



**BETWEEN FORMALISM AND
CONSERVATISM:
THE RESURGENT LEGAL FORMALISM
OF THE ROBERTS COURT**

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INTRODUCTION

It is often said that the Roberts Court is the most conservative Supreme Court since the 1930's.¹ But the Roberts Court is not only

¹ See, e.g., Erwin Chemerinsky, *Supreme Court's Conservative Majority is Making its Mark*, L.A. TIMES, Oct. 4, 2010, <http://articles.latimes.com/2010/oct/04/opinion/la-oe-chemerinsky-scotus-20101004> (“[T]he reality is that this is the most conservative court since the mid-1930s.”); Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FIVETHIRTYEIGHT, N.Y. TIMES (March 29, 2012, 8:06 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/> (“One statistical method for analyzing the Supreme Court, in fact, already finds that the current court is the most conservative since at

very conservative, it is also very formalistic. By this I mean that it makes many decisions that rely exclusively on narrow fact-like considerations, like a dictionary definition or some historical circumstance, while rejecting any deliberations over the merits of cases—including time-honored considerations like expected consequences, the legislative purpose or history of a statutory or constitutional provision, changed conditions, coherence with other laws, or, of course, considerations of justice.²

The two most famous and comprehensive formalist methodologies are textualism in the statutory domain and originalism in the constitutional one.³ Each seeks to reduce legal interpretation, respectively, to an exercise in following semantics and syntax, or to a determination of historical facts.⁴ But formalism can also assume a less comprehensive form—as when a case is decided by strict adherence to a rigid rule, coupled with a refusal to consider the merit of a possible exception.⁵ For example, the claim (made in a recent

least the 1930s.”). For additional support, see the statistics compiled by Lee Epstein and Andrew Martin at <http://epstein.usc.edu/research/FracCon.pdf>.

² The definition of formalism offered above applies in equal force to the “old” formalism—i.e., to the sort of conceptual analysis, or “logical analysis of meaning” (to use Max Weber’s terminology) that was the target of Legal Realism. Here the narrow fact-like considerations include purported logical deductions.

³ Excluded from the charge of formalism are versions of New Originalism whose *raison d’être*, in contrast to traditional originalism, is *not* the reduction of judicial discretion—like the originalism of Randy Barnett or Jack Balkin. See Randy E. Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004), Jack M. Balkin, *LIVING ORIGINALISM* (2011). In accordance with the thesis of this article, it is perhaps unsurprising that many such “new originalists” (Barnett aside) are not conservative—as opposed to traditional originalists, who are almost exclusively conservative. See generally Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009), Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013).

⁴ Of course, under both formalism and originalism it may sometimes be necessary for judges to go beyond mere historical or linguistic facts in resolving cases, since those facts may prove to be linguistically or historically vague or indeterminate. But if the language and history are clear and determinate, the legal inquiry is at an end.

⁵ See, e.g., Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 509-10 (1988) (“Even a cursory look at the literature reveals scant agreement on what it is for decisions in

Supreme Court case) that content-based restrictions of speech are constitutional only if they have a historical pedigree—no matter how unjustified they may be, or how justified a non-historical exception may be—is such local formalism.⁶

Formalism is an old motif in the annals of legal practice, and criticism of it is similarly longstanding.⁷ In the modern era, formalism has become something of a dirty word in American legal circles.⁸ But formalism is making a comeback—straight into the heart of American legal practice: it is reemerging with a vengeance in the opinions of the Roberts Court. This Article is an examination of this resurgence and its intellectual roots.

The first part of the article is a survey of formalistic opinions taken from broad swaths of Supreme Court jurisprudence—including the First, Second, Fourth, and Sixth Amendments, the Due Process Clause, federal habeas corpus, the Bankruptcy Act, and the Copyright Act. The second part of the article turns to the question of the relation between formalistic reasoning and conservative ideology: why is it that formalism is, for the most part, a conservative project? Is formalism a mere conservative strategy or oppor-

law, or perspectives on law, to be formalistic, except that whatever formalism is, it is not good. Few judges or scholars would describe themselves as formalists, for a congratulatory use of the word 'formal' seems almost a linguistic error. Indeed, the pejorative connotations of the word 'formalism,' in concert with the lack of agreement on the word's descriptive content, make it tempting to conclude that 'formalist' is the adjective used to describe any judicial decision, style of legal thinking, or legal theory with which the user of the term disagrees.").

⁶ See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'").

⁷ See, e.g., Rudolph von Jhering, *In the Heaven for Legal Concepts: A Fantasy*, 58 TEMP. L.Q. 799 (Charlotte L. Levy trans., 1985), originally published in German as *Im juristischen Begriffshimmel. Ein Phantastiebild.*, in SCHERZ UND ERNST IN DER JURISPRUDENZ (Breitkopf & Hartel, Leipzig 1884).

⁸ See, e.g., Schauer, *supra* note 5, at 510 (noting the pejorative connotations of the term "formalism").

tunism, or is there a deeper relation between the two? Those questions will be explored in the second part.

I. FORMALISM ON THE ROBERTS COURT

A. THE SECOND AMENDMENT: *DISTRICT OF COLUMBIA V. HELLER*

In 2008 the Roberts Court issued the most originalist Supreme Court opinion in modern history.⁹ Overruling what was considered settled Second Amendment doctrine, the Court relied exclusively on what it called the “original meaning” of the Second Amendment to conclude that Washington D.C.’s ban on handguns was unconstitutional.¹⁰ Citing to 18th century dictionaries¹¹ and debates in the English House of Lords,¹² the opinion proclaimed that the original meaning of the Amendment was the only relevant consideration for the decision.¹³ Indeed the opinion berated the dissent (by the four liberals on the Court) for including a “discussion of the arguments for and against gun control,”¹⁴ and added that modern conditions “cannot change our interpretation of the right.”¹⁵ For the majority, considerations like gun crime rates, the rates of gun homicide or

⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008). See also Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344 (2009) (describing *Heller* as a test case for originalism).

¹⁰ *Heller*, 554 U.S. at 614, 635.

¹¹ See *id.* at 581 (citing 1 *Dictionary of the English Language* 107 (4th ed.); 1 *A New and Complete Law Dictionary* (1771); N. Webster, *American Dictionary of the English Language* (1828) (reprinted 1989)).

¹² *Id.* at 591-592 (“In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as ‘a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense.’” (citing 49 *The London Magazine or Gentleman’s Monthly Intelligencer* 467 (1780))).

¹³ See *id.* at 634-35.

¹⁴ *Id.* at 634.

¹⁵ See *id.* at 627-28 (“[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”).

suicide, the yearly number of accidental shootings, or the fact that we no longer fear armed federal takeover (which was the driving force behind the Amendment¹⁶), were simply beside the point.

Justice Breyer's dissent argued against this formalistic position: "the protection the Amendment provides is not absolute," wrote Breyer, and the Court must therefore determine whether the challenged regulation is "unreasonable or inappropriate in Second Amendment terms."¹⁷ That evaluation required engagement with the purpose of the Second Amendment in light of current conditions.¹⁸ But the majority would have none of that:

A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.¹⁹

The only relevant consideration in constitutional interpretation, said the opinion, is the provision's meaning at the time of its ratification. Period.

¹⁶ See *id.* at 599 ("[T]he Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. . . . [T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right . . . was codified in a written Constitution.").

¹⁷ *Id.* at 681 (Breyer, J., dissenting).

¹⁸ Two years later, when the Court relied on *Heller* in applying the Second Amendment to the States, Breyer explained his position in *Heller* by stating: "In my own view, the Court should not look to history alone but to other factors as well. . . . It should, for example, consider the basic values that underlie a constitutional provision and their contemporary significance. And it should examine as well the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3122 (2010) (Breyer, J., dissenting).

¹⁹ *Heller*, 554 U.S. at 634-35 (Scalia, J.).

B. THE DUE PROCESS CLAUSE: *MCDONALD V. CHICAGO*

Two years after *Heller*, the Court applied the Second Amendment to the states in another highly formalistic decision.²⁰ The opinion, written by Justice Alito, marked a fundamental departure from accepted incorporation and substantive due process doctrines.

