FOR THE NINTH CIR. (May 2012), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/IV_Review_AD.pdf (showing the high level of deference federal courts will give to administrative agency decision).

²⁸² *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, *1 (T.T.A.B. 2014).

²⁸³ *Id.*

²⁸⁴ H.R. Res. 427.

²⁸⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²⁸⁶ Adam White, *More on Justice Scalia's Doubts About Chevron*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 17, 2016), <http://YaleJReg.com/nc/more-on-justice-scalias-doubts-about-chevron/>.

Audience Question 7: Well, the only limit we had on delegations have brought general authority to the executive branch, and it's something that might still have some vitality.

Judge Pryor: Please join me in thanking this panel for a great discussion.

