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# Confrontation, Fidelity, Transformation: The “Fundamentalist” Judicial Persona of Justice Antonin Scalia

Tom Levinson \*

## I. Introduction

Commentators characterize a number of federal judges and legal academics as “fundamentalists.”<sup>1</sup> In part, the term is used because religious fundamentalists and their purported legal counterparts share a similar type of political conservatism.<sup>2</sup> In larger part, though, the connection is drawn between legal and religious “fundamentalism” because of the analogous relationship between the legal interpretative method of textualism<sup>3</sup> and the religious fundamentalist’s theology—

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1. See CASS SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA* (2005). According to Sunstein, legal fundamentalists consider themselves to be part of a “movement” that seeks broad, “radical” changes in constitutional law. *Id.* at 26, 20. Among the judges tagged by Sunstein as fundamentalists are Clarence Thomas, Antonin Scalia, Robert Bork, and Douglas Ginsburg. *Id.* at 26, 31, 54.

2. See *id.* at 26.

3. Black’s Law Dictionary does not contain a definition for “textualism,” instead cross-referencing textualism with “strict constructionism.” BLACK’S LAW DICTIONARY 5 (8th ed. 2004). Textualism is a doctrinal rule of judicial construction requiring judges to interpret a document or statute according to its plain, objective meaning. Textualism and originalism are often used interchangeably. They are similar interpretative methodologies; originalism is, in effect, textualism applied to constitutional interpretation. If there is a difference, originalists tend to look more closely at drafters’

especially notable in the Protestant fundamentalist context—which is anchored in scriptural literalism.

The relationship appears to have been first sketched by Professor Morton J. Horwitz in his 1989 essay, *The Meaning of the Bork Nomination in American Constitutional History*.<sup>4</sup> Horwitz writes, “To the extent that Constitution worship is America’s secular religion, and all religions have a tendency toward fundamentalism, originalism in constitutional discourse is the equivalent of religious fundamentalism.”<sup>5</sup> After positing this textual equivalence, Horwitz extended his analysis, suggesting that constitutional originalists and religious fundamentalists also share an opposition to modern interpretative theories.<sup>6</sup> However, Horwitz hemmed the thread between the two schools of interpretation.

Other legal commentators have pursued this analysis,<sup>7</sup> stressing especially the link between the two because of their fidelity to, and the authority of, foundational written texts in their respective traditions. However, the parallels they draw between the schools of thought are narrow. In fact, commentators disclaim that originalism bears any substantive connection to religious fundamentalism.<sup>8</sup> Narrowly focusing on the analogy between originalism and fundamentalism and their respective views toward text reveals a fruitful connection, but it obscures a broader, deeper relationship between the two. This deeper relationship lies less in the approach to textual interpretation than in the ambition of the message and the attitude of the messenger.

This paper focuses on Justice Antonin Scalia and the extent to which his judicial persona may appropriately be called “fundamentalist.”<sup>9</sup> I contend that textualism and originalism are not the

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intentions than textualists, who look solely to the meaning of the text. See Frank H. Easterbrook, *Textualism and Democratic Legitimacy: Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 n.4 (1998).

4. 50 U. PITT. L. REV. 655 (1989).

5. *Id.* at 663.

6. *Id.*

7. See, e.g., George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309-10 (1990) [hereinafter Kannar, *Constitutional Catechism*].

8. See SUNSTEIN, *supra* note 1, at 5.

9. I am well aware that the term “fundamentalism” has almost uniformly pejorative connotations in the wider culture. I am also nearly certain that Justice Scalia would recoil at the claim that he has a “fundamentalist” legal persona. As a student of contemporary religion, however, I am interested in fundamentalism as a uniquely potent cross-cultural phenomenon of the twentieth century. Where other commentators may use it as a slur (or in the case of fundamentalists themselves, as a shield), I use it as a descriptive. My objective in this paper is not to engage in polemics, not to bash or praise, but rather to examine the religious fundamentalist’s outlook in an effort to place Justice Scalia’s

constituent parts of his fundamentalism. Rather, Justice Scalia's judicial persona resembles that of a fundamentalist because of his attitude toward contemporary culture and his colleagues, his approach toward legal interpretation, and his ambition for the widescale penetration of his distinctive perspective. Scalia's judicial persona may also be considered "fundamentalist," because of the depth of antagonism and anxiety his views engender in his adversaries.

Justice Scalia's approach to constitutional and statutory interpretation (again, as shorthand, "textualist" for statutory interpretation and "originalist" for constitutional interpretation) stresses fidelity to the plain meaning of a "dead," or unchanging, text. In speeches, Justice Scalia routinely observes that this method was once "constitutional orthodoxy" in the United States.<sup>10</sup> Yet Scalia's judicial persona consists of more than his text-centered interpretative approach. Indeed, he is an outspoken and often confrontational justice, a lightning rod who is at once admired and reviled for his opposition to "modern" forms of interpretation; his fealty to text and tradition; his attacks on extratextual sources for interpretation (for example, legislative history); his distinctive public advocacy of his jurisprudential point of view; his derision of legal culture's prevailing norms; and the embattled, isolated tone that permeates many of his opinions. Justice Scalia has attracted both fierce detractors and staunch defenders. Observers have branded his style as "radical,"<sup>11</sup> "counter-revolutionary,"<sup>12</sup> "martial,"<sup>13</sup> "promot[ing] an alternative faith about the function of Constitution and law in the American polity,"<sup>14</sup> and "deploy[ing] a rhetoric that exposes

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judicial persona within a broader cultural perspective. Moreover, this paper does not question Justice Scalia's claim that he is an originalist—and an adherent to what he considers legal orthodoxy. Instead, it raises the question whether the stylistic characteristics of religious fundamentalism reveal something new about Justice Scalia's jurisprudence and its impact on American legal culture.

10. See, e.g., Justice Antonin Scalia, Remarks at The Catholic University of America: A Theory of Constitution Interpretation, (Oct. 18, 1996), available at <http://www.courtstv.com/archive/legaldocs/rights/scalia.html>) [hereinafter Scalia, Remarks]; Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, Mar. 28, 2005, at 40.

11. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

12. David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 924 (1993).

13. See Talbot, *supra* note 10, at 54.

14. RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 1 (1997).

the essential fraudulence of the Court's claim to be interpreting the Constitution."<sup>15</sup>

A number of observers brand Scalia a fundamentalist because of his commitment to statutory textualism and constitutional originalism. Yet Justice Scalia concedes that periodically, he is a "faint-hearted originalist."<sup>16</sup> He admits that textualism, taken to its extreme, has "a lot of problems."<sup>17</sup> He calls strict constructionism—the exclusively literal reading of legal text—a "degraded form of textualism that brings the whole philosophy into disrepute."<sup>18</sup> Furthermore, his public speeches and essays on his interpretative method suggest that textualism and originalism represent for him pragmatic choices as much as ideological necessities.<sup>19</sup> Scalia is not a textual absolutist.

Rather than cataloguing his textualism or originalism, this paper represents an exploration of how Justice Scalia engages legal text and the legal establishment, how he articulates his understanding of America and its traditions, and how he effectuates his aspiration for significant legal change in the United States. In its conclusion, this paper suggests that Justice Scalia's fundamentalist judicial persona has contributed to the politicization of the federal judiciary. Given Justice Scalia's impact, one may expect to see more nominees who fuse combative judicial rhetoric, what might be called interpretative obedience, and a restorative agenda in the federal judiciary. This may lead to progressively more heated and confrontational confirmation battles.

## II. Defining Fundamentalism

Religious fundamentalism is, by definition, a modern phenomenon, as well as a response to modern phenomena. At its inception, fundamentalism was a distinctively Protestant American movement.<sup>20</sup>

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15. Ramesh Ponnuru, *Demystifying the Court: What Justice Scalia Is Up To*, NAT'L REV. ONLINE, July 1, 2003, <http://www.nationalreview.com/ponnuru/ponnuru070103.asp>.

16. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) [hereinafter Scalia, *Originalism*].

17. Scalia, Remarks, *supra* note 10, at 6.

18. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) [hereinafter SCALIA, INTERPRETATION].

19. Kannar, *Constitutional Catechism*, *supra* note 7, at 1345.

20. The term "fundamentalism" was first introduced between 1910 and 1915 when a pair of brothers who had gained great wealth in a California oil boom sponsored the composition and circulation of a pamphlet entitled "The Fundamentals: A Testimony of Truth." MALISE RUTHVEN, FUNDAMENTALISM: THE SEARCH FOR MEANING 10 (2004).

From the outset, what came to be known as fundamentalism represented a religious-political response to seismic social change. Protestant fundamentalists positioned themselves as defenders of a formerly uncorrupted culture overrun by a new intellectual and social elite.<sup>21</sup> As crusaders for moral purity, Protestant Fundamentalists mounted a radical backlash against a society that appeared increasingly dismissive of tradition.<sup>22</sup> Over the course of the twentieth century, fundamentalisms emerged in other religious traditions: Judaism, Islam, Hinduism, and Sikhism, among others.

While each community's "fundamentals" vary,<sup>23</sup> fundamentalisms share certain essential characteristics.<sup>24</sup> These essential characteristics, described as "family resemblances,"<sup>25</sup> reflect "patterns of activism"<sup>26</sup> emerging at a particular time in world history.<sup>27</sup> These "family resemblances" allow the distinct movements to be "fruitfully compared."<sup>28</sup>

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The brothers helped fund the mailing of three million of these pamphlets to Protestant pastors, missionaries, theology students and professors, as well as YMCA secretaries, church school directors, and editors of religious publications, with the professed aim of halting the erosion of what the brothers considered to be the "fundamental" beliefs of Protestantism. *Id.* at 10-11. In 1920, the term was also notably used by a theologically conservative Protestant editor who said he, along with other militant and devoted believers, was willing to do "battle royal" to preserve the "fundamentals" of the Christian faith, then under a seemingly withering onslaught by evolutionists and biblical critics. GABRIEL A. ALMOND, R. SCOTT APPLEBY & EMMANUEL SIVAN, *STRONG RELIGION: THE RISE OF FUNDAMENTALISMS AROUND THE WORLD* 1-2 (2003). Among these "fundamental" beliefs was the inerrancy of the Bible. RUTHVEN, *supra*, at 10-11.

21. Robert A. Garson, *Political Fundamentalism and Popular Democracy in the 1920's*, in *MODERN AMERICAN PROTESTANTISM AND ITS WORLD* 129, 143 (1993).

22. *Id.*

23. Indeed, there is great diversity within any one religious tradition's fundamentalist believers, as well.

24. A number of scholars and practitioners charge that the term "fundamentalism" has become too politically charged and over-used, especially by those on the religious and political left, to describe accurately any particular phenomenon. They assert that "fundamentalism" is a term of abuse—a synonym for political extremism and religious fanaticism, often accompanied by violence—that loses its meaning as it refers to increasingly more groups. See RUTHVEN, *supra* note 20, at 6-7. However, many other prominent scholars of fundamentalism believe that a comparison of fundamentalisms is appropriate and potentially illuminating. See, e.g., BRUCE B. LAWRENCE, *DEFENDERS OF GOD: THE FUNDAMENTALIST REVOLT AGAINST THE MODERN AGE* (1989); ALMOND ET AL., *supra* note 20; *Fundamentalism*, <http://religiousmovements.lib.virginia.edu/nrms/fund.html> (last visited Mar. 14, 2006).

25. ALMOND ET AL., *supra* note 20, at 6.

26. *Id.* at 17.

27. *Id.* at 16.