Long standing precedents identified fundamental substantive due process rights as those that are fundamental as a matter of justice, and respected by American history and tradition.²¹ But the opinion in *McDonald v. Chicago* essentially tossed the moral question away:

[W]e now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, *Duncan*, 391 U.S. at 149, or as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition.’ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).²²

Thus according to the opinion, the two inquiries—the moral (whether a right is “fundamental to our scheme of ordered liberty”) and the historical (whether the right is “deeply rooted in this Nation’s history and tradition”)—amounted to one and the same thing; and that thing was the historical question (namely, whether the asserted right had been historically protected as fundamental).

²⁰ *McDonald*, 130 S. Ct. 3020.

²¹ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149, n. 14 (1968); *Adamson v. California*, 332 U.S. 46 (1947); *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932).

²² *McDonald*, 130 S. Ct. at 3036.

Although the opinion disclaimed any novelty and purported to rely on precedents, no previous decision—including *Duncan v. Louisiana*²³ and *Washington v. Glucksberg*,²⁴ to which the opinion refers directly for support—treated the moral question and the historical question as interchangeable. But the *McDonald* Court did, and it then concluded that the Second Amendment applied to the states because the right to bear arms was historically treated as an important right.²⁵

This radical reformulation of doctrine did not go unchallenged. Justice Stevens wrote that “[a] rigid historical test is inappropriate”²⁶ and “unfaithful to the Constitution’s command.”²⁷ And Justice Breyer protested that “this Court, in considering an incorporation question, has never stated that the historical status of a right is the only relevant consideration.”²⁸ But these objections were brushed aside: the only relevant consideration was the historical one.

²³ See generally *Duncan*, 391 U.S. 145. *Duncan*’s focus on “our scheme of ordered liberty” (emphasis added) did not dispense with the question of justice but merely positioned it within the context of American institutions and traditions. In fact, the *Duncan* Court went to great lengths to establish the importance of the right to a trial by jury as a matter of justice. See *id.* at 156-57. See also *McDonald*, 561 U.S. at 3097 (Stevens, J., dissenting) (“Nor, as the Court intimates . . . did *Duncan* mark an irreparable break from *Palko*, swapping out liberty for history.” (citations omitted)).

²⁴ See generally *Glucksberg*, 521 U.S. 702. *Glucksberg* clearly kept the two questions distinct, both in its articulation of the test and in applying it. See *id.* at 720-21 (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” (emphasis added)).

²⁵ See *McDonald*, 130 S. Ct. at 3036 (“[B]y 1765, Blackstone was able to assert that the right to keep and bear arms was ‘one of the fundamental rights of Englishmen.’”); *id.* at 3037 (“The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights.”); *id.* (“Founding-era legal commentators confirmed the importance of the right to early Americans.”).

²⁶ *Id.* at 3097 (Stevens, J., dissenting).

²⁷ *Id.* at 3098.

²⁸ *Id.* at 3123 (Breyer, J., dissenting).

C. THE FIRST AMENDMENT: *UNITED STATES V. STEVENS*

In the same year that *McDonald* was decided, the Court also turned to a purely historical test in First Amendment jurisprudence.²⁹ *United States v. Stevens* involved a federal statute that made it a crime to create, sell, or possess depictions of animal torture for commercial purposes.³⁰ The statute came as a response to the proliferation of “crush videos,” where women wearing high heel shoes (or sometimes with their bare feet) were shown crushing kittens or puppies or other small animals to death.³¹ Thousands of these sickening videos were posted on the Internet.

The first conviction under the statute—which happened to involve the production and distribution of dogfight videos—was challenged as a violation of the First Amendment.³² The government’s principal response was that depictions of animal torture produced for commercial gain were of so little social value, and inflicted such terrible harm, that they were simply not protected by the First Amendment.³³ Over the years, the Court has recognized a number of such unprotected categories of speech, including sexually obscene speech and child pornography.³⁴ The government

²⁹ *United States v. Stevens*, 559 U.S. 460 (2010).

³⁰ *See id.* at 464, n. 1 (quoting 18 U.S.C. § 48) (“Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both. (b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. (c) DEFINITIONS.—In this section— (1) the term ‘depiction of animal cruelty’ means any visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place . . .”).

³¹ *Id.* at 465.

³² *See Roth v. United States*, 354 U.S. 476 (1957); *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. Stevens*, 559 U.S. 460 (2010).

³³ *Stevens*, 559 U.S. at 469-70.

³⁴ *Id.* at 469-71.

claimed that, as with child pornography, criminalizing the commercial depictions of animal torture was the only feasible way of combatting this nefarious and illegal conduct.³⁵

The Supreme Court rejected the argument on the ground that, whatever its substantive merit, there was no historical precedent for recognizing depictions of animal torture as unprotected: “we are unaware of any similar tradition excluding depictions of animal cruelty from the freedom of speech codified in the First Amendment, and the Government points us to none.”³⁶ Since such depictions were not historically excluded from First Amendment protections, wrote Chief Justice Roberts, they were protected.³⁷

The government protested that “historical evidence about the reach of the First Amendment is not ‘a necessary prerequisite for regulation today,’ and...categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation.”³⁸ Although precedent clearly supported the government’s position, the Court disagreed: “The Government . . . proposes that a claim of categorical exclusion . . . depends upon a . . . balancing of the value of the speech against its societal costs;”³⁹ but such evaluations are “highly manipulable,” and judges should not be allowed to carve unprotected categories of speech by reference to such a manipulable test.⁴⁰ Thus, “[w]hen we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.”⁴¹

³⁵ *Id.*

³⁶ *Id.* at 469 (emphasis and internal quotation marks omitted).

³⁷ *Id.* at 469-70, 481-82.

³⁸ *Id.* at 469 (quoting Brief for Petitioner at 12 n.8, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769)).

³⁹ *Id.* at 470.

⁴⁰ *Id.* at 472.

⁴¹ *Id.* at 471. The opinion in *Ferber v. New York* explained its analytical framework in the following way:

Notwithstanding the opinion's assertion, important First Amendment precedents have engaged in precisely such cost-benefit analysis in recognizing unprotected categories of speech—including the 1982 *New York v. Ferber* decision, which recognized child pornography as an unprotected category of speech (and which the Court cited as an authority).⁴² But the Court opted for a different test: namely, whether a category of speech had been unprotected as a matter of historical tradition.⁴³ And since there was no historical

We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. . . . The question whether speech is, or is not protected by the First Amendment often depends on the content of the speech . . . Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

458 U.S. 747, 762-64 (1982) (citations omitted) (internal quotation marks omitted).

⁴² In *Stevens*, the Court cited *Ferber* as an authority on other issues. See 458 U.S. 747, 762-64 (1982) (citations and quotations omitted).

⁴³ Regarding the issue of lesser manipulability, the *Stevens* opinion claimed that child pornography was in fact a historically unprotected category of speech, because it was expression that was an integral part of the commission of a crime, and that historical tradition recognized such an exception to First Amendment protections. See *Stevens*, 559 U.S., at 472 (“[I]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. . . . *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech. . . .”). But, like *Ferber*, *Stevens* equally involved expression “used as an integral part of conduct in violation of a valid criminal statute.” *Id.* at 472 (quoting *Ferber*, 458 U.S. at 762). The statute struck down in *Stevens* only penalized depictions of conduct that “is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place . . .” *Id.* at 470, n. 1 (quoting 18 U.S.C. § 48)). No legal test, whether substantive or formalistic, is immune to manipulation.

precedent for excluding depictions of animal torture, depictions of animal torture were protected speech.⁴⁴

One of the more deplorable aspects of the case—beyond the short shrift it gave the interests of animals—was the fact that it was joined by seven justices, with only Justice Alito dissenting.⁴⁵ Thus all four liberal justices signed off on the dogma that First Amendment protections of categories of speech are exclusively a function of a simple historical test. It is hard to believe that these justices actually subscribe to such a formalistic position; but unlike some of their predecessors, they are, apparently, not always careful about the methodology of the opinions they join.⁴⁶ Their ideological rivals, in the meantime, remain scrupulous about their methodological predispositions.⁴⁷

⁴⁴ *Id.* at 472 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them.”).