28. *Id.* at 6, 35-36 (Because each community shapes its worldview in a tradition-

The first, and perhaps most elemental, fundamentalist “family resemblance” is a *reactive, confrontational worldview*. Fundamentalist movements are militant, mobilized, self-conscious responses to modernity.<sup>29</sup> To the fundamentalist, modernity represents a world unmoored from traditional values and antagonistic to immutable truths.<sup>30</sup> Fundamentalists believe the modern worldview is contaminated by its secular permissiveness,<sup>31</sup> by its elevation of the individual above the community and God,<sup>32</sup> and by its corrosive rationality, which challenges longstanding value systems and authority.<sup>33</sup> They target as their primary adversaries not only the elites of secular culture, but also those members of their own faith traditions whom they believe have grown impermissibly rationalistic and relativistic.<sup>34</sup> For example, *haredi* (or ultra-orthodox) Jews view the more liberal Jewish denominations (Reform, Conservative, and Reconstructionist) as heretical non-Jewish movements that seek to assimilate and, inevitably, to “destroy Judaism.”<sup>35</sup> Thus, fundamentalist movements begin in an “anti”-stance: where prevailing cultural mores are permissive, fundamentalists stress restrictiveness; where prevailing religious teachings permit relativism, fundamentalists preach absolutes; and where politics privileges compromise, fundamentalists reject it.<sup>36</sup>

A second closely related “family resemblance” is the fundamentalist’s *defiance*. As part of their confrontational worldview, fundamentalists take concededly “scandalous” positions in an effort to shock, unsettle, and affront outsiders.<sup>37</sup> Fundamentalists reject the prevailing norms of contemporary culture, anchoring this rejection as an expression of their belief in an unchanging faith. The impulse to scandalize emerges from a conviction that there exists a way to imagine and understand the world other than the modern, rational, secular

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specific way, establishing functional parallels rather than “exact equivalents” is the goal).

29. *Id.* at 99.

30. See MARTIN E. MARTY & R. SCOTT APPLEBY, *THE GLORY AND THE POWER: THE FUNDAMENTALIST CHALLENGE TO THE MODERN WORLD* 15 (1992).

31. RUTHVEN, *supra* note 20, at 23.

32. MARTY & APPLEBY, *supra* note 30, at 33.

33. ALMOND ET AL., *supra* note 20, at 96.

34. See VINCENT CRAPANZANO, *SERVING THE WORD: LITERALISM IN AMERICA FROM THE PULPIT TO THE BENCH* 44-45 (2000).

35. Answers.com, *Relationships Between Jewish Religious Movements*, <http://www.answers.com/topic/relationships-between-jewish-religious-movements> (last visited Feb. 9, 2006).

36. MARTY & APPLEBY, *supra* note 30, at 182-83.

37. *Id.* at 23.

outlook.<sup>38</sup> Fundamentalists accept that the mainstream views them as marginalized.<sup>39</sup> Far from accommodating to gain acceptance by the mainstream, fundamentalists relish their place at the margins and perceive themselves as “under siege . . . even persecuted.”<sup>40</sup> Thus, when fundamentalists are cast by the mainstream media as out of touch with modern thought they often acquiesce in these portrayals to bolster their marginalized self-image.<sup>41</sup> Aware of their marginalization, conscious of their defensiveness, and defiantly proud of the traditionalism that sets them squarely against the secular mainstream, fundamentalists assume these stances to reject explicitly a modern world that fails to live up to their exacting standards.<sup>42</sup>

A third “family resemblance” is the *restorative* or *revivalist* quality of fundamentalist movements. Fundamentalists seek not merely to critique the world as is, but to change it, ushering the restoration of traditional values into contemporary culture.<sup>43</sup> They aspire to convert others to their worldview,<sup>44</sup> and to create a “contrary world,” both as a bequest to future generations and as an assault on the current status quo.<sup>45</sup> A crucial part of this restorative project is to regain interpretative authority over their sacred texts and traditions. For example, in the 1920s Protestant fundamentalists recoiled at the biblical Higher Criticism then dominant in European and liberal American seminaries. Originating in Germany in the late nineteenth century, the Higher Criticism movement sought to determine through scholarship the authenticity and authorship of the Bible.<sup>46</sup> The movement “began to challenge the received understandings of the Bible, for example by using sophisticated models of textual analysis to argue that books attributed to Moses or Isaiah show evidence of editorial changes, textual accumulations, and

38. *Id.* at 24.

39. ALMOND ET AL., *supra* note 20, at 35.

40. *Id.*

41. MARTY & APPLEBY, *supra* note 30, at 14 (Protestant Fundamentalists as “Cultural Neanderthals”), 95-98 (*haredi* Jews as late medieval anachronisms).

42. However, it is crucial to note that fundamentalists are not separatists; they frequently live and work alongside those who believe differently. And though traditionalist, fundamentalists are nevertheless at home in the modern, technologically advanced world, making use of modern media to spread their distinct messages and build their respective movements. *Id.* at 183.

43. *Id.* at 15.

44. *Id.* at 17.

45. *Id.* at 19.

46. CRAPANZANO, *supra* note 34, at 38.



multiple authorship . . . ”<sup>47</sup> Protestant fundamentalists responded by formulating the inerrancy of scripture as an article of faith. Fundamentalist pastors and teachers believed the Bible was true; inerrancy thereby served to retrieve the purity and orthodoxy of an earlier time.<sup>48</sup> A vital part of fundamentalist movements’ self-understanding lies in their claim that their repudiation of the present serves to hasten the restoration of the past, whether the past is embodied by a privileged text, tradition, or teacher.<sup>49</sup> Their innovations are understood (or, viewed differently, are framed) as retrievals, and they buttress the audacity of their claims with the authority of ancient, or foundational, precedent.

A fourth “family resemblance” of fundamentalist movements is expressed in their professed *obedience* to a sacred text, an immemorial tradition, or the authoritative teachings of a recognized leader. For fundamentalists, obedience serves a way to validate their claims of authenticity. To return to the example of Protestant fundamentalists’ belief in the inerrancy of scripture: inerrancy functions as a proxy for obedience. For Protestant fundamentalists, submission to the Bible’s plain meaning becomes the most authentic way to honor the scriptures.<sup>50</sup> Any deviation from the scriptural text undermines its timeless, indeed self-evident, authority.<sup>51</sup> Obedience to text not only demonstrates the fundamentalists’ fidelity to its presumed Creator, but also spotlights the “naturalness” and neutrality of the fundamentalists’ mode of interpretation.<sup>52</sup> By contrast, other interpretative methods appear to be human inventions or manipulations.

A fifth “family resemblance” is the movements’ shared aspiration for *purity* and *absolutes*. Fundamentalists choose to see themselves as a

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47. RUTHVEN, *supra* note 20, at 17.

48. Nancy T. Ammerman, *Re-awakening a Sleeping Giant: Christian Fundamentalists in Late Twentieth-Century U.S. Society*, in *THE FREEDOM TO DO GOD’S WILL: RELIGIOUS FUNDAMENTALISM AND SOCIAL CHANGE* 89, 96 (Gerrie ter Haar & James J. Busuttill eds., 2003). Note that in the Protestant fundamentalist context, inerrancy typically denotes literalism. However, many people of faith view their scripture as “inerrant,” yet do not equate inerrancy with literalism. Rather, in this context, inerrancy connotes an understanding that the scripture was divinely revealed. If these believers believe that the text is the product of human authorship, these human authors were divinely inspired. By contrast, religious fundamentalists approach text as divinely revealed and thus absolutely, literally true.

49. ALMOND ET AL., *supra* note 20, at 92.

50. CRAPANZANO, *supra* note 34, at 261.

51. *See id.* at 219.

52. *See generally id.* at 16-17.

“righteous remnant turned vanguard,” a pure minority enclave fighting against a corrupt, dominant, intrusive majority.<sup>53</sup> Their quest for purity is articulated in a number of ways. First, fundamentalist communities impose rigid rules to constrain the seemingly limitless choices in modern secular culture. This includes prioritizing a legalism that promises certainty and security through a punctilious observance of sacred law and/or custom.<sup>54</sup> For example, the belief in scripture’s inerrancy promotes the adoption of “unambiguous behavioral rules.”<sup>55</sup> Second, fundamentalist movements maintain rigid boundaries between their communities and the world outside. They draw stark lines to divide them from their enemies<sup>56</sup> as well as lines to establish clear, stratified divisions within their own communities between men and women and adults and children.<sup>57</sup> These boundaries are erected to prevent the penetration of secular, relativistic viewpoints into their communities and, more specifically, their interpretative frameworks.<sup>58</sup> Third, fundamentalists interpret texts and traditions to clarify and reify the absolutes by which their communities must abide.<sup>59</sup> By promoting absolutes in the effort for interpretative purity, fundamentalist communities try to eliminate “potentially dangerous plays with language and meaning.”<sup>60</sup>

These aforementioned “family resemblances”—confrontational worldview, defiant attitude, revivalist ambition, obedience to text and tradition, and commitment to purity—point to a sixth and, for the purposes of this paper, final “family resemblance” of fundamentalist movements: their inescapably *political, transformational* nature. Fundamentalisms, while rooted in theology and religious observance, are simultaneously political movements operating at a number of different levels. First, ideological: fundamentalisms aim to change the way people think about current social norms and accepted practices and to help people imagine another way to organize the world.<sup>61</sup> Second,

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53. LAWRENCE, *supra* note 24, at 100.

54. ALMOND ET AL., *supra* note 20, at 232.

55. *See id.* at 102.

56. MARTY & APPLEBY, *supra* note 30, at 29.

57. Grant Wacker, *The Rise of Fundamentalism*, <http://www.nhc.rtp.nc.us:8080> (follow “TeacherServe” hyperlink; then follow “20th Century” hyperlink; then follow “The Rise of Fundamentalism”) (last visited Mar. 16, 2006).

58. ALMOND ET AL., *supra* note 20, at 93, 96.

59. *See id.* at 96.

60. CRAPANZANO, *supra* note 34, at 16.

61. Ammerman, *supra* note 48, at 93-94.

interpretative: a large swath of the fundamentalist battlefield consists of a fight for authority over how to understand history and text.<sup>62</sup> The fundamentalist claims of fidelity to text and tradition are, at least in part, strategies to harness history to their side. Their rhetorical deference to tradition stands in stark contrast to a changing, modernizing culture.<sup>63</sup> Third, organizational: fundamentalisms are “community-building movements in a time of modern individualist anomie on many cultural scenes.”<sup>64</sup> The political potency of Protestant fundamentalism, for example, is the product of decades of community organizing, savvy use of media, the founding of independent schools and seminaries, and the regular convening of conferences.<sup>65</sup> Furthermore, fundamentalist movements place special emphasis on recruiting and mobilizing young people into political organizations and militant cadres.<sup>66</sup> Fourth, rhetorical: as they point to tradition as the path of the future, fundamentalist movements simultaneously cast elites as hegemonic defenders of the status quo. Fundamentalists thereby project themselves as “world transformers”<sup>67</sup> and communicate their aspirations with “charismatic intensity.”<sup>68</sup>

Interestingly, this political nature of fundamentalist movements tends to alter the believers over time.<sup>69</sup> By participating in a political culture that invites compromise, fundamentalists gain access to power.<sup>70</sup> In securing this political foothold, fundamentalists sacrifice a degree of authenticity about their place at the margins.<sup>71</sup> Thus, their ideological and rhetorical stances serve, at least in part, to shield fundamentalists from claims that they have capitulated to the mainstream. By

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62. MARTY & APPLEBY, *supra* note 30, at 53.

63. Ammerman, *supra* note 48, at 96.

64. MARTY & APPLEBY, *supra* note 30, at 33.

65. Joel A. Carpenter, *Fundamentalist Institutions and the Rise of Evangelical Protestantism, 1924-1942*, in 10 MODERN AMERICAN PROTESTANTISM AND ITS WORLD 55, 60-63 (1993). However, as Samuel Bray noted in earlier comments, Protestant fundamentalism has a strong escapist, millennial component. Many fundamentalists believe that politics, like the current world, is irretrievably corrupt, and admonish their co-religionists to remain apart from this-worldly political aims because the world can be transformed solely through Christ's return.

66. ALMOND ET AL., *supra* note 20, at 92.

67. FUNDAMENTALISMS COMPREHENDED 478-79 (Martin E. Marty & R. Scott Appleby eds., 1995).

68. MARTY & APPLEBY, *supra* note 30, at 34.

69. ALMOND ET AL., *supra* note 20, at 12.

70. MARTY & APPLEBY, *supra* note 30, at 180.

71. *Id.*

announcing that they remain resolutely apart, even when entrenched in the establishment they rail against, fundamentalists are able to wield power at the same time they profess to resist it.