⁴⁵ *See generally id.* at 482-500 (Alito, J., dissenting). Alito concluded that the First Amendment did not protect the depictions covered by the challenged statute, and he reached that conclusion by relying on the substantive claim that “the harm caused by the underlying criminal crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess.” *Id.* at 1600.

⁴⁶ *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 752-789 (1997) (Souter, J., concurring) (writing separately to explain his disagreement with the majority’s excessive reliance on a historical test in substantive due process doctrine); *Furman v. Georgia*, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring) (writing separately to explain his disagreement with the majority’s excessive reliance on history in Eighth Amendment doctrine); *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 628-640 (1990) (Justice Brennan, joined by Justices Marshall, Blackmun, and O’Connor, writing separately because historical pedigree, although important, is not the only factor to be taken into account in establishing whether a jurisdictional rule satisfies due process, so that an independent inquiry into the fairness of the prevailing in-state service rule must be undertaken); *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (O’Connor & Kennedy, J.J., joining Justice Scalia’s plurality opinion except for Footnote 6, and writing separately to explain that “This footnote sketches a mode of historical analysis” they did not accept).

⁴⁷ *See, e.g.,* *Levin v. United States*, 133 S. Ct. 1224, 1227, 1232 n.6, 1234 n.7 (2013) (Ginsburg, J.; Scalia, J. joining all but footnotes 6 & 7, which use legislative history).

D. THE FOURTH AMENDMENT: *ASHCROFT V. AL-KIDD*

In *Ashcroft v. al-Kidd*, the Supreme Court rejected a Fourth Amendment challenge to the arrest of an individual as a material witness, even though there was no intention to ever use him as a witness, and the arrest was done purely for investigatory purposes.⁴⁸ This bizarre decision was another direct consequence of the Roberts Court's formalism.

The case concerned a lawsuit by Abdullah al-Kidd, an American-born convert to Islam who was arrested by the FBI in 2003.⁴⁹ His arrest warrant was issued under the federal Material Witness Statute,⁵⁰ which authorizes the detention of individuals not suspected of criminal wrongdoing if: 1) their testimony is "material in a criminal proceeding,"⁵¹ and 2) it may "become impracticable to secure [their] presence . . . by subpoena . . ."⁵² The FBI's warrant application declared that al-Kidd's testimony was "crucial" to the prosecution of one Sami Omar al-Hussayen for visa fraud.⁵³ But al-Kidd was never called to testify in any criminal proceeding, and his lawsuit alleged that he was never meant to act as a witness.⁵⁴ Instead, he was arrested for investigative purposes.⁵⁵ The lawsuit filed by al-Kidd claimed that John Ashcroft, the U.S. Attorney General at the time, established a policy authorizing the arrest and detention of people suspected of ties to terrorism, often on the flimsiest of grounds (and without anything approaching probable cause) under the pretext that they were material witnesses.⁵⁶ The allega-

⁴⁸ See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079, 2085 (2011).

⁴⁹ See *id.* at 2079.

⁵⁰ See *id.*

⁵¹ 18 U.S.C. § 3144 (2006).

⁵² *Id.*

⁵³ See *al-Kidd*, 131 S. Ct. at 2079.

⁵⁴ See *id.*

⁵⁵ See *al-Kidd v. Ashcroft*, 580 F.3d 949, 954-55, 959-60 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

⁵⁶ See *id.*

tion was supported by statistics showing that many Muslims arrested as material witnesses after 9/11 were never asked to testify in any criminal proceeding; and by official statements and affidavits of DOJ officials—including Ashcroft’s own public statement that the Material Witness Statute was an important tool in “taking suspected terrorists off the street.”⁵⁷ Dozens were allegedly arrested and detained pursuant to that policy.⁵⁸ (The Inspector General at the Justice Department is currently conducting a long-running inquiry into the matter.⁵⁹)

An opinion by the five conservative justices held that even if al-Kidd’s allegations were true, his Fourth Amendment rights were not violated.⁶⁰ According to the opinion, the Fourth Amendment is not violated when an individual is arrested and detained as a material witness, even if the arrest and detention are entirely pretextual and aimed at investigating him as a criminal suspect—so long as the government can show that the requirements of the Material

⁵⁷ The allegation was supported by statistics (many of the Muslim individuals arrested as material witnesses post-9/11 were never asked to testify in any criminal proceeding) and by official statements and affidavits of DOJ officials—including Ashcroft’s own public statement that the Material Witness Statute was an important tool in “taking suspected terrorists off the street.” *See id.* at 954-55. Other statements included those of Michael Chertoff, then-Assistant United States Attorney General for the Criminal Division, who stated publicly that the material witness statute, was “an important *investigative* tool in the war on terrorism,” *id.* at 962, and then-FBI Director Robert Mueller who said in a 2002 speech that a number of suspects were detained on material witness warrants. Brief for Respondent at 6, *al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98).

⁵⁸ *See* Naftali Bendavid, *Material Witness Arrests Under Fire*, CHI. TRIB., Dec. 24, 2001, http://articles.chicagotribune.com/2001-12-24/news/0112240169_1_material-witness-trial-of-zacarias-moussaoui-arrests..

⁵⁹ The Office of Inspector General of the Department of Justice is working on a report “reviewing the Department’s use of the material witness warrant statute, 18 U.S.C. 3144 . . . [and] investigating whether the Department’s post-September 11th use of the statute in national security cases violated civil rights and civil liberties.” OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS OCTOBER 1, 2011 – MARCH 31, 2012 17 (2012), *available at* <http://www.justice.gov/oig/semiannual/1205/index.pdf>.

⁶⁰ *See al-Kidd*, 131 S. Ct. at 2085.

Witness Statute (materiality of information and unavailability) are satisfied.

This surprising holding resulted from a textualist interpretation of the Material Witness Statute that refused to consider either the legislative purpose of the statute, or the purpose of the executive officials enforcing it. As the government's brief put it in arguing for this formalistic interpretation: "Congress provided an objective standard for obtaining a material-witness warrant . . . and that standard, on its face, does not turn upon the prosecutor's alleged motive. . . . [I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁶¹ Accordingly, the Material Witness Statute could authorize al-Kidd's arrest—even if his arrest had nothing to do with securing his testimony, but was in fact an investigatory arrest lacking probable cause.⁶² All that mattered was that the strict language of the statute was followed; the statute's purpose or the intention of the people enforcing it were irrelevant to the legality of the arrest.

E. FEDERAL RULES OF APPELLATE PROCEDURE: *BOWLES V. RUSSELL*

In *Bowles v. Russell*, an opinion by the five conservative justices held that a man lost his right to appeal a murder conviction after his attorney followed the mistaken instructions of a judge.⁶³ A federal district court judge instructed the defendant's lawyer to file his notice of appeal of a habeas corpus disposition by February 27 instead of February 24, and the lawyer filed on February 26.⁶⁴ Too late, said the Supreme Court in an opinion written by Justice Thomas: the right to appeal this murder conviction was extinguished.⁶⁵ Rule 4 of

⁶¹ Reply Brief for Petitioner at 15, *al-Kidd*, 131 S. Ct. 2074 (2011) (No. 10-98).

⁶² See generally, Ofer Raban, *Judicial Fundamentalism, the Fourth Amendment, and Ashcroft v. al-Kidd*, 2 VA. J. CRIM. L. 1 (2013).

⁶³ See *Bowles v. Russell*, 551 U.S. 205, 215 (2007).

⁶⁴ *Id.* at 207.

⁶⁵ See *id.* at 214-15.

the Federal Rules of Appellate Procedure set the time limit for the appeal, and a judge could not change that time limit either wittingly or unwittingly.⁶⁶

In order to reach this result, the Court not only had to reject all equitable considerations, it also had to overrule two older cases that extended such deadlines in order to mitigate “the obvious great hardship to a party who relies upon the trial judge’s finding”⁶⁷ The exceptions these precedents carved, read Justice Thomas’ opinion, “detract[ed] from the clarity of the rule.”⁶⁸ (An outraged dissent proclaimed that it was “intolerable for the judicial system to treat people this way”⁶⁹)

F. THE SIXTH AMENDMENT: JUSTICE THOMAS’ CONCURRING OPINION IN WILLIAMS V. ILLINOIS

The radical formalism of some Roberts Court Justices can also be glimpsed from two solo opinions—a concurring opinion by Justice Thomas and a dissenting opinion by Justice Scalia.

Thomas’ opinion concerned the admissibility of lab reports under the Sixth Amendment’s Confrontation Clause.⁷⁰ The question in *Williams v. Illinois* was whether a criminal defendant has a constitutional right to confront the lab technician who prepared the DNA report introduced at the trial, or whether the state could present the report through the testimony of another expert witness.⁷¹ The Court was divided 4-1-4 on the matter, with a sole concurrence by Justice Thomas who agreed that the Confrontation Clause was not violated—though on grounds altogether different than the plurali-

⁶⁶ See *id.* at 213-14 (rejecting the “unique circumstances” doctrine and holding that jurisdictional requirements are absolute).

⁶⁷ *Id.* at 214.

⁶⁸ *Id.*

⁶⁹ *Id.* at 215 (Souter, J., dissenting).

⁷⁰ *Williams v. Illinois*, 132 S. Ct. 2221, 2255 (2012) (Thomas, J., concurring).

⁷¹ See *id.* at 2227 (Alito, J., plurality opinion).

ty's.⁷² For Justice Thomas, the Confrontation Clause was inapplicable because the DNA report at issue in the case was "neither a sworn nor a certified declaration of fact."⁷³ The report was therefore different than reports previously declared "testimonial" which were "sworn to before a notary public."⁷⁴ In other words, the Confrontation Clause was not applicable to this DNA report because the report lacked a signature. "That distinction is constitutionally significant," explained Thomas, "because the scope of the confrontation right is properly limited to extrajudicial statements similar in solemnity to the [16th Century] Marian examination practices that the Confrontation Clause was designed to prevent."⁷⁵

The dissent had this to say about Thomas' reasoning:

Justice Thomas's unique method of defining testimonial statements . . . grants constitutional significance to minutia. . . . Indeed, Justice Thomas's approach, if accepted, would turn the Confrontation Clause into a constitutional geegaw—nice for show, but of little value. The prosecution could avoid its demands by using the right kind of forms with the right kind of language. . . . It is not surprising that no other member of the Court has adopted this position.⁷⁶

G. THE FEDERAL BANKRUPTCY CODE: JUSTICE SCALIA'S DISSENTING OPINION IN *HAMILTON V. LANNING*

Hamilton v. Lanning involved the statutory formula for calculating debtors' future earnings for purposes of determining their

⁷² *Id.* at 2255 (Thomas, J., concurring).

⁷³ *Id.* at 2260.

⁷⁴ *Id.* (distinguishing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)).

⁷⁵ *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 835-36 (2006)) (concurring in the judgment in part and dissenting in part).

⁷⁶ *Id.* at 2275-77 (Kagan, J., dissenting).

monthly payments under bankruptcy protection.⁷⁷ A 2005 amendment to the Code calculated a debtor's future earning on the basis of "the average monthly income" during a specified 6-month period.⁷⁸ The case before the Court involved a debtor who received an exceptional one-time payment during the statutory period, which resulted in the statutory formula yielding a projected monthly income that was more than double the actual one.⁷⁹ The Supreme Court held that the calculated expected income needed to be corrected, notwithstanding the clear statutory language: "the method outlined [in the statutory formula] should be determinative in most cases," wrote the Court, "but . . . where significant changes in a debtor's financial circumstances are known or virtually certain, a bankruptcy court has discretion to make an appropriate adjustment."⁸⁰

Justice Scalia alone dissented from that decision.⁸¹ He thought that the Court should follow the clear statutory language.⁸² "The Court . . . can arrive at its compromise construction only by rewriting the statute," he wrote.⁸³ If the predicted income was unrealistic and the calculated payments too large for the debtor to pay, said Scalia, then the debtor simply could not afford bankruptcy protection: "The Court says [that the formula] makes no sense unless the debtor is actually able to pay an amount equal to his projected dis-

⁷⁷ *Hamilton v. Lanning*, 560 U.S. 505, 508-09 (2010). *See also* 11 U.S.C. §§ 1306(b), 1321, 1322(a)(1), 1328(a).

⁷⁸ 11 U.S.C. § 101(10A)(A)-(B).

⁷⁹ *Hamilton*, 560 U.S. at 511.

⁸⁰ *Id.* at 513.

⁸¹ *Id.* at 524 (Scalia, J., dissenting).

⁸² *See id.* at 529-31 (Scalia, J., dissenting) (explaining that a "mechanical" application of the statute is perfectly reasonable).

⁸³ *Id.* at 527 (Scalia, J., dissenting).

posable income. But it makes no sense only if one assumes that the debtor is entitled to [bankruptcy protection].”⁸⁴

H. THE COPYRIGHT ACT: ORAL ARGUMENTS IN *KIRTSAENG V. JOHN WILEY & SONS, INC.*

My last example comes from oral argument. In October 2012, the Court heard oral argument in *Kirtsaeng v. John Wiley & Sons, Inc.*, which dealt with the scope of the Copyright Act.⁸⁵ The precise question was whether the Act’s permission to book buyers to sell their purchased copy without the bookseller’s permission (the so-called “first sale” doctrine) also extended to books purchased overseas and brought to the U.S. in order to be sold here.⁸⁶ Former Solicitor General Theodore Olson represented the book publisher who wanted to bar the overseas buyer from selling the books. But the Justices were concerned about the implications of this position: isn’t it true, they asked, that a failure to extend the first sale doctrine to items bought abroad may wreak havoc on the huge market in second hand goods? After all, innumerable items—from books to smartphones to car parts to museum pieces—are regularly imported from overseas.⁸⁷ This question seemed to lie at the heart of the case—unless, of course, you are a formalist, in which case all that mattered was the text of the statute, irrespective of the expected consequences. Olson, eager to deflect this potentially damaging inquiry, therefore tried to tap into the Court’s formalism. His attempt generated vigorous protestations from some Justices; but the mere fact that such an argument could be made with a straight face, and that the justices felt obligated to defend their line of question-

⁸⁴ *Id.* at 530-31 (Scalia, J., dissenting) (citation omitted).

⁸⁵ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

⁸⁶ *Id.* at 1355.

⁸⁷ Transcript of Oral Argument at 28-32, *Kirtsaeng*, 133 S. Ct. 1351 (No. 11-697), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-697.pdf.

ing, was a testament to the inroads formalism has been making into the jurisprudence of our highest court. Here is an excerpt from the transcript:

JUSTICE BREYER: Now, explain to me, because there are horrors if I summarize them, millions and millions of dollars' worth of items with copyrighted indications of some kind in them that we import every year; libraries with three hundred million books bought from foreign publishers that they might sell, resell, or use; museums that buy Picassos. . . Those are some of the horrors that they sketch. And if I am looking for the bear in the mouse hole, I look at those horrors, and there I see that bear. So I'm asking you to spend some time telling me why I'm wrong.

MR. OLSON: Well, I'm -- first of all, I would say that when we talk about all the horrors that might apply in cases other than this -- museums, used Toyotas, books and luggage, and that sort of thing -- we're not talking about this case. And what we are talking about is the language used by the statute that does apply to this case. And that --

JUSTICE BREYER: But we need to --

JUSTICE SOTOMAYOR: Don't those horrors --

JUSTICE KENNEDY: We need to know about those hypotheticals in order to decide this case.

MR. OLSON: Well, and that's --

JUSTICE KENNEDY: You're aware of the fact that if we write an opinion with the -- with the rule that you propose, that we should, as a matter of common sense, ask about the consequences of that rule. And that's what we are asking....