### III. Does Justice Scalia Have a Fundamentalist Judicial Persona?

[Justice Scalia] believes he has the true faith, the real understanding of the Constitution, and that others who basically agree with him don't have the guts to follow through. He runs the risk of alienating the others, of crying in the wilderness. But he may be creating a climate in which his way of thinking is intellectually acceptable, even compelling.<sup>72</sup>

To characterize Justice Scalia's distinctive brand of fundamentalism, I use three phrases to describe him: confrontational defender, faithful servant, and world transformer.<sup>73</sup> Each of these phrases is distinct because each addresses a different aspect of Justice Scalia's judicial persona. "Confrontational defender" refers to Justice Scalia's relationship with those individuals and institutions he casts as his ideological *bêtes noires*, whether they are Supreme Court colleagues, litigants, legal and social elites, or cultural currents more generally. "Faithful servant" refers to Justice Scalia's judicial approach and his relationship with sources, whether they are constitutional or statutory text or legal tradition. Finally, "world transformer" refers to Justice Scalia's ambition, his self-understanding, and what can be effectively described as his aspirational impact on the legal world.

It should be noted that these attributes do not encapsulate Justice Scalia's jurisprudential approach. Indeed, in some facets of his jurisprudence, the fundamentalist analogy fails.<sup>74</sup> Nevertheless, these

72. Linda Greenhouse, *Supreme Court Dissenters: Loners or Pioneers?*, N.Y. TIMES, July 20, 1990, at B7 (quoting Geoffrey Stone).

73. I hope these phrases effectively encapsulate the "family resemblances" explored above. As with the above "family resemblances," there will surely be overlap among these categories. What makes the judicial fundamentalist is the aggregation of these different attributes. One could identify many judges who prominently display one or even two of these traits. For example, Justice Clarence Thomas might be considered a confrontational defender. Former Chief Justice Earl Warren might be regarded as a world transformer. Justice Hugo Black would be acknowledged for his interpretative obedience. The judge with the fundamentalist persona, however, is distinctive and unusual because he (or she) combines all of these attitudinal attributes. Perhaps only Judge Robert H. Bork could also be appropriately called a judicial fundamentalist within this analysis.

74. For example, like a religious fundamentalist, Justice Scalia may routinely view academic and social elites with scorn, but unlike many religious fundamentalists, he is not at all anti-intellectual. Indeed, many observers believe he is the most intellectually

different characteristics, when viewed together, make Justice Scalia a legal figure with a distinctively fundamentalist outlook and agenda.

### A. *Confrontational Defender*

This section examines the ways in which Justice Scalia functions as a “confrontational defender” and focuses in particular on five sub-areas: 1) his self-identification as a “maligned minority” defending long-established legal orthodoxies and moral norms; 2) his pointed critique on the prevailing ethos of law school “elites”; 3) his steady—some might say, relentless—attacks on the relativism of modern legal theory and the undemocratic nature of judicial activism; 4) his combative, charismatic rhetorical style; and 5) his biting, often scathingly delivered opinions on hot-button political issues (religion, homosexuality, and abortion), modern mores, and what he views as his colleagues’ submission to them.

#### 1. Maligned Minority

Despite his position as a life-tenured justice on the nation’s highest court—and a legal career that includes a degree from Harvard Law School, a three-year stint as Assistant Attorney General in the Office of Legal Counsel at the Department of Justice, time spent teaching at four of the nation’s most highly regarded law schools, as well as four years of service on the Court of Appeals of the District of Columbia—Justice Scalia regularly portrays himself as an outsider, marginalized because of his interpretative preferences and his moral positions. In language that seems to fuse pride and concession, Scalia frequently acknowledges that, as a self-professed textualist and originalist, he is a member of a “small but hardy school” which once represented “constitutional orthodoxy.”<sup>75</sup>

In his Tanner Lectures delivered at Princeton University in March, 1995, Justice Scalia said his commitment to textualism and originalism is

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astute of the Court’s current justices. Like religious fundamentalists, Justice Scalia believes wholeheartedly in the rightness of his interpretative approach and social vision; yet unlike them, he is not prepared to impose that approach and this vision on his adversaries. Thus, while Justice Scalia may believe abortion is wrong as a moral matter and that a constitutional right to abortion offends the text of the Constitution, he advocates only that the right to abortion be decided state-by-state. A religious fundamentalist, by contrast, would seek an absolute ban. In addition, Justice Scalia, recognizes that the texts and traditions he obeys are products of a specific historical circumstance, whereas religious fundamentalists are far more likely to assume an ahistorical approach to their sources.

75. Scalia, Remarks, *supra* note 10, at 1.

"repugnant to the first instincts of much of the legal profession."<sup>76</sup> Later in the same speech he added that some in "sophisticated circles" regard his textualism as "simple-minded."<sup>77</sup> At a recent speech at the University of Michigan Law School, Justice Scalia recounted a conversation he has routinely: "People ask me, 'When did you first become an *originalist*?,' like they're saying, 'When did you first start eating human flesh?'"<sup>78</sup> His approach, at once seemingly self-deprecating and facetious, allows Scalia to represent himself as part of a dwindling, beleaguered group that looks aberrant to the conventional majority.<sup>79</sup> Yale law professor Robert Burt stated that "[Scalia] has this view of himself as embattled . . . always fighting the desperate fight."<sup>80</sup>

Scalia extends his marginalized self-perception to his faith background, as well. For example, at a 1996 Mississippi prayer breakfast, Scalia told the attendees that "We are fools for Christ's sake . . . We must pray for the courage to endure the scorn of the sophisticated world," adding that in educated circles Christians are often regarded as "simpleminded."<sup>81</sup> A devout, traditionally-minded Catholic, Scalia has accused some colleagues on the Court, and by extension the broader American culture, of effusing "a positive hostility to religion."<sup>82</sup> The Court, he has written, likens religion to "some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room."<sup>83</sup> His colleagues, one concludes from the language he uses, are not just neutral toward religion; rather, they display active animosity toward it. In his view, they frequently depict religion—in Scalia's mind a necessary moral anchor in this morally topsy-turvy age—as an offender of reasonable people's sensibilities. For Scalia, religious conviction, like

76. SCALIA, INTERPRETATION, *supra* note 18, at 79.

77. *See id.* at 97-98.

78. Talbot, *supra* note 10, at 42.

79. James S. Kunen, *One Angry Man: Even on a Conservative Court, Antonin Scalia Manages to Seem Embattled*, TIME, July 8, 1996, at 48.

80. *Id.* at 49.

81. *Id.* In this speech, Justice Scalia was citing Corinthians, in which Paul writes: "For it seems to me that God has put us apostles on display at the end of the procession, like men condemned to die in the arena. We have been made a spectacle to the whole universe, to angels as well as to men. We are fools for Christ, but you are so wise in Christ!" 1 Corinthians 4:9-10. To some extent, a "simpleminded" self-conception may be a component of a Christian's understanding in any age. There is a measure of wisdom, and honor, and salvation in one's public (self-)deprecation.

82. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 749 (1994) (Scalia, J., dissenting).

83. Lee v. Weisman, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

textualism, stands as a bulwark against the relativism and nihilism of the “vulgar age” in which we live.<sup>84</sup> Yet, these beliefs—orthodox as they may have been generations ago—today invite the “scorn of the sophisticated.”

## 2. Elites

“Law-trained elites” comprise one of Justice Scalia’s most frequent targets. “Law-trained elites” are those sophisticated individuals and groups who, in Justice Scalia’s mind, privilege their own views over the democratic process, churning the rule of law into the rule of men.<sup>85</sup> Scalia attacks those in the legal profession—academics, judges, and lawyers—whose commitment to the “Living Constitution” not only subverts the proper functioning of the democratic process, but threatens the viability of the Constitution itself.<sup>86</sup> In particular, judges, plucked largely from the academic and cultural elite, are ill-equipped at determining divisive political and social questions.<sup>87</sup> Instead, they frequently substitute their values for those expressed by democratic majorities.<sup>88</sup>

Moreover, academic elites have concocted interpretative theories which call into question the plain meaning of textual language (e.g., Legal Realism, Critical Legal Studies, and Feminist Legal Studies). Justice Scalia’s derision of this interpretative relativism recalls the deep suspicion with which fundamentalists viewed the Higher Criticism biblical scholars in the 1920s. Much of the potency of this critique, of course, lies in the fact that, in Scalia’s view, “law-trained elites” seek to shape the Constitution to meet their own objectives, whereas Scalia seeks only to protect the Constitution. In this respect, he recognizes his agenda as including the safeguarding of constitutionally guaranteed rights from culture warriors who seek to impose their own elite, minority views on the nation’s majority. That this places him on the frontline of the culture wars, Justice Scalia concedes, willingly.

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84. *Id.* at 637.

85. Allen R. Kamp, *The Counter-Revolutionary Nature of Justice Scalia’s “Traditionalism”*, 27 PAC. L.J. 99, 113-14 (1995); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1386 (1999).

86. Zlotnick, *supra* note 85, at 1385.

87. *See id.* at 1386.

88. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620 (1996) (Scalia, J., dissenting).

### 3. Modern Legal Relativism

Justice Scalia believes there is a “Great Divide” in current constitutional interpretation between original meaning and current meaning.<sup>89</sup> Originalism, once orthodoxy, today seems an interpretative anachronism, a state Scalia deplores even while he appears to relish his advocacy of an orthodoxy dismissed by the mainstream. He places his own beliefs in relief against what he describes as “the ascendant school of constitutional interpretation,” one which “affirms the existence of what is called ‘the Living Constitution,’ a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society.”<sup>90</sup> Under this interpretative approach, judges delegate to themselves the authority to determine the needs of a society in flux.<sup>91</sup> In the process, judges’ views replace those of the people’s elected representatives and, according to Scalia, American society grows progressively less democratic.

Justice Scalia employs another name for advocates of the “Living Constitution” model: “nonoriginalists.” Nonoriginalism enables the Constitution to change based on the predilections of unelected judges and the currents of prevailing public opinion. Nonoriginalism, which under one or another formulation invokes

“fundamental values” as the touchstone of constitutionality . . . [makes it] very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are “fundamental to our society.” Thus, by the adoption of such a criterion judicial personalization of the law is enormously facilitated.<sup>92</sup>

The drastic tilt toward nonoriginalism has taken place within the past forty years, and conservatives as well as liberals are equally prone to fashion new rights under this “evolutionist” theory of the Constitution.<sup>93</sup> But the “Great Divide,” to continue to use Scalia’s term, is “not a liberal

89. SCALIA, INTERPRETATION, *supra* note 18, at 38.

90. *Id.*

91. *Id.*

92. Scalia, *Originalism*, *supra* note 16, at 863.

93. Scalia, Remarks, *supra* note 10, at 4 (equating, in this respect, the federal constitutional right to abortion advocated by liberals with the federal constitutional right not to have an excessive jury verdict advocated by conservatives). Scalia’s use of “evolutionist” to deride his rivals is also worth mention, given that many observers suggest that the fundamentalist community’s entrance into mainstream American consciousness occurred during the 1925 Scopes Monkey Trial, in which a Tennessee teacher was convicted for teaching evolution when a state statute barred it.



versus conservative issue.”<sup>94</sup> Rather, it pits the “modernist versus the traditionalist view of the Constitution.”<sup>95</sup> Scalia frames this interpretative battle in precisely the same language that religious fundamentalists use to frame theirs. For nonoriginalists, the Constitution is a document in which the meaning may change as American society changes. To Scalia, this is unacceptable. During the time when originalism was constitutional orthodoxy,

everyone at least said . . . that the Constitution was that anchor, that rock, that unchanging institution that forms the American polity. Immutability was regarded as its characteristic. What it meant when it was adopted it means today, and its meaning doesn’t change just because we think that meaning is no longer adequate to our times.<sup>96</sup>

There is in Scalia’s rhetoric, then, the sense that the modernist nonoriginalists are in some way upsetting the very balance of the American cosmos. Scalia does not back away from this claim. “Nonoriginalism,” he has said, is “the death knell of the Constitution [sic].”<sup>97</sup> To believe in an “evolving” Constitution is tantamount to chiseling away at the bedrock of the American polity, because judges will become the nation’s political decision-makers, and the constitutional protections guaranteed by the ratifiers will be, or can be, brushed aside. Only “originalism” represents a faithful interpretative methodology.<sup>98</sup> A “traditionalist” understanding appears to be all that stands between the American polity and the chaos born of relativism and a belief in an evolving Constitution.