MR. OLSON: But the problem is -- the statutes may not be perfect with respect to this, and there may be horrors that occur under one set of interpretations of the statute, and the

other interpretation of the statute is to interpret it as -- as the petitioner --

JUSTICE SOTOMAYOR: Mr. Olson, we know from the Karp exchange that the response was, this is something that we have to study with care, in 1976. The parade of horrors is now causing the Solicitor General and at least one, if not two, courts of appeals to write exceptions into the language to take care of what they perceive as horrors. Isn't it incumbent upon us to give the statute what is plainly a more rational plain meaning then to try to give it a meaning and then fix it because we understand that the meaning doesn't make sense?

MR. OLSON: I -- there -- there is a body of the government of the United States that is entitled and capable of fixing this.⁸⁸

To repeat, the exchange is a grim testament to the formalism of the Roberts Court. At the end, formalism lost in this particular case; but the very Justices who opposed it here, have allowed it to win in many other cases.⁸⁹

It is time we move to the second part of the paper, which examines the relation between formalism and conservatism.

II. FORMALISM AND CONSERVATISM

Why is it that formalism is experiencing its great resurgence under the most conservative Supreme Court since the 1930's? What is the connection between conservatism and formalism? Indeed

⁸⁸ *Id.*

⁸⁹ See *Kirtsaeng*, 133 S. Ct. at 1358 ("We . . . doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities.").

why is it that formalist theories like textualism or originalism are overwhelmingly theories of conservative rather than liberal judges? Or that conservative politicians and even conservative voters appear to subscribe to formalist theories of legal interpretation far more than liberal ones?⁹⁰ (One is reminded of the conservative outrage over candidate Sotomayor's comments about the potential role of morality in judicial decisionmaking, or Obama's remark that he wanted a Supreme Court justice with empathy.⁹¹) So what is the explanation for the affinity between conservatism and legal formalism? Here are a number of suggestions.

A. REACTIONISM

The first and most superficial thesis sees formalism as nothing more than a conservative reaction to decades of liberal Supreme Court decisions, beginning with the liberal revolution of the Warren Court and continuing, to a lesser extent, with the more conservative leadership of Chief Justice Burger.⁹² Frustrated conservative jurists like Raoul Berger, Edwin Meese, Robert Bork, and Antonin Scalia

⁹⁰ JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 146 (2007).

⁹¹ See, e.g., Matthew J. Franck, *Sotomayor's 'Prejudices' and 'Relative Morality'*, BENCH MEMOS, NATIONAL REVIEW ONLINE (May 27, 2009, 10:03 PM), <http://www.nationalreview.com/bench-memos/50037/sotomayors-prejudices-and-relative-morality/matthew-j-franck> ("It's a dubious business to assign to judges the role of moralizers or moral philosophers in the first place; isn't it infinitely worse to suppose they are to be, not moral reasoners, but moral emotionalists?"); Major Garrett, *Obama Pushes for 'Empathetic' Supreme Court Justices*, FOXNEWS.COM (May 1, 2009), <http://www.foxnews.com/politics/2009/05/01/obama-pushes-empathetic-supreme-court-justices/> ("In the end, Obama is likely to prevail. He has the votes in the Senate, after all, and his allies say he won this battle last November. . . . That doesn't mean conservatives won't complain and won't challenge this 'activist' view of the court.").

⁹² See, e.g., Lorianne Updike Toler, J. Carl Cecere, & Justice Don Willett, *Pre-Originalism*, 36 HARV. J.L. & PUB. POL'Y 277, 287-88 (2013) ("Although the Court has engaged in historicalism since its inception, the movement towards modern Originalism began in the 1980s. The movement coalesced in reaction to Warren- and Burger-era expansions in the areas of speech, criminal procedure, privacy, congressional power, voting and civil rights, and religion.").

launched sustained attacks against this constitutional corpus of liberal jurisprudence (which extended constitutional protections to criminal defendants⁹³ and welfare recipients,⁹⁴ extended Congress' power,⁹⁵ expanded First Amendment freedoms⁹⁶ and voting rights,⁹⁷ and recognized such rights as the right to use contraceptives⁹⁸ or have an abortion⁹⁹) by attacking its methodology.¹⁰⁰ Since these critics believed that the American judiciary was dominated by a liberal elite bent on shaping the law in accordance with its ideology, their solution was a method of legal interpretation that minimized the opportunities of judges to inject their ideological preferences into their legal decisions.¹⁰¹ Indeed the writings of these conservatives jurists (in books like *Government by Judiciary* or *The Tempting Of America*) were replete with acerbic denunciations of the unbridled discretion of judges, while exalting legal formalism as the

⁹³ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁹⁴ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁹⁵ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁹⁶ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁹⁷ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁹ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰⁰ See generally, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998); MARK I. SUTHERLAND, EDWIN MEESE, ET AL., *JUDICIAL TYRANNY: THE NEW KINGS OF AMERICA?* (2005). See generally Andrew C. Spiropoulos, *Rights Done Right: A Critique of Liberation Originalism*, 78 UMKC L. REV. 661, 661 (2010) ("Bork and Scalia, after all, turned to originalism in response to what they believed was the Court's illegitimate use of judicial power in the Warren and post-Warren Court era. They believed the Court imposed its own moral opinions on the Constitution and the people, replacing the rule of law with its own moral ukases. They sought an alternative to an interpretive method too reliant on the subjective opinions of judges and, thus, corrosive of the foundations of the rule of law.").

¹⁰¹ See also William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 320 (1989) ("A central tenet of these theorists is that judicial discretion to make law is suspect in statutory interpretation, just as it is in constitutional interpretation.").

remedy for such excesses.¹⁰²

Legal formalism was not, of course, a new phenomenon. But whereas the old form of legal formalism has long suffered ridicule and abuse,¹⁰³ formalism's conservative revival in the 1980's had an altogether different reception. Two main reasons accounted for this: the methodology of the new formalism was different and less grandiose than the methodology of the old one,¹⁰⁴ and the intellectual justification for the new formalism was also new – and happened to coincide with intellectual developments in legal theory.

The most famous assault on the old formalism was led by the Legal Realists of the 1920's and 30's who (among other things) attacked the idea – which lay at the heart of the old formalism – that judges were seriously constrained by the logic of highly abstract legal concepts like “contract” or “property.”¹⁰⁵ As a result of these cogent criticisms, American judges were pushed, willy-nilly, towards greater judicial candor: policy-like (and often value-laden) discussions became common in American judicial opinions. But the collapse of the old formalism and the emergence of a new, more honest style of judicial reasoning (“we are all realists now,” went the maxim¹⁰⁶) only precipitated a new search for judicial legitimacy:

¹⁰² See generally Berger, *supra* note 100; Robert H. Bork, *The Tempting Of America* 72-73, 129-32, 143 (1990).

¹⁰³ See, e.g., Jhering, *supra* note 7; Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935); H.L.A. HART, *THE CONCEPT OF LAW* 129 (1961) (“The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for . . . choice . . .”).

¹⁰⁴ See, e.g., Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 210 (2005) (“Even the much-touted “new formalism” of the 1990s tended to keep its distance . . . contrasting its empirical justifications with the essentialism of the classical model.”).

¹⁰⁵ See, e.g., Cohen, *supra* note 103; Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 603 (1943).

¹⁰⁶ See generally Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988).

if judges were not the technocrats they were previously pretending to be, what can legitimize their enormous policy-making powers?

The answers proposed in the following decades have proven unsatisfactory: the sources of judicial constraints suggested by the Legal Process theorists of the 1950's and 60's may have been thoughtful, reasonable, indeed accurate,¹⁰⁷ but they failed to supply the silver bullet that could hermetically separate political ideology from statutory and constitutional interpretation.¹⁰⁸ And so their porous solution—coupled with the many politically controversial decisions of the Supreme Court of the time—made conditions ripe for the resurgence of a new sort of formalism.¹⁰⁹

This new formalism employed novel methodologies and new intellectual justifications. It was no longer defended by pretentious myths about the law's coherence and analytical inevitability (as the old formalism was), but grounded in the perceived necessity of limiting judicial discretion: in a democracy—so went the claim—it was simply improper for judges to make policy decisions. Judges must therefore adopt judicial methodologies that prevent them from injecting their value judgments into their judicial decision-making. The two most comprehensive newly proposed methodologies were textualism (in the statutory realm) and originalism (in the constitutional realm)—two seemingly straightforward practices that (unlike old formalism's conceptual analysis of highly abstract legal terms) appeared genuinely capable of constraining judicial discretion.

Still, under this account of legal formalism, formalism is nothing more than a strategic reaction to a string of liberal decisions.

¹⁰⁷ See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1st ed. 1958).

¹⁰⁸ See, e.g., Richard H. Fallon, Jr., *Reflections on the Hart & Wechsler Paradigm*, 47 *VAND. L. REV.* 953, 974-75 (1994); see also GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 44-47 (1st ed. 1995).

¹⁰⁹ See generally, e.g., Nicholas S. Zeppos, *Scalia's Textualism: The "New" New Legal Process*, 12 *CARDOZO L. REV.* 1597 (1991).

Thus, if, counterfactually, the Supreme Court of the 50's and 60's was dominated by conservative rather than liberal justices, it could have been the liberals who would have embraced formalism.¹¹⁰

No doubt, this popular account has much truth in it.¹¹¹ But it is, at least for now, a little too shallow: there may be more than mere opportunism to the conservative adoption of legal formalism.

B. A-MORALITY

Formalism may eliminate the discretion of liberal judges, thereby reducing their ability to shape the law in accordance with their political views. But it also eliminates the discretion of conservative judges. Thus the following three proposals are something of an improvement to the suggestion above, in that they not only see legal formalism as a strategic conservative move; they also explain why formalism is in fact conducive for conservatism.

The first of these two proposals has its origin in the theory of Max Weber, the renowned sociologist (and lawyer) writing at the turn of the 20th Century. In his classic (posthumous) *Economy and Society*, Weber divided legal systems into several different types,

¹¹⁰ I meant the suggestion to elicit incredulosity. *But see* Brian Tamanaha, *Fellow Liberals: Be a "Legal Formalist," Join the Recovering Realists Club (Small Meetings Likely)*, BALKINIZATION (Dec. 29, 2006, 2:22 PM), <http://balkin.blogspot.com/2006/12/fellow-liberals-be-legal-formalist.html> ("Liberals should consider a different approach: retake the high road and insist that judges should rule according to the law. Rather than ridicule formalistic statements by conservative judges, let's applaud them, then hold the judges to their avowed legal formalism, vociferously criticizing decisions that appear to be politically driven (remember *Bush v Gore!*), condemning violators as hypocrites and offenders of the rule of law. I fervently hope that Justices Scalia, Thomas, Roberts and Alito do not decide cases based upon their political views. Legal formalism stands against this as well.").

¹¹¹ *See*, O'NEILL, *supra* note 90, at 146 ("The Reagan administration found in originalism an academic expression of popular dissatisfaction with liberal Supreme Court decisions. . . . [J]udicial nominees would be screened to ensure that they adhered to a properly limited view of the judicial function, and throughout the 1980s the Reagan administration carefully examined the judicial philosophy of each candidate for the federal bench.").

one of which was “formal rationality.”¹¹² In “formally rational” legal systems, judges applied “highly abstract rules” through a process Weber described as the “logical analysis of meaning.”¹¹³ This “logical analysis of meaning” was, in fact, no different than the old formalism—which was, indeed, the governing judicial ideology of Weber’s time.

Weber believed that this peculiar form of law and of legal interpretation was unique to the Western world, and was a key ingredient in the rise of capitalism in the West.¹¹⁴ One of the reasons for this (we will see another one shortly) was the fact that the “logical analysis of meaning” made considerations of justice extraneous to legal decision-making.¹¹⁵ The elimination of morality as a proper legal consideration, claimed Weber, allowed Western legal systems to develop the legal framework necessary for a free market economy.¹¹⁶ So long as morality was allowed to impact legal resolutions, the legal rules that allow capitalism to thrive were often sacrificed for justice; only when morality was out of the way could the legal system provide the necessary legal underpinning for a truly free market economy. For example, allowing property rights to drive the destitute from land they had occupied for generations,¹¹⁷ or en-

¹¹² 2 MAX WEBER, *ECONOMY AND SOCIETY* 657 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978).

¹¹³ *Id.*

¹¹⁴ *See id.* at 25. *See also* David M. Trubek, *Weber on Law and Capitalism*, 1972 *WIS. L. REV.* 720, 721 (1972).

¹¹⁵ *See* WEBER, *supra* note 112, at 892.

¹¹⁶ *See also* Jürgen Habermas, *Law and Morality: The Tanner Lectures on Human Values* (Kenneth Baynes trans.) (Oct. 1 & 2, 1986), available at http://tannerlectures.utah.edu/_documents/a-to-z/h/habermas88.pdf (“According to Weber . . . any fusion of law and morality threatens the rationality of law. . .”).

¹¹⁷ The most famous example in the annals of capitalism of such large-scale actions was the English Enclosures. *See generally* E. P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1991).

forcing a contract even if it spelled ruin to one of the parties,¹¹⁸ or exempting commercially beneficial activities (like newly developed railways) from compensating for injuring they had caused absent a demonstration of negligence,¹¹⁹ are all results that may appear unjust but may be essential for a successful market economy.

Adopting this thesis to the issue before us, the claim is that the conservative predilection for legal formalism is a function of the tension between conservatism and popular justice. The claim resembles the theory of reactionism above, whose heart is the elimination of judicial discretion; only that here the entire coup consists in the elimination of judicial discretion strictly in regard to morality—which supposedly resists substantive conservative results.

But why think that conservative positions are less moral than liberal ones? The answer cannot be based, à-la Weber, on a conservative belief in capitalism, since American liberals are also advocates of a free market economy. Liberals are capitalists too—but they are no formalists.¹²⁰ In any event, conservative formalists surely believe that their substantive positions are the moral ones, and that the liberal agenda (abortion rights, welfare rights, criminal defendants' rights, strong federal power at the expense of local democracy, etc.) is the one in conflict with popular morality. Linking conservatism and formalism via a-morality smacks of prejudice and partisanship.

¹¹⁸ See generally Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 267 (1999).

¹¹⁹ See, e.g., *U.S. v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947) (discussing the "Hand formula" for calculating whether a legal duty of care was breached).

¹²⁰ But see Tamanaha, *supra* note 110. Perhaps conservative positions are still more "capitalistic" than liberal ones: a pro-business agenda that favors *caveat emptor* to consumer rights, corporate rights to organized labor or employment rights, and strong property rights to anti-discrimination rights. Still it seems to me that we live in a world where the values of capitalism (competition, individual responsibility, self-reliance) are as much those of mainstream liberals as they are of conservatives.

C. ARCHAISM

Archaism is another explanation as to why legal formalism—specifically, originalism—is conducive to conservative results. As we saw, originalism regards the original understanding of a constitutional provision as dispositive to all its present applications (no matter how different are today’s underlying concerns or circumstances or moral and political values).¹²¹ According to the thesis of archaism, conservatives embrace the formalist methodology of originalism simply because the conservative view of the constitution is more in accord with 18th Century (or, in the case of later constitutional amendments, 19th Century) values and political philosophies.¹²² Conservative constitutional positions on gender equality,¹²³ homosexuality,¹²⁴ the rights of criminal defendants,¹²⁵ the range of legitimate criminal punishment,¹²⁶ First Amendment rights (especially where national security is concerned¹²⁷), or even the issue of federal power—have far more in common with 18th and 19th Century norms than liberal ones do. Indeed it is unsurprising that conservatives subscribe to archaic constitutional positions: this pro-

¹²¹ See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

¹²² See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 103 (2008) (“This politically conservative response (‘originalism’ or ‘textualism-originalism’)—which under different conditions could be a liberal response but is more congenial to conservatives because of its evocation of an era more culturally conservative than today. . .”).