#### 4. Combative Rhetoric and Charismatic Leadership

Religious fundamentalist leadership relies heavily on the power of personality, on rhetorical skills, and on a combative nature. The same is true for Justice Scalia, whose judicial personality and public persona spotlight his charisma, self-assuredness, and ideological ferocity. Take, for example, a 1996 speech at Catholic University in Washington, D.C., during which Scalia expressed unusually concessionary language about originalism:

Originalism has a lot of problems. It’s not always easy to do. Sometimes

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94. *Id.* at 4.

95. *Id.*

96. *Id.* at 2.

97. Scalia, Remarks, *supra* note 10, at 7-8.

98. Zlotnick, *supra* note 85, at 1378.

it's very hard. Sometimes it's awful hard to tell what the original meaning was . . . . But the real problem is not whether it's the best thing in the world, but whether there's anything better . . . . And the fact is, I have never heard another one that has a snowball's chance in hell of ever being adopted by more than two people . . . . If you don't take what I suggest, what is the standard? The answer is, there isn't any.<sup>99</sup>

Scalia dismisses the possibility that any other effective interpretative methodology exists other than his own. It is an inflexibility born of self-certainty. Moreover, the audience listening to Scalia is led to respond: if Justice Scalia has not heard of a plausible or potential alternative, *there really must be none*. Often in his opinions, as here, Justice Scalia aims to put forth not merely a convincing argument, but an irrebuttable one.<sup>100</sup> In addition, his language—"snowball's chance in hell"—is colorful and colloquial, yet combative.

Scalia's opinions are marked by a feistiness and antagonism quite possibly unmatched in Supreme Court history.<sup>101</sup> In opinions, he has maligned his colleagues on the Court for fashioning a constitutional jurisprudence that is "nothing short of preposterous,"<sup>102</sup> for writing opinions that are "oblivious to our history,"<sup>103</sup> for writing an opinion that "vandaliz[es] . . . our people's tradition,"<sup>104</sup> for "inventing" rather than "interpreting" a constitution in a manner that is "nothing less than Orwellian,"<sup>105</sup> and for imposing their own "self-righteous" social and economic perspectives on an unwitting nation.<sup>106</sup> Partly because of this often mocking, incendiary tone, he has gained a great many detractors, who criticize him with their own powerful language.<sup>107</sup> What is

99. Scalia, Remarks, *supra* note 10, at 7.

100. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., dissenting) (stating that the Court's "self-awarded sovereignty" over the field of abortion regulation is assuredly not a role for the Court); *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., concurring) (using a dictionary to "prove" that the Confrontation Clause guarantees "always and everywhere" a criminal defendant the right to face-to-face meetings with witnesses at trial).

101. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 399 (2000).

102. See *Romer v. Evans*, 517 U.S. 620, 652 (1996).

103. *Lee v. Weisman*, 505 U.S. 577, 633 (1992).

104. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

105. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 990, 995 (1992) (Scalia, J., concurring in the judgment and dissenting in part).

106. *U.S. v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting).

107. Commentators have described Justice Scalia's style as "abrasive," see, e.g., Kunen, *supra* note 79 (quoting Professor Mark Tushnet); evincing a "siege mentality,"

fundamentalist about Justice Scalia in these exchanges is that the scandalizing language he employs in opinions and public speeches is met (at least by commentators, if not by his judicial colleagues) with the kind of derision typically reserved for vilified political leaders but seldom extended toward judges.

Scalia unloads much of his rhetorical artillery in his frequent dissents.<sup>108</sup> Scalia has written: "Dissents are simply the normal course of things. Indeed, if one's opinions were never dissented from, he would begin to suspect that his colleagues considered him insipid, or simply not worthy of contradiction."<sup>109</sup> Expressing a sense of home in the minority, Scalia's singular voice and perspective acquire a higher volume in dissent. Furthermore, he often targets for attack not merely the opinions of the Court as a whole, but specific justices, especially those like Justices Anthony Kennedy and Sandra Day O'Connor, who Scalia often deems to be traitors to the cause of interpretative integrity.<sup>110</sup>

Due in part to his contrarian persona and his ideological self-confidence, Scalia has developed an enthusiastic, loyal following. For instance, in his public appearances following the Court's ruling in *Lawrence v. Texas*,<sup>111</sup> which struck down a Texas law prohibiting sodomy, Scalia reportedly "mocked"<sup>112</sup> Justice Kennedy's majority

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*see id.*; "militant," Zlotnick, *supra* note 85, at 1427; "remarkably myopic . . . very much like the jurisprudence that comes out of the literalist Islamic school," Douglas McCollam, *Annotating Islam*, THE AM. LAW. MAG. (Dec. 2001), available at <http://www.scholarofthehouse.org/anamlawmagde.html>. They have said Scalia is "more Jeremiah than judge," Dahlia Lithwick, *Scaliapalooza*, SLATE, Oct. 30, 2003, <http://slate.msn.com/id/2090532>; that he resides in an "anachronistic moral and social universe," George Kannar, *Strenuous Virtues, Virtuous Lives: The Social Vision of Antonin Scalia*, 12 CARDOZO L. REV. 1845, 1865 (1991); and that having "accepted a commission in the . . . Kulturkampf . . . his loyal foot soldiers are now heeding his call," Jeffrey Rosen, *Originalist Sin*, THE NEW REPUBLIC, May 5, 1997, at 28.

108. Indeed, Justice Scalia's dissents are noteworthy enough that an anthology of them was recently edited by a lawyer and fan of Scalia's. *See generally* KEVIN A. RING, *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE* (2004).

109. Linda Greenhouse, *Ideas & Trends: Divided They Stand; The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, at 4.

110. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532, 537 (claiming in dissent that Justice O'Connor's views could not be "taken seriously," and that "irrational is the new concept that Justice O'Connor introduces into the law"); *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (asserting that Justice Kennedy's majority opinion "[l]a[ys] waste . . . our rational-basis jurisprudence").

111. 539 U.S. 558 (2003).

112. Peter Augustine Lawler, *Supreme Mocking*, NAT'L REV. ONLINE, Oct. 27, 2003, <http://www.nationalreview.com/comment/lawler200310270839.asp>.

opinion before “adoring” crowds.<sup>113</sup> Scalia recounts another incident when, during the 2004 presidential campaign, he accidentally received a fundraising appeal from Democratic strategist James Carville.<sup>114</sup> Carville sought funds with this “terrifying” message on the flier: “What Would You Think of Chief Justice Scalia?”<sup>115</sup> When Scalia recounted the anecdote at a Federalist Society meeting in fall, 2004, “the audience erupted into sustained and thunderous cheers and applause.”<sup>116</sup> The article stated that Scalia enjoys an “exalted status among a growing cadre of conservative law students, lawyers, professors, and judges.”<sup>117</sup> They see him as an intrepid legal warrior seeking to put rules back into the rule of law.”<sup>118</sup> In an earlier political season, John McGinnis, professor at Cardozo School of Law, suggested in a *National Review* article that Scalia would be “the model candidate” for a 2000 presidential run.<sup>119</sup> Several websites—including The Scalia Shrine<sup>120</sup> and Cult of Scalia<sup>121</sup>—are dedicated to praising Justice Scalia. One commentator asks what has driven “Justice Scalia to eschew the reclusive public life of many justices, or at least the blandly apolitical public lives of most, to play the role of benighted public intellectual and knight gallant in the culture wars?”<sup>122</sup> At times as much passionate advocate as nonpartisan jurist, Scalia has gained a following, at least in part, by courting a following.

## 5. Defending Traditional Moral Values

Justice Scalia also bears a striking resemblance to religious fundamentalists in the manner in which he defends traditional moral values<sup>123</sup> on some of the hot-button cultural issues that come before the

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113. Lithwick, *supra* note 107.

114. Warren Richey, *One Justice's Vision of Role of the Courts*, CHRISTIAN SCI. MONITOR, Nov. 16, 2004, <http://www.csmonitor.com/2004/1116/p01s03-usju.html>.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Glen Elsasser, *No Contest: Top Court's Top Fighter is Scalia*, CHI. TRIB., May 27, 1997, at 1.

120. *See* <http://www.johnh.wheaton.edu/~johnmitch/scalia.html>. (no longer available).

121. *See* Cult of Scalia, <http://members.aol.com/schwenkler/scalia/> (last visited Mar. 16, 2006).

122. Lithwick, *supra* note 107.

123. It should be noted that occasionally, what Justice Scalia disdains in these opinions is not the underlying behavior, but the legal elite's willingness to undermine conventional morals legislation that accord with long-standing American traditions. *See*,

Court.<sup>124</sup> This section will look briefly at two areas of the Court's jurisprudence: religion and abortion.<sup>125</sup>

Commentators note that at a substantive legal level, Justice Scalia tends to enforce both the Free Exercise and Establishment Clauses in a "weak" manner; that is, he is strongly disinclined to endorse judicially-mandated free exercise exemptions from generally applicable laws or to strike down laws as effecting an establishment of religion.<sup>126</sup> Justice Scalia subscribes to the majoritarian belief that demarcation of the boundary between church and state should be left to the elected legislature rather than the unelected judiciary.<sup>127</sup> However, also strikingly constant in Scalia's religion clause opinions are his dissents, which routinely accuse the majority of an anti-religious animosity that undermines the place of faith in American history, and supplants the religious views of the American majority for those of the secular elite.

Justice Scalia articulated this perspective in *Lee v. Weisman*.<sup>128</sup> There, a public school student and her father filed suit seeking a permanent injunction that would bar public schools from including religious prayers and benedictions offered by clergy (in the respondents' case, a rabbi) at graduation ceremonies.<sup>129</sup> The Court held that the Establishment Clause prohibits public schools from incorporating clergy and their prayers in graduation ceremonies because of the "particular risk of indirect coercion" and the perception that a "state-created orthodoxy" arises when government appears to sanction religious exercise.<sup>130</sup>

In his dissent from the majority opinion, which he called "conspicuously bereft of any reference to history,"<sup>131</sup> Justice Scalia

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*e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 603-04 (2003). "Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means . . . . But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best." *Id.*

124. Because this section focuses on Scalia's attitude rather than his approach, I'll highlight here the *manner* in which he engages in these often divisive debates, and leave the substance of his positions for a later section in the paper.

125. In the "Faithful Servant" section below, I will look more closely at homosexuality, which certainly could have been included in this section.

126. Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 449-50 (2000).

127. Steven Goldberg, *Antonin Scalia, Baruch Spinoza, and the Relationship Between Church and State*, 23 CARDOZO L. REV. 653 (2002).

128. 505 U.S. 577 (1992).

129. *Id.* at 580-84.

130. *Id.* at 592.

131. *Id.* at 631.

wrote:

the Court—with nary a reference that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves . . . . As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion . . . .<sup>132</sup>

According to Scalia, public expression of gratitude to God represents a long-standing constitutionally protected tradition and promotes tolerance among a religiously pluralistic citizenry.<sup>133</sup> Deeply troubled that the majority, “oblivious to our history,”<sup>134</sup> perceived a nondenominational prayer offered at a middle school graduation by a Reform Jewish rabbi as an instrument of coercion, Scalia viewed the majority opinion not merely as poorly reasoned law but as thinly-veiled social engineering, a means of hastening religion’s displacement from the American public square.