¹²³ See, e.g., *Michael M. v. Sup. Ct. of Sonoma County*, 450 U.S. 464 (1981); *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

¹²⁴ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

¹²⁵ See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (limiting the applicability of the Fifth Amendment); *Herring v. United States*, 555 U.S. 135 (2009) (limiting the applicability of the exclusionary rule).

¹²⁶ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.) (The Eighth Amendment does not bar the execution of the mentally retarded).

¹²⁷ See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

clivity is evidenced in their very name. Conservatives prefer the habits and norms of yore as a matter of principle.

In short, originalism – according to this theory – is the conservative way of loading the dice of constitutional interpretation with substantive conservative positions. But archaism fails to account for the conservative attraction to other forms of formalism, like textualism. Indeed the conservative adoption of both originalism and textualism seems to derive, at least according to conservative jurists, from the same set of concerns. Moreover, like reactionism, archaism sees the link between conservatism and formalism in strategic opportunism; but there may be a deeper explanation for the conservative predilection for formalism.

D. MINIMAL GOVERNMENT REGULATION

A purportedly deeper proposal for linking conservatism with formalism sees legal formalism as a deregulative tool. The basic idea is this: both textualism and originalism not only insist that the law requires all and only what the literal language of the law requires (be it determined by modern dictionaries and linguistic conventions or by 18th Century ones); they also insist that the law must be framed in as specific a language as possible (indeed otherwise judicial discretion would not be curbed).¹²⁸ The upshot is that much that does not fall within the law's specifically-defined requirements remains unregulated. Andrei Marmor puts the point as follows:

[T]he underlying motivation of textualism derives from a neo-conservative... ideal of the 'minimal' state and its deep distrust of the 'big government.' ...[T]extualists ... know ... that difficult cases reach higher courts primarily because the language of the relevant statute is not clear enough to

¹²⁸ See, e.g., Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

resolve the issues at hand. Their underlying political agenda, however, is to leave those unregulated issues as they find them. By advocating a theory of statutory interpretation that is preoccupied with literal meaning, and purportedly relies on bright line rules or canons of statutory interpretation, textualism strives to effectuate a broader ideological agenda that seeks to reduce the state and its regulatory functions to the necessary minimum. The deep distrust of neo-conservatives is not really a distrust of judges, it is a distrust of regulation and state intervention.¹²⁹

This take on formalism is explicitly adopted by some conservative jurists, including Frank Easterbrook of the Seventh Circuit Federal Court of Appeals:

A principle that statutes are inapplicable unless they either plainly supply a rule of decision or delegate the power to create such a rule is consistent with the liberal principles underlying our political order. Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government. There is still at least a presumption that people's arrangements prevail unless expressly displaced by legal doctrine. All things are permitted unless there is some contrary rule. ... A rule declaring statutes inapplicable unless they plainly resolve or delegate the solution of the matter respects this position.¹³⁰

¹²⁹ Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063 (2005); see also TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 5 (1996).

¹³⁰ Frank Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 549-50 (1983).

Similarly, Justice Scalia has repeatedly declared that the federal constitution is not supposed to be a remedy for all ills, so that matters it does not explicitly address are simply not governed by it.¹³¹

But it seems that this thesis is based on a fallacy—the unelaborated assumption that textualist or originalist interpretation minimizes the reach of laws *as compared to non-formalistic interpretation*. But neither textualism nor originalism necessarily do that. To borrow from the very few examples presented above: in *District of Columbia v. Heller*, a purported originalist interpretation meant that the federal constitution regulated an area previously believed to be left unregulated by it;¹³² in *Ashcroft v. al-Kidd*, a textualist interpretation meant that the government was free to expand the reach of the Material Witness Statute;¹³³ in *Bowles v. Russell*, a textualist interpretation extended the reach of a procedural requirement that the dissent claimed should not be applied;¹³⁴ and in *Kirtsaeng v. John Wiley & Sons, Inc.* a textualist argument was made in support of expanded copyright protections.¹³⁵ Indeed the relation between the literal

¹³¹ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 427 (1993) (Scalia J., concurring) (“We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be ‘actually innocent.’ I would have preferred to decide that question, particularly since, as the Court’s discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. . . . I nonetheless join the entirety of the Court’s opinion . . . because there is no legal error in deciding a case by assuming, *arguendo*, that an asserted constitutional right exists, and because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice. . . .”).

¹³² 554 U.S. 570 (2008).

¹³³ 131 S. Ct. 2074 (2011).

¹³⁴ 551 U.S. 205, 215 (2007).

¹³⁵ See generally *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013). And while we’re at it, here is another example that may be familiar to many readers: In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Supreme Court followed the

language of legal rules and the extent of government regulation is far more complicated than the oversimplified assumption built into this thesis: legal rules extend liberties as much as obligations, grant exemptions and immunities, and regulate against a vast background of other legal and social norms that determine whether a particular statutory or constitutional provision increases or decreases government intervention (Indeed this lesson was repeatedly preached by the legal realists of the 1920's.¹³⁶). The supposition that formalism would contract rather than expand the reach of government regulation may be intuitively appealing, but it is, in fact, speculative in the extreme, and is probably untrue.

Moreover, the “minimalist state” strand of conservatism is not representative of many conservatives, and does not reflect the position of many of the advocates of legal formalism. Most conservatives may favor minimal state intervention in the economy, but they also favor extensive state regulation of the social sphere—from abortion to illicit drugs to assisted suicide. The “minimum regulation” thesis may indeed emanate from some legal philosophy wonks with a libertarian streak; but that agenda is not shared by many of their conservative peers, and is based on false assumptions about law and legal interpretation.

E. LEGAL CERTAINTY

Max Weber had another—more important—argument as to why legal formalism was essential for capitalism: he claimed that

text of the Endangered Species Act and concluded that the Act prohibited completion of a dam which was virtually completed and to which Congress continued to appropriate millions of dollars after being apprised of the project's expected impact on the snail darter—a small fish of little apparent interest. The dissenters' non-textual approach would have decreased the regulative reach of this federal law.

¹³⁶ See, e.g., Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920).

formalism provided the legal certainty that capitalism required.¹³⁷ In an often-cited article, Duncan Kennedy has proposed a similar idea, linking conservatism to formalism via the idea of legal certainty.¹³⁸ According to Kennedy, conservatism and formalism share a belief in the unqualified importance of a clear and predictable legal order. Unlike Weber, Kennedy does not allege an actual causal link between formalism and legal certainty; but he does attribute the pretension of legal certainty to legal formalism, and he then links this formalism to conservatism.

Kennedy's thesis is that "[t]here is a strong analogy between the arguments that lawyers make when they are defending a 'strict' interpretation of a rule and those they put forward when they are asking a judge to make a rule that is substantively individualist."¹³⁹ By "strict interpretation" Kennedy is referring to legal formalism; and by "individualism" he is referring to conservatism. Thus Kennedy speaks of "strict interpretation" as "rigid rules rigidly applied";¹⁴⁰ and he defines "individualism" to include "the belief that a preference in conduct for one's own interests is legitimate, . . . an insistence on defining and achieving objectives without help from others (*i.e.*, without being dependent on them or asking sacrifices of them) . . . [and] a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others. . . . Individualist rhetoric in general empha-

¹³⁷ See Weber, *supra* note 112, at 883. See also *id.* at 847 ("[T]he bourgeois interests . . . had to demand an unambiguous and clear legal system that would be free of irrational administrative arbitrariness as well as of irrational disturbance by concrete privileges, that would also offer firm guarantees of the legally binding character of contracts, and that, in consequence of all these features, would function in a calculable way."). For criticism of this position, see generally Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. Pub. Int. L.J. 175 (2010).

¹³⁸ See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

¹³⁹ *Id.* at 1738.