Scalia wrote an even more vociferous rejection of the majority’s take on religion in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>135</sup> In *Kiryas Joel*, several taxpayers and the association of state school boards brought suit claiming that a specific New York state school districting law, which drew the boundaries of the Kiryas Joel school district precisely along the boundaries of the Village of Kiryas Joel, offended the Establishment Clause because the village was a religious enclave of the Satmar Hasidim, an Orthodox Jewish community described by Justice David Souter as “vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it.”<sup>136</sup> The majority regarded the New York legislature’s school districting law as an impermissibly non-neutral establishment of the state’s civic authority in a particular religious community.<sup>137</sup>

Accusing the majority of abandoning both constitutional text and American tradition,<sup>138</sup> Scalia dissented, arguing that the school district’s population only incidentally shared the same religion<sup>139</sup> and that the New York legislature did not favor the Satmar Hasidim in its creation of the

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132. *Id.* at 631-32.

133. *Id.* at 646.

134. *Id.* at 633.

135. 512 U.S. 687 (1994).

136. *Id.* at 691.

137. *Id.* at 696, 703.

138. *Id.* at 732.

139. *Id.* at 733.

school district. "The Court's decision today is astounding . . . . [The decision] continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration."<sup>140</sup> Almost tauntingly, Scalia critiques Justice Souter's majority opinion:

I have little doubt that Justice Souter would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that *are* accompanied by religious belief.<sup>141</sup>

The majority, Scalia suggests, actively disfavors deeply committed religious believers and religious practice. Those who "go to great lengths to avoid assimilation" into the modern world are subject to an especially suspicious gaze by the majority. Scalia reserves a distinctive degree of scorn for Justice Stevens' concurring opinion, which expressed concern that the Satmar Hasidic children's "isolation" "unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' faith."<sup>142</sup> "So much for family values," Scalia writes.<sup>143</sup> Scalia calls Stevens' opinion a "manifesto of secularism" which "announces a positive hostility to religion—which, unlike all other noncriminal values, the State must not assist parents in transmitting to their offspring."<sup>144</sup>

What is distinctively fundamentalist about these dissents<sup>145</sup> is the

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140. *Id.* at 752.

141. *Id.* at 741.

142. *Id.* at 711.

143. *Id.* at 749.

144. *Id.*

145. Other cases in this area where Scalia, in dissent, hinted at the majority's anti-religious inclinations include *Edwards v. Aguillard*, 482 U.S. 578, 610, 634 (1987) (Scalia, J., dissenting) (defending the constitutionality of the Louisiana legislature's Balanced Treatment Act, which provided for the teaching of "creation-science" in addition to "evolution-science," and expressing astonishment at the Court's "instinctive reaction that any governmentally-imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression," finding instead that "the Court's position is the repressive one"); *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting) (holding constitutional a state scholarship plan that barred theology students:

One need not delve too far into modern popular culture to perceive a trendy

extent to which Scalia views religion as marginalized, disfavored, and under assault, despite its preeminent position in the Bill of Rights and American history. In these dissents, Scalia emerges both as a defender of religious practice and of religion more broadly.<sup>146</sup> Where his colleagues and contemporary culture display a willingness to attack religion, Scalia emerges to shield it from their secular assault.

Scalia reserves some of his most antagonistic salvos for his opponents in the battle over judicially recognized abortion in the three decades since the Court's 1973 *Roe v. Wade*<sup>147</sup> decision. I want to focus on two strains in his opinions in the Court's abortion cases: one, the consequences of the Court's involvement in determining abortion's nationwide legality, and two, his own visionary attributes. First, as to institutional legitimacy, Justice Scalia stresses that federal courts should remain out of the field entirely, ceding determination of a woman's right to have an abortion to the state-by-state political process.<sup>148</sup> The *Roe* Court, Scalia believes, "sought to *establish*—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text."<sup>149</sup> The Court's decisions over the past generation have made "a democratic vote by nine lawyers" dispositive, at a nationwide level, on policy choices regarding what limits to place on abortion.<sup>150</sup> And a majority of Scalia's own colleagues submit to the continuing temptation toward "systematically eliminating checks upon its own power."<sup>151</sup> If the Court continues down the path of injecting itself into this policy determination without reference to constitutional or statutory text, or the country's traditions, it will inevitably impose itself on other areas of policy reserved to the political process.<sup>152</sup> Before even entering the moral

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disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups (citation omitted), its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional).

*Id.*

146. He is a defender of legal religious practices, not those that offend otherwise generally applicable neutral laws like that in *Employment Division v. Smith*, 494 U.S. 872 (1990). This position, interestingly, has occasionally pitted Justice Scalia's commitment to rule-of-law values against religious conservatives' desire to extend the protection afforded to religious believers.

147. 410 U.S. 113 (1973).

148. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1000-01 (1992) (Scalia, J., concurring in part and dissenting in part).

149. *Id.* at 980 n.1.

150. *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).

151. *Casey*, 505 U.S. at 981.

152. *Id.* at 1000.



debate over abortion, then, Justice Scalia conjures a doomsday scenario for the country because of the Court's behavior.

More perilously for the nation and itself, according to Justice Scalia, the Court paints an "unrecognizable" portrait of *Roe* as a resolution, rather than a detonation, of the national abortion issue.<sup>153</sup>

[T]o portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since.<sup>154</sup>

Instead of overruling *Roe*, and sending the issue back for state-by-state determination, the Court makes a virtue of its purported "constancy," of "remain[ing] steadfast, of adhering to "principle."<sup>155</sup> This is not consistency, but a kind of deliberate misrepresentation, Scalia asserts, through which the Court depicts itself as remaining faithful to precedent, when instead it remains committed only to its own self-destructive power grab. "The Imperial Judiciary lives," Scalia writes.<sup>156</sup> "[T]he notion that the Court must adhere to a decision for as long as the decision faces 'great opposition' and the Court is 'under fire' acquires a character of almost czarist arrogance."<sup>157</sup> Value judgments are best and most appropriately made by the people and their elected representatives, not the appointed members of a life tenured judiciary.<sup>158</sup>

Throughout these opinions, Scalia spotlights his own predictive—in some places, he may be said to aspire to prophetic—powers about the Court's decision-making. In emphasizing the inevitably apocalyptic consequences of the Court's current behavior, he casts the majority as engaging in a form of constitutional deviance to secure their own institutional power.<sup>159</sup> He stands for the people,<sup>160</sup> as a jurist interested

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153. *Id.* at 995.

154. *Id.* at 995-96.

155. *Id.* at 997.

156. *Id.* at 996.

157. *Id.* at 999.

158. *Id.* at 1001; see also *Stenberg v. Carhart*, 530 U.S. 924, 955-56 (2000).

159. *Carhart*, 530 U.S. at 955-56.

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the joint opinion's expressed belief that *Roe v. Wade*, "had call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," . . . and that the decision in *Casey* would ratify that happy truce . . . I cannot understand why those who acknowledge that, in the opening words of Justice O'Connor's concurrence, "the issue of

solely in ascertaining objective law, and more portentously, on the right side of history.<sup>161</sup>

This stark, Manichean depiction of the near future is a trademark of the fundamentalist outlook. The world as presently constituted stands at the precipice, and only a revival of traditional norms and a resurgence in the authority of the past can prevent the world from falling apart. Justice Scalia's articulated outlook is not much different: if the Court and the American legal community follows him, his legal methodology, and the rules it imposes, their existence will be assured; by moving in the opposite direction, the Court, and the legal establishment more broadly, head toward self-destruction.

### *B. Faithful Servant*

The fundamentalist outlook is persuasive and galvanizing to its adherents not merely because it confronts a chaotic, apparently unraveling modern world, but also because it claims to have the exclusive answer for how to put it back together. The fundamentalist outlook frames itself as the restorer of the stability and simplicity of an earlier age. Fundamentalists assert their perspectives are authoritative because they aim to retrieve, not remake. Their claims are self-evident and represent the established order of things. By remaining faithful to original sources of meaning, fundamentalists commit themselves to stability in a time of flux, and objectivity in a time of relativism.

In his fealty to text and his deference to tradition, Justice Scalia understands himself to be a faithful servant to constitutional text, the original meaning provided by the Constitution's ratifiers (along with statute-enacting legislatures), and to the long-standing traditions of the American people. Scalia, as well as his commentators, have rooted this "faithful servant" aspect of Scalia's judicial personality in a number of different sources, among them in his repudiation of the vague,

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abortion is one of the most contentious and controversial in contemporary American society," . . . persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it.

*Id.*

160. See *Casey*, 505 U.S. at 1001 ("The people know that their value judgments are quite as good as those taught in law school—maybe better.").

161. Scalia begins his *Carhart* dissent by stating: "I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*." 530 U.S. at 953 (Scalia, J., dissenting).

democracy-defeating methodology advocated by “Living Constitution” acolytes;<sup>162</sup> in his pre-Vatican II Catholic upbringing;<sup>163</sup> and in a Burkean traditionalism.<sup>164</sup> In this section of the paper, I will describe Justice Scalia’s commitment to the interpretative approach of textualism (in the constitutional context, originalism) and the privileged place he gives tradition in his jurisprudence. I will look at the various approaches he uses to proclaim his textual fidelity to the law. I will argue that given his claims of fidelity, his professed neutrality, and his sought-after simplicity, Scalia’s approach to interpretation closely parallels the interpretive project of a religious fundamentalist.

### 1. Commitment to Textualism

Justice Scalia is probably the most prominent proponent and practitioner of textualism (in the constitutional context, originalism). In his own words, “[t]he theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated.”<sup>165</sup> According to this theory, judges evaluating constitutional (and statutory) claims are charged with homing in, first and foremost, on the text of the constitutional provision. Where the text is clear, the judge follows its plain meaning; where the text is vague, the judge defers to its original meaning.<sup>166</sup> The judge, according to Scalia, is duty-bound to follow the text.<sup>167</sup> The judge must avoid importing her own personal predilections into the text, because judges lack the institutional authority to pursue their own policy preferences or independently formulate their own laws.<sup>168</sup> Textualism does not demand strict constructionism—“a degraded form of textualism that brings the whole philosophy into disrepute”<sup>169</sup>—but calls instead for the reasonable construction of the legal text.<sup>170</sup> Textualism, then, requires judicial objectivity, not literalism.

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162. SCALIA, *INTERPRETATION*, *supra* note 18, at 42.

163. Kannar, *Constitutional Catechism*, *supra* note 7, at 1315.

164. See David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1707 (1991).

165. Scalia, *Remarks*, *supra* note 10, at 1.

166. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 29 (1994).

167. SCALIA, *INTERPRETATION*, *supra* note 18, at 22 (“The text is the law, and it is the text that must be observed.”).

168. *See id.* at 98.

169. *Id.*

170. *Id.*

Chief among the virtues of textualism is that it removes the individual judge from inventing, instead of interpreting, the law. Scalia writes:

Besides being accused of being simplistic, textualism is often accused of being "formalistic." The answer to that is, of course it's formalistic! The rule of law is about form . . . Long live formalism. It is what makes a government a government of laws and not of men.<sup>171</sup>

This is the core of what Professor Cass Sunstein calls Scalia's democratic formalism.<sup>172</sup> Constraints on judges, among them clear rules and their own, self-binding interpretive methodologies, ensure that the voices of the people are not muzzled by an elite judiciary.<sup>173</sup> For Scalia, anything other than originalism, as noted earlier, will precipitate the end of the rule of law and the crowning of a kind of "judicial aristocracy."<sup>174</sup>

What is worse, according to Justice Scalia, is that putative judicial aristocrats no longer conceal their intentions. He writes:

It may surprise the layman, but it will surely not surprise the lawyers here, to learn that originalism is not, and had perhaps never been, the sole method of constitutional exegesis. It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what judges currently thought it desirable to mean . . . [I]n the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing . . . It is only in relatively recent years, however, that nonoriginalist exegesis has, so to speak, come out of the closet, and put itself forward overtly as an intellectually legitimate device.<sup>175</sup>

Where the current judicial ethos permits, indeed encourages, judges to make the law, Scalia's textualism purports to remove, insofar as is possible, the judge from determination of the law. The judge should function, in a role propounded by Thomas Jefferson, as a "mere machine" who interprets statutes in order to effect the popular will.<sup>176</sup> As

171. *See id.* at 99-100.

172. Cass Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530 (1997) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

173. SCALIA, *INTERPRETATION*, *supra* note 18, at 38.

174. Richey, *supra* note 114.

175. Scalia, *Originalism*, *supra* note 16, at 852.

176. Gordon S. Wood, *Comment* to SCALIA, *INTERPRETATION*, *supra* note 18, at 134.

a result, the textualist will not succumb to the ascendant ethos that views the Constitution as “evolving” and “living.”<sup>177</sup> A dead Constitution cannot “suggest changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot take them away.”<sup>178</sup> By freezing the meaning of the Constitution in time, Scalia believes the textualist honors the Constitution and protects long-standing constitutional rights.

Promoting this neutral objectivity is a primary goal of the originalist project. “[O]riginalism has been modern American legal culture’s chief means of infusing the nation’s founding political document with an objective authority that modernism refuses to concede.”<sup>179</sup> Like the religious fundamentalist, Scalia the originalist pits textual interpretation as a confrontation between the unmoored modernist and the faithful traditionalist. Thus, the textualist is portrayed by Scalia as dispassionate, reasonable, and apolitical, reading the text only for what it “fairly” means rather than what he thinks it should mean.<sup>180</sup> Here, as noted earlier, the textualist as legal fundamentalist perceives himself as obedient and objective, reverent toward history and reasonable toward text.

## 2. Use of Dictionaries

Justice Scalia’s textualism places a distinct emphasis on the formalistic study and application of words.<sup>181</sup> One device Justice Scalia uses to establish his textual fidelity is his repeated reference to dictionaries, especially those from the era of the framers, along with ancient sources and words’ etymological roots, to discern the contents of original meaning. Two cases dealing with the Sixth Amendment’s Confrontation Clause offer useful examples.

In *Maryland v. Craig*, the Court considered whether the Confrontation Clause categorically prohibits a child witness in a child sex abuse case from offering testimony against the defendant outside the defendant’s physical presence (here by way of one-way closed circuit television).<sup>182</sup> The Court held that the Confrontation Clause does not

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177. SCALIA, INTERPRETATION, *supra* note 18, at 38.

178. *See id.* at 114.

179. Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32, 99 (1993).

180. SCALIA, INTERPRETATION, *supra* note 18, at 29.

181. Kannar, *Constitutional Catechism*, *supra* note 7, at 1307.

182. 497 U.S. 836, 840 (1990).

guarantee criminal defendants an absolute right to a face-to-face meeting with witnesses against them at trial when an important public policy (here, protecting child witnesses from the trauma attendant to testifying in child abuse cases) is implicated.<sup>183</sup>

Justice Scalia dissented. He accused the majority of a “conspicuous” failure “to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion,”<sup>184</sup> and of undermining the Sixth Amendment’s “literal, unavoidable text.”<sup>185</sup> To counter the Court’s argument likening its analysis to that used in cases dealing with the admission of hearsay evidence, Scalia consulted *An American Dictionary of the English Language*, published in 1828, and *Linguae Britannicae Vera Pronunciatio*, published in 1757, to establish the meaning of the word “witness” in 1791, when the Sixth Amendment was adopted.<sup>186</sup>

Two years earlier, in *Coy v. Iowa*,<sup>187</sup> the Court adjudicated whether the Confrontation Clause guaranteed the petitioner, convicted in an Iowa state court of two counts of lascivious acts with a child, the right to a face-to-face confrontation with his accusers.<sup>188</sup> There, writing for the majority, Scalia wrote that the plain text of the Sixth Amendment required that a criminal defendant have the right to a face-to-face confrontation with witnesses testifying against him at trial.<sup>189</sup> To support this opinion, Scalia cited the New Testament’s Book of Acts (25:16), Shakespeare’s Richard II (Act I, Sc. 1), as well as the Latin roots of “confrontation.”<sup>190</sup>

However, scholars observe that during the eighteenth, nineteenth, and much of the twentieth centuries, many general English language dictionaries were prescriptive, not descriptive: they offered the reader the lexicographer’s recommendations about how a word should be used,

183. *Id.* at 857.

184. *Id.* at 860 (Scalia, J., dissenting).

185. *Id.* at 863.

186. *Id.* at 864-65.

187. 487 U.S. 1012 (1988).

188. *Id.* at 1014-15 (Pursuant to a 1985 state statute meant to protect child victims of sex abuse, the Iowa state court had granted the State’s motion that a screen be placed between the accused and the alleged victims which allowed him to hear his accusers, but see them only dimly).

189. *Id.*

190. Justice Scalia wrote that a face-to-face meeting was implicit in “confrontation” based on its ordinary English usage, as well as its Latin origins, “since the word ‘confront’ ultimately derives from the prefix ‘con-’ (from ‘contra’ meaning ‘against’ or ‘opposed’) and the noun ‘frons’ (forehead).” *Id.* at 1015-17.

rather than illustrating the way the word was used in practice.<sup>191</sup> Furthermore, these dictionaries were littered with obsolete words and meanings, which the lexicographer hoped to restore to the language.<sup>192</sup> In addition, there are dozens, if not hundreds of dictionaries to reference to find the meaning one seeks.<sup>193</sup> Because these dictionaries did not aspire to descriptive impartiality, they are imprecise, somewhat ineffective, instruments to use to divine the original meaning of words employed by the framers.<sup>194</sup> Nevertheless, resorting to them creates an aura of authenticity and authority that befits the textualist's interpretative project.

### 3. Fidelity to Tradition

Further establishing the conclusive authority of the past in his jurisprudence, Justice Scalia relies heavily on tradition, especially when text is insufficient.<sup>195</sup> His emphasis of tradition represents both Scalia's deference to the past for legal standards, as well as a more personal, almost romantic sense of nostalgia about the "good society" that seems to "underlie the fatalistic realism about present-day America so evident in many of Justice Scalia's opinions."<sup>196</sup> In a 1987 article, Scalia drafted a list of "fortunate" societies—those in which "extraordinarily talented and virtuous men and women have the good fortune to be associated with enough others to form a critical mass, [a]nd something wonderful happens"—which included Pericles' Athens, Cicero's Rome, Dante's Florence, and George Washington's United States.<sup>197</sup> His affinity for those communities, and the primacy he gives to tradition in his opinions, spotlights the wisdom of the past as well as the chaos of the present.

Yet distinctive in his respect for social tradition is his occasional aversion to *stare decisis*. Scalia's willingness to disregard legal precedent is frequent and wide-ranging.<sup>198</sup> Scalia does not believe it

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191. Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 *FORDHAM L. REV.* 2177, 2182 (2003).

192. *Id.* at 2212.

193. *Id.* at 2198 (during the 1997-1998 Term, the Court's Justices cited to 120 different dictionaries).

194. *Id.* at 2188-89.

195. Strauss, *supra* note 164, at 1705.

196. George Kannar, *Strenuous Virtues, Virtuous Lives: The Social Vision of Antonin Scalia*, 12 *CARDOZO L. REV.* 1845, 1848 (1991).

197. Antonin Scalia, *The Limits of the Law*, 119 *N.J. L.J.* 736 (1987).

198. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., dissenting) (expressing desire to overrule *Roe v. Wade*); *Barnes v. Glen Theater, Inc.*,

necessary to disassemble what he considers erroneously decided precedent “doorjamb by doorjamb;”<sup>199</sup> rather, he prefers to challenge explicitly those precedents he would overrule.<sup>200</sup> Professor David A. Strauss explained this apparent tension in a 1990-91 article:

[I]n fact there is no paradox. Precedent overlaps tradition; it is not subsumed by it. Some precedents may be said to be part of a tradition. But not all are. Some are simply the decisions of a group of judges rendered a few years ago. Burke’s injunction—not to cast aside the accumulated wisdom of generations, gained through trial and error, in favor of abstractions—does not call for such precedents to be sustained. On the contrary, it calls for them to be discarded.<sup>201</sup>

Seen from this light, tradition represents the culture’s received, cumulative wisdom whereas precedent amounts simply to a judge’s (or court’s) particular case determination. Moreover, while tradition gains strength as it ages, precedent often loses weight over time.<sup>202</sup>

Scalia’s reverence for tradition and frequent disinclination to follow *stare decisis* gains additional clarity within the context of his fundamentalist judicial persona. Scalia’s iconoclastic, confrontational side emerges when he challenges precedent. His obedient, reverential side surfaces when he defends tradition. In his book, *Tradition and Morality in Constitutional Law*, Robert Bork wrote that in law, as in theology, “the main bulwark against heresy [is] only tradition.”<sup>203</sup> Where established traditions run counter to current norms, but judges privilege the current norms anyway, Scalia believes they commit a form of judicial heresy. Indeed, when judges make decisions based on their personal predilections rather than the objective meaning of the law, they also commit judicial heresy, according to Justice Scalia. Through his traditionalism, then, Justice Scalia works as a kind of doctrinal defender of the faith. The stridency of his tone, the ridicule in his attacks, and the assuredness of his approach all contribute to the sense that the fate of American rule of law hinges on fidelity to text and tradition.

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501 U.S. 560, 580 (1991) (Scalia, J., concurring) (suggesting that, despite Court precedents, nude dancing deserves no constitutional protection); *Edwards v. Aguillard*, 482 U.S. 578, 611 (1987) (Scalia, J., dissenting) (calling into question the first prong of the test used to evaluate Establishment Clause challenges in dissent).

199. *Webster*, 492 U.S. at 537.

200. Gerhardt, *supra* note 166, at 125.

201. Strauss, *supra* note 164, at 1706.

202. David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1043 (1991).

203. ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 10 (1984).



Indeed, in an article written for the religion journal *First Things* in which Justice Scalia explained his belief in the constitutionality of the death penalty through the prism of his Catholic faith, he framed his perspective as more faithful to Catholic tradition than Pope John Paul II's, a famously tradition-minded pontiff.<sup>204</sup> Justice Scalia grounds his argument in St. Paul's Letter to the Romans 13:1-5. There, Paul enunciated the belief that a government derives its moral authority from God. Quoting the passage from Romans, Justice Scalia writes: "[The state] is the 'minister of God' with powers to 'revenge,' to 'execute wrath,' including even wrath by the sword."<sup>205</sup> The verses from Romans represent the Western consensus until very recently, according to Justice Scalia, and the "emergence of democracy" has fissured this consensus; yet when viewed over the long arc of history, those who disapprove of the legality and morality of the death penalty are the anomalies, rather than those who do.<sup>206</sup> Moreover, the modern world features a "greatly increased capacity for evil."<sup>207</sup> Pope John Paul II's encyclical *Evangelium Vitae*, in Scalia's view, is wrong, and misrepresents the weight of Catholic tradition and teaching on the permissibility of the death penalty.<sup>208</sup> The article concludes with a swipe at the Vatican itself: "We need some new staffers at the Congregation of Prudence in the Vatican. At least the new doctrine should have been urged only upon secular Europe, where it is at home."<sup>209</sup>

His fidelity to tradition emerges prominently in a number of the Court's cases dealing with traditional sexual practices. For example, in *Michael H. v. Gerald D.*,<sup>210</sup> the putative natural father of a son conceived in an adulterous relationship brought suit, challenging as a violation of

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204. Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17 [hereinafter Scalia, *God's Justice*]. Professor George Kannar, in his article *The Constitutional Catechism of Antonin Scalia*, attributes, in significant part, Justice Scalia's penchant for rules and textualism to his religious roots. Kannar, *Constitutional Catechism*, *supra* note 7, at 1310. A traditional Catholic education, buttressed by the literalism preached by his father, an academic and literary translator who believed that "to avoid destroying 'what is unique' in reading any text, 'literalism is . . . essential,'" *Id.* at 1316 (citing S.E. SCALIA, *CARDUCCI: HIS CRITICS AND HIS TRANSLATORS IN ENGLAND AND AMERICA*, 1881-1932 90 (1937)), stressed the necessity of fidelity to text. "Following the 'original' Constitution and all its corollary precedential 'rules' provides a . . . way of proving that one is 'strong enough to obey.'" *Id.* at 1320.

205. Scalia, *God's Justice*, *supra* note 204, at 19.

206. *Id.*

207. *Id.* at 20.

208. *Id.* at 21.

209. *Id.*

210. 491 U.S. 110 (1989).

substantive due process a California statute that presumed that a child born to a woman who lived with her husband was the husband's child.<sup>211</sup> Authoring a plurality opinion, Justice Scalia rejected the petitioner's suit, holding that the substantive part of the due process clause only protects interests "deeply rooted in this Nation's history and tradition."<sup>212</sup> To determine this, Scalia looks to the presumption of natural paternal legitimacy in common law and cites texts from 1569, 1826, and 1836.<sup>213</sup> The tradition at issue, Scalia writes, is not the general parental rights of parents, but the far more specific tradition of whether putative natural fathers may secure visitation rights to their children born into an extant marital family.<sup>214</sup> "[T]he claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."<sup>215</sup> American law affords a "sanctity" to the "unitary family,"<sup>216</sup> and while Scalia concedes that the contemporary family takes different forms than what was conventional 200 or even 40 years ago, the notion of family forfeits its established meaning and its constitutional support when it strays too far from traditional conceptions.<sup>217</sup> The Constitution's Due Process Clause is designed to entrench "important traditional values" rather than to permit the Court to "invent new ones."<sup>218</sup>

Scalia concentrates some of his most inflamed defense of tradition for several of the Court's cases in the area of homosexuality. In the 1996 case of *Romer v. Evans*, the Court held that a Colorado constitutional amendment prohibiting all legislative, judicial, and executive actions undertaken to protect homosexual individuals from discrimination violated the Equal Protection Clause.<sup>219</sup> The amendment, the Court stated, imposed a special disability exclusively on homosexual persons for no discernible reason other than "animus toward the class it affects."<sup>220</sup> Justice Scalia "vigorously dissent[ed]."<sup>221</sup> Misreading the amendment as born of hostility rather than deep-seated values, the Court,

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211. *Id.* at 113-14.

212. *Id.* at 124.

213. *Id.* at 124-25.

214. *Id.* at 129.

215. *Id.* at 131.

216. *Id.* at 123.

217. *Id.* at 124 n.3.

218. *Id.* at 123 n.2.

219. 517 U.S. 620, 635 (1996).

220. *Id.* at 632.

221. *Id.* at 636.

he wrote, had unconscionably taken sides in an ongoing culture war.<sup>222</sup> In so doing it both disregarded recent precedent, and more comprehensively, razed a body of legal and cultural tradition—part of the country's "moral heritage"<sup>223</sup>—in existence since "the founding of the Republic": moral disapproval of homosexual conduct expressed through a criminal prohibition on the behavior.<sup>224</sup>

Justice Scalia spends a good part of his opinion highlighting the democratic pedigree of the Colorado amendment, and how the Court's opinion subverts basic majoritarian principles.<sup>225</sup> He also states that it is neither his nor the Court's business "to take sides in this culture war."<sup>226</sup> Yet his legal argument seems, in some respects, like a sidebar to the propulsive outrage explicit in his opinion. The Court, he writes, has taken sides in the culture war,

by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than "a bare . . . desire to harm a politically unpopular group (citations omitted)" is nothing short of insulting.<sup>227</sup>

Justice Scalia appears to take very personally what he reads as the Court's branding of tradition as bigotry.

The same note of personal outrage about the abandonment of tradition is apparent in his equally strong dissent in *Lawrence v. Texas*.<sup>228</sup> There, the Court explicitly overruled *Bowers v. Hardwick*<sup>229</sup> and held as violative of the Due Process Clause a Texas statute which criminalized two persons of the same sex engaging in certain intimate sexual conduct. Anticipating, or at least responding, to Justice Scalia's argument about long-standing tradition, the Court stated that the traditions and laws most relevant to its decision were those of the past half century which demonstrated "an emerging awareness" about the liberty interests afforded people in their private conduct.<sup>230</sup> Justice Scalia rejected this as historically short-sighted and institutionally devastating: "homosexual

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222. *Id.* "[The amendment represents] a modest attempt by seemingly tolerant Coloradoans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." *Id.*

223. *Id.* at 644.

224. *Id.* at 640, 644.

225. *Id.* at 647.

226. *Id.* at 652.

227. *Id.*

228. 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

229. 478 U.S. 186 (1986).

230. *Lawrence*, 539 U.S. at 571-72.

sodomy is not a right ‘deeply rooted in our Nation’s history and tradition,’”<sup>231</sup> and the Court, acting as a “governing caste” had “largely signed on to the so-called homosexual agenda.”<sup>232</sup> Thus, the Court had strayed not merely from the Nation’s traditions, but from the tradition of neutrality that Justice Scalia believes is at or near the core of its institutional identity. The Court had “laid waste” to a part of its existing jurisprudence,<sup>233</sup> and effectively announced the end of morals legislation by ruling that the promotion of majoritarian sexual morality did not amount to a legitimate state interest.<sup>234</sup>

These opinions represent the voice of a legal fundamentalist, and not merely an aggrieved dissenter, because Justice Scalia is at once defensive and accusatory, protective of the country’s moral tradition and condemnatory of his colleagues’ scornful treatment of it. What emerges in these opinions is the sense that Justice Scalia writes these opinions as finger-wagging homilies to the Court and, more broadly, the culture. When the Court strays from its traditional role as “neutral observer,”<sup>235</sup> the hortatory nature of Scalia’s dissents appear designed to reproach the Court for its deviations. The Court, he writes, has taken sides, having effectively been captured by “some homosexual activists” who aim to “eliminate[e] the moral opprobrium that has traditionally attached to homosexual conduct.”<sup>236</sup> The Court is now politicized—no longer neutral, no longer faithful to tradition, representing now “the lawyer class”<sup>237</sup> whose attitudes may be contrasted with “the more plebian attitudes that apparently still prevail in the United States Congress”<sup>238</sup>—and thus it seems only a matter of time before its forewarned deterioration will occur.

### C. *World Transformer*

Justice Scalia’s “fundamentalist” style extends beyond his vociferous dissents and his castigation of intellectual and ideological adversaries. Indeed, his style is “fundamentalist” in that he actively seeks to persuade citizens, colleagues on the Court, and the legal

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231. *Id.* at 596.

232. *Id.* at 602, 604.

233. *Id.* at 604.

234. *Id.* at 599.

235. *Id.* at 602.

236. *Id.*

237. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

238. *Id.* at 653.

profession more broadly of the rightness of his views. Where this “faith in the correctness of his views”<sup>239</sup> arose from—his Catholic faith, his formalist upbringing, his intellectual self-assurance, the adulation (and condemnation) he receives from large swaths of the public—is of little consequence for this paper. What is relevant is that Justice Scalia has self-consciously sought, and in incremental steps has begun to attain, a sea change in the American legal establishment. This section spotlights Justice Scalia’s commitment to transform American legal culture.

Disdainful of modern methods of interpretation, antagonistic toward what (and who) he views as the legal and cultural elite, and committed to text and tradition as ultimate (and effectively exclusive) sources of meaning, Justice Scalia has pursued this transformation actively and publicly. Justice Scalia distinguishes himself from his colleagues because he communicates directly to the American public: at student assemblies, bar association events, faith-based community gatherings, and in print. Insofar as his fellow Justices have been reluctant to adopt his methodological approach, he has stumped for adoption of that approach throughout the country, becoming to some “not just a politicized judge but a true politician.”<sup>240</sup> In seeking to mobilize his “troops,” as it were, Justice Scalia’s legal mission is, in many respects, a fundamentalist kind of endeavor: the world is in trouble, its prevailing standards breed moral and political disorder, and transformation of the world as it is remains possible only through doggedly pursuing a recovery of the world as it was (or as the fundamentalist believes it to have been).

Notably, observers of the Court detect a “radical,”<sup>241</sup> “embattled,”<sup>242</sup> and “marginalized”<sup>243</sup> Scalia, and speculate that his judicial mission amounts to a political failure.<sup>244</sup> In fact, however, Justice Scalia has already been successful at converting people to his message and his vision.<sup>245</sup> Moreover, his failures at persuasion might be even more

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239. Kannar, *Constitutional Catechism*, *supra* note 7, at 1309.

240. Zlotnick, *supra* note 85, at 1427-28.

241. Linda Greenhouse, *The Nation: Gavel Rousers; Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at E1.

242. Kunen, *supra* note 79.

243. Linda Greenhouse, *Legacy of a Term—A Special Report; In Supreme Court’s Decisions, A Clear Voice, and a Murmur*, N.Y. TIMES, July 3, 1996, at A20.

244. See Talbot, *supra* note 10, at 52.

245. A 1997 essay in THE NEW REPUBLIC evaluated Scalia’s impact through his first eleven years on the Court:

Scalia joined the Court in 1986, and it is a little startling to reflect on how

significant than his successes, because through these failures he cements his self-described position on the legal margins. The fundamentalist in Scalia savors his place outside the mainstream, and uses these rejections as a platform to reaffirm his own methodological commitments and to decry prevailing legal and social standards.

Justice Scalia's transformational impact can be viewed in several different categories. In the realm of interpretation, the Court's justices increasingly rely on textualist readings of statutes and the Constitution to shape their opinions; a corollary to the preceding change surfaces in the emerging stigma attached to legislative history. At the organizational level, groups and institutions formed over the past two decades comprise a new generation of followers of Justice Scalia's legal methodology. This in turn has had an ideological impact, as the federal judiciary has experienced an unprecedented politicization over the past generation. While Scalia deplores this trend and stresses that judges must restrain themselves and concede law-making power to the country's politically accountable bodies, his combative judicial persona has fueled this trend.<sup>246</sup>

### 1. Converting the Court to Textualism

Justice Scalia has had an undeniable impact on the way the current Court tackles the interpretation of legal texts. Professor Cass Sunstein writes:

[Legal fundamentalists] think that constitutional interpretation requires an act of *rediscovery*. Their goal is to return to what they see as the essential source of constitutional meaning: the views of those who ratified the document . . . . They know that current constitutional law does not reflect their own views, and they tend to be angry about that fact. For this reason, fundamentalists have radical inclinations; they seek to make large-scale changes in constitutional law.<sup>247</sup>

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dramatically he and the movement that he personifies have transformed the terms of constitutional debate. As a justice, Scalia seems increasingly frustrated, and his dissents grow lonelier and more acerbic with the passage of time. But if Scalia's substantive views often fail to carry the day, his methodological victory is nearly complete: in famous cases and in obscure ones, liberal and conservative justices find themselves debating the intricacies of eighteenth-century history.

Rosen, *supra* note 107, at 26-27.

246. Talbot, *supra* note 10, at 48.

247. CASS SUNSTEIN, *FUNDAMENTALLY WRONG: HOW EXTREMISTS ARE TRANSFORMING THE COURTS AND THE CONSTITUTION* 19 (manuscript of *RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA* (2005)) (on file

In particular, Justice Scalia has pilloried the judicial search for a legislature's original intent.

You will find it frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to the "intent of the legislature." [A] legal system that determines the meaning of laws on the basis of what was meant rather than what was said is . . . tyrannical.<sup>248</sup>

Scalia's critique of this interpretative method represents a "radical, as opposed to marginal . . . rethinking of the Court's role."<sup>249</sup> Confronted with their colleague's withering contempt of original intent as unreliable and undemocratic, the Court has increasingly followed Scalia.

## 2. Dwindling Role for Legislative History

Before Scalia joined the Court in 1986, justices reviewed a law's legislative history in nearly all statutory cases.<sup>250</sup> Between 1980 and 1998, the number of citations to legislative history dropped from 479 to 79, a decrease of 85.5 percent.<sup>251</sup> In this respect, the Court's current use reflects a return to the era where originalism was "constitutional orthodoxy:" in 1938, the Court's opinions contained only nineteen citations to legislative history.<sup>252</sup> Reviewing legislative history only became customary in the decades following the New Deal, as government expanded, the amount of legislation surged, and judges enjoyed new opportunities to review legislative materials as government libraries grew.<sup>253</sup>

Shortly after his arrival, Scalia's frontal assault on legislative history began. In *I.N.S. v. Cardoza-Fonseca*, the Court considered an alien's appeal for asylum.<sup>254</sup> The relevant provision of the Immigration and Nationality Act indicated that an asylum-seeker's "well-founded fear

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with author).

248. SCALIA, INTERPRETATION, *supra* note 18, at 16-17.

249. Eskridge, *supra* note 11, at 624.

250. Talbot, *supra* note 10, at 52.

251. Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 386 (1999).

252. *Id.* at 386 nn.7-8. The example of the dwindling use of legislative history demonstrates that Justice Scalia's judicial fundamentalist persona is not confined to inflammatory dissents on combustible political issues. It is not merely a "loser's rhetoric." Rather, its stridency seeks transformative change. Here, that stridency has largely achieved its sought-after goals.

253. *Id.* at 371-72.

254. 480 U.S. 421 (1987) (Scalia, J., concurring).

of persecution” only required a showing that the fear was reasonable, rather than clearly probable, as the I.N.S. asserted.<sup>255</sup> The Court, despite noting the “ordinary and obvious meaning” of the phrase at issue, nevertheless proceeded through a lengthy analysis of the provision’s legislative history, which confirmed the Court’s understanding of the statute’s “ordinary meaning.”<sup>256</sup>

Concurring in the judgment, but not in the method by which it was reached, Justice Scalia wrote that the reference to legislative history constituted “an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.”<sup>257</sup> The Court’s “exhaustive investigation of the legislative history of the Act” was unnecessary and unjustified.<sup>258</sup>

He has sustained his attacks on the Court’s use of legislative history throughout his term on the Court.<sup>259</sup> Scalia grounds his rejection of legislative history in tradition.<sup>260</sup> What makes this strategy “fundamentalist,” rather than merely assertive, is the wholesale change he demands in the legal establishment (for if it remains on its current course, it will destroy itself), as well as his confrontational pronouncements that his views, though rooted in tradition, are nevertheless dismissed as aberrant and “backward” by the current legal establishment.

### 3. Canons of Construction

Another example of his transformative impact, and the scandalous stances he assumes in the legal world, is his embrace of canons of construction. In *A Matter of Interpretation* he writes:

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255. *Id.* at 428-29.

256. *Id.* at 449.

257. *Id.* at 452.

258. *Id.* at 452-53.

259. See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (Scalia, J., concurring); *United States v. Estate of Romani*, 523 U.S. 517 (1998) (Scalia, J., concurring in part and concurring in the judgment).

260. SCALIA, *INTERPRETATION*, *supra* note 18, at 29-30:

My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning. This was the traditional English, and the traditional American, practice.

*Id.*



Textualism is often associated with rules of interpretation called the canons of construction—which have generally been criticized, indeed even *mocked*, by modern legal commentators. Many of the canons were originally in Latin, and I suppose that alone is enough to render them *contemptible*.<sup>261</sup>

Before Scalia began to advocate for their return, canons of construction had regularly been dismissed as arbitrary and ineffective instruments for statutory interpretation.<sup>262</sup> Textualists like Scalia, however, have applied them “with exceptional vigor.”<sup>263</sup> Moreover, others on the Supreme Court followed Scalia’s lead in the years following his appointment, retrieving the canon “‘*inclusio unius est exclusio alterius*’ (the inclusion of one thing implies the exclusion of all others),”<sup>264</sup> despite the fact that the canon had “long been the object of academic scorn because it is not a recognized precept of grammar or logic and poorly reflects the multifaceted decision-making structure of Congress.”<sup>265</sup> What makes the reintroduction of canons of construction “fundamentalist” rather than simply old-fashioned is that the traditional device is employed both to affirm the wisdom of the past as well as to scandalize, inviting the condescension of the elite.

#### 4. Organizing the Faithful

Justice Scalia’s project is “fundamentalist” because it is at core transformative and political. Convinced that the elite has imprinted its views on the mainstream, Justice Scalia’s jurisprudential approach is at once a counterattack and a revival. If his approach is evangelical in that it seeks to persuade and recruit, it is so in part because he perceives the current legal morass as the result of a conversion campaign begun by his adversaries.

The American people have been *converted to belief* in The Living Constitution, a “morphing” document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the

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261. *Id.* at 25 (emphasis added).

262. Eskridge, *supra* note 11, at 664.

263. *See id.* at 665.

264. *Id.* at 664.

265. *Id.* *See, e.g.*, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46, 47 n.22 (1989) (Brennan, J.); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 585 (1989) (O’Connor, J.); *Karahalios v. Nat’l Fed’n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1988) (White, J.).

basis of their views regarding a whole series of proposals for constitutional evolution.<sup>266</sup>

To repel that conversion campaign to the “Living Constitution,” Scalia has spearheaded an organized legal counterpoint. The most prominent manifestation of this effort is the growth of the Federalist Society, which Justice Scalia has been an advisor to since its inception.<sup>267</sup> Fundamentalist movements place special emphasis on community-building and political organization, especially among young people, to counter the accepted (and/or presumed) orthodoxy of the general culture. In similar ways, the Federalist Society represents an organized counterattack on what its members believe to be the prevailing norms—political, interpretative, and cultural—of the legal world. The Federalist Society at once acknowledges this transformational ambition in its own materials,<sup>268</sup> and is acknowledged to have this ambition by its critics.<sup>269</sup>

If the Federalist Society can be regarded as the vanguard of an attack on the legal establishment, then its mission may be regarded as fundamentalist both for the scale of its sought-after change, and the anxious, ideologically charged responses its work incites. Interestingly, its critics have tended to frame the Federalists as either too marginal to engage<sup>270</sup> or too conspiratorial to ignore.<sup>271</sup> This binary treatment mirrors that given to Justice Scalia, whose influence on the Court and legal culture is alternately regarded as peripheral and dominant.

266. SCALIA, INTERPRETATION, *supra* note 18, at 47 (emphasis added).

267. Terry Carter, *The In Crowd: Conservatives Who Sought Refuge in the Federalist Society Gain Clout*, A.B.A. J., Sept. 2001, at 46, 51.

268. In its mission statement, the Federalist Society calls for a sustained challenge to the “orthodox liberal ideology which advocates a centralized and uniform society.” The Federalist Society, <http://www.fed-soc.org/ourpurpose.htm> (last visited Mar. 23, 2006). However, whatever its ideological bent, the Federalist Society regularly hosts fora where people of different political bents meet to debate the legal issues of the day. By hosting these events, the Federalist Society notably amplifies the views not only of its own members, but of its intellectual adversaries, as well.

269. Jeffrey Rosen of George Washington Law School noted the Federalist Society “deserves credit for transforming the terms of the legal debate.” Thomas B. Edsall, *Federalist Society Becomes a Force in Washington*, THE WASH. POST, Apr. 18, 2001, at A4.

270. Carter, *supra* note 267, at 50.

271. *Id.*; see also EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL AND FUTURE OF THE MODERN SUPREME COURT (1999), a book written by former law clerk for Justice Harry Blackmun Edward Lazarus, who though he observed a “cabal” of conservative law clerks working at the court, said that “liberals make a terrible mistake when, instead of engaging these folks on the merits, they overemphasize some kind of conspiracy theory.”

Not unlike Justice Scalia, the Federalist Society professes neutrality. The Society maintains that, at an institutional level, it “remains above the political and legislative fray,” taking no official positions and refraining from lobbying and advocating on behalf of judicial nominees.<sup>272</sup> Its public commitment to neutrality belies its conservative and libertarian reputation, and its commitment to reconfigure the federal courts in its own image.<sup>273</sup> As Scalia himself has said, “I am not happy about the intrusion of politics into the judicial appointment process . . . . Frankly, however, I prefer it to the alternative, which is government by judicial aristocracy.”<sup>274</sup> For Scalia, then, grassroots movement-building, as it were, is the antidote to the present tilt toward “judicial aristocracy.”

#### IV. Conclusion

On Sunday, April 24, 2005, at the Highview Baptist Church in Louisville, Kentucky, a number of conservative Christian leaders, joined in video simulcast by Sen. Bill Frist, protested what they view as an ongoing and “unprecedented filibuster of people of faith.”<sup>275</sup> According to Tony Perkins, President of the Family Research Council, activist judges in the federal judiciary have worked stealthily to “rob us of our Christian heritage and our religious freedoms.”<sup>276</sup> Aiming to mobilize popular support for presidential nominees to the federal bench who are strict constructionists and not activists,<sup>277</sup> the event’s organizers claimed that these nominees were being blocked “because they are people of faith and moral conviction.”<sup>278</sup> When questions emerged about Supreme Court nominee Judge John G. Roberts, Jr.’s ability to partition his Catholic faith from his interpretation of the Constitution and the laws of the United States, religious conservatives argued that the inquiry was a religious litmus test.<sup>279</sup> (Moreover, perhaps not unpredictably, whether

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272. Edsall, *supra* note 269, at A4.

273. Carter, *supra* note 267, at 51: “The society’s main focus, beginning in the Reagan years and continuing today, has been the federal bench.”

274. Richey, *supra* note 114.

275. Tony Perkins, President, Family Research Council, *Justice Sunday: Stop the Filibuster Against People of Faith*, (Apr. 2005), available at <http://www.frc.org/get.cfm?i=LH05D02>.

276. *Id.*

277. *Id.*

278. *Id.*

279. Charles Hurt, *Democrats to Delay Roberts Hearings*, THE WASH. TIMES, July 26, 2005, available at <http://www.washingtontimes.com/national/20050726-123009-8867r.htm>.

Judge Roberts had been a member of the Federalist Society—he said he could not recall—warranted national media scrutiny.)<sup>280</sup>

To the extent that Justice Scalia's judicial persona can be understood to be "fundamentalist," it is so at least in part because of its permeation into the political sphere.<sup>281</sup> While Justice Scalia did not initiate the politicization of the federal judiciary, he can be said to have encouraged it.<sup>282</sup> For example, in his 2002 article defending the constitutionality of the death penalty in *First Things*, Justice Scalia encouraged citizens concerned with the undermining of America's religious heritage to act up.

The reaction of people of faith to this tendency of democracy to obscure the divine authority behind government should not be resignation to it, but the resolution to combat it as effectively as possible. We have done that in this country (and continental Europe has not) by preserving in our public life many visible reminders that—in the words of a Supreme Court opinion from the 1940s—"we are a religious people, whose institutions presuppose a Supreme Being."<sup>283</sup>

Fundamentalism is confrontational, self-certain, and committed to radical change of the *status quo*. It is also frequently effective. While the protest against the alleged filibustering of people of faith has not yet had a demonstrable impact on the nominations process, the protest could be said to have changed the terms of the political battle. Though the mainstream may impugn the fundamentalist outlook, its adherents act out of interpretive certainty, moral clarity, and (when not viewing the world as irredeemably corrupt) political urgency. From their place on the

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280. Charles Lane, *Roberts Listed in Federalist Society '97-98 Directory*, THE WASH. POST, July 25, 2005, at A1.

281. Dahlia Lithwick, *How Do You Solve the Problem of Scalia*, SLATE, Mar. 30, 2006, <http://slate.msn.com/id/2138117>. Scalia, after having attended a Boston-area Catholic church for a Red Mass for lawyers and politicians, offered a "chin flick" to a journalist who asked him how he responded to critics who questioned his impartiality in light of his Roman Catholic beliefs. Lithwick writes that only Scalia could "trigger a nationwide debate about the hermenutics of chin flips . . . His kiss-off is already being spun, amazingly, as a justified response to an insulting attack on his religious beliefs. Scalia is once again the victim, it seems, of cunning liberal attempts to 'make him into news.'"

282. Stephanie Reitz, *Scalia Defends Involvement in Cheney Case*, THE WASH. POST, April 13, 2006, at A6. At a speech at the University of Connecticut, Scalia called his decision not to recuse himself from a 2004 case involving Vice President Dick Cheney, a personal friend, the "proudest thing" he has done on the court. Responding to a question from the audience about his impartiality in light of that decision, Scalia said: "For Pete's sake, if you can't trust your Supreme Court justice more than that, get a life."

283. Scalia, *God's Justice*, *supra* note 205, at 19.

periphery, their political participation changes the mainstream. The same can be said of Justice Scalia's "fundamentalist" judicial persona.