¹⁴⁰ *Id.* at 1685.

sizes self-reliance as a cardinal virtue.”¹⁴¹ These positions, of course, lie at the heart of American conservatism.¹⁴²

Kennedy explores the similarity between the arguments for “individualism” (a.k.a conservatism) and the arguments for legal formalism along three domains—morality, economics, and politics.¹⁴³ The following synopsis is confined to the moral dimension— if only because, as Kennedy points out, it is the “simplest of these [three] analogies.”¹⁴⁴

Morally speaking, individualism is the belief that “people *ought* to be willing to accept the consequences of their own actions. They ought not to rely on their fellows or on government when things turn out badly for them. They should recognize that they must look to their own efforts to attain their objectives.”¹⁴⁵ The same logic, says Kennedy, underlies legal formalism.¹⁴⁶ Like individualism, legal formalism evidences a belief that people should be given the conditions allowing them to attain their objectives through their own efforts; that people are consequently responsible for their successes or failures; and that people should weather these conse-

¹⁴¹ *Id.* at 1713, 1738..

¹⁴² See, e.g., GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 30 (2d ed. 2002) (“Here are some words and phrases used over and over in conservative discourse: character, virtue, . . . self-reliance, individual responsibility. . . .”); Michael Kranish & Bobby Caina Calvan, *A Staunch Conservative Based on Self-Reliance*, BOSTON GLOBE, Aug. 12, 2012, http://www.boston.com/news/nation/articles/2012/08/12/paul_ryan_mitt_romneys_running_mate_formed_beliefs_of_self_reliance_conservatism_from_early_age/ (explaining Republican Congressman Paul Ryan’s “belief in self-reliance”); Paul Jaskunas, *A False Self-Reliance*, BALTIMORE SUN, Aug. 23, 2012, http://articles.baltimoresun.com/2012-08-23/news/bs-ed-self-reliance-20120823_1_reliance-ryan-budget-paul-ryan (“Republicans have long presented themselves as the authentic champions of individualism and the American Dream. That posture is essential to Paul Ryan's appeal among conservatives. He's Mr. Self-Reliance, eager to wean the masses from the big government teat, freeing us to become truly prosperous.”).

¹⁴³ See Kennedy, *supra* note 137, at 1738. See generally *id.*

¹⁴⁴ *Id.* at 1738.

¹⁴⁵ *Id.* at 1738.

¹⁴⁶ *Id.* at 1739.

quences themselves and not ask other individuals (or the government) to mitigate them.¹⁴⁷

Thus, at the root of formalism is the belief that legal interpretation must limit itself to strict enforcement of clearly worded legal rules (and abstain from any deliberations over issues of policy or morality or legislative purpose) because that would give people secure knowledge of their legal rights and duties, thereby enabling their self-reliance—and ultimately justifying attributing to them full responsibility for the consequences. Under such conditions of legal certainty “there is no good reason why the victim should not have engaged in competent advance planning to avoid what has happened to him.”¹⁴⁸ In short, the argument for legal formalism “is unmistakably individualist [i.e., conservative]. It is the sibling if not the twin of the general argument that those who fare ill in the struggle for economic or any other kind of success should shoulder the responsibility, recognize that they deserved what they got, and refrain from demanding state intervention to bail them out.”¹⁴⁹

According to Kennedy’s argument, legal formalism is perceived as enabling the legal conditions that are needed for the implementation of conservative ideology, by establishing a purportedly predictable legal environment (“rigid rules rigidly applied”¹⁵⁰) that allows people to know where they legally stand, and to plan their actions accordingly.¹⁵¹ The greater knowability of formalistic law allows people to assume maximum responsibility for their actions (and also allows for saddling them with that responsibility), because it allows them to contemplate their actions knowing full well what the legal consequences would be.

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1687. Expanding on this point, Kennedy notes that “[f]ormally realizable general rules are, by definition, knowable in advance.” *Id.* at 1739.

¹⁵¹ *See id.*

As already noted, Kennedy's thesis is far weaker than Weber's—who actually believed that legal formalism provided certainty and predictability.¹⁵² Kennedy knows better: legal formalism does no such thing; at the very least, he says, it is extremely difficult to examine such factual assertions.¹⁵³ And so Kennedy limits himself to an argument about the similarity of the *rhetoric* of conservatism and formalism: conservatism and legal formalism share a similar “rhetoric.”¹⁵⁴ In Kennedy's cautious articulation, “the argument for [formalism] *smacks* of individualism.”¹⁵⁵ The relation between conservatism and formalism is therefore no more than a “psychological” association aided by a “historical accident” (the two came together in the intellectual justification of laissez-faire economics and are since conjoined).¹⁵⁶

Nonetheless, Kennedy's argument provides a strong thesis as to why conservatives may be attracted to legal formalism—even if their attraction may ultimately be rooted in an intellectual error (that is, the error that legal formalism provides legal certainty¹⁵⁷):

¹⁵² Compare *id.* with WEBER, *supra* note 112, at 667 (noting that the certainty provided by legal formalism is the “most elementary” part of economic life).

¹⁵³ See Kennedy, *supra* note 137, at 1723 (“When we set out to analyze an action, and especially a judicial opinion, it is only rarely possible to make a direct inference from the rhetoric employed to the real motives or ideals that animate the judge. And it is even harder to characterize outcomes than it is personalities or opinions. It will almost always be possible to argue that, if we look hard at its actual effects on significant aspects of the real world, a particular decision will further both altruist and individualist values, or neither.”).

¹⁵⁴ *Id.* at 1776.

¹⁵⁵ *Id.* at 1742 (emphasis added).

¹⁵⁶ See *id.* at 1745 (“For all one can tell from the discussion so far, this structural similarity is an interesting historical accident. On the basis of the analogy we might hazard a guess that particular values or premises that make substantive nonintervention attractive will tend to make formal nonintervention attractive as well. But this would be no more than a psychological speculation. . .”).

¹⁵⁷ For an explanation of why formalism cannot provide the certainty that it purports to provide, see generally Ofer Raban, *supra* note 136.

legal formalism coheres with the picture of moral responsibility advanced by conservatism.

By contrast, the next hypothesis on the conservative predilection for formalism is not rooted in mere analogous rhetoric, or indeed in an intellectual fallacy, but in a principle deeply rooted in the very foundations of conservative thought.

F. SKEPTICISM

As we saw, formalistic legal reasoning seeks to reduce legal decision-making into an exercise in grammar and syntax (in the case of textualism), or history (in the case of originalism), or some other form of reasoning divorced from any substantive evaluation like morality or public policy.¹⁵⁸ And we also saw that conservatives embrace such form of judicial decision-making because they believe that engaging in substantive deliberations is bound to result in judges imposing their own ideological or moral preferences on the law.¹⁵⁹

So far so good: all the theories we examined so far agree that the elimination of judicial discretion is central to the conservative attraction to formalism. But what explains the conservative insistence that wide judicial discretion is bound to result in judges imposing their own preferred ideologies on the law?

One possible answer is judicial bad faith: if allowed to engage in decision-making that is not clear and determinate, judges may be tempted to reach their substantively favorite results, because they could hide their manipulation of the legal materials behind opaque

¹⁵⁸ See *supra* notes 4-5 and accompanying text.

¹⁵⁹ See *supra* Part II.B. As one formalist Michigan Supreme Court justice put it when explaining his reluctance to consider the legislative purpose of statutes: "what I discern as the principal purpose of the [statute] cannot be allowed to trump its actual language. To allow such a result would enable the judge to impose on the law his own characterization of its unstated 'purpose. . .'" *Cameron v. Auto Club Ins. Assn.*, 718 N.W.2d 784, 799 (Mich. 2006) (Markman, J., concurring).

judicial reasoning.¹⁶⁰ They would opt for the decisions they favor instead of the decisions that are actually mandated.¹⁶¹

The suggestion of bad faith is not the explanation favored by conservatives, and for obvious reasons. If the problem is one of judicial bad faith, the likely solution is not formalism. True, judicial bad faith may presumably be more *visible* if legal formalism were the common method of legal interpretation (though how much more is unclear, given now common disagreements among textualists¹⁶² and originalists.¹⁶³) And yet the very allegation of bad faith assumes that judicial deception can be identified, but that judges engage in bad faith anyway. Thus, bad faith is also likely to occur under formalistic methodologies. Indeed if bad faith is our problem, the adoption of formalism is both too radical and potentially too inefficient. Changes in professional selection methods or enhancement of professional ethics may be more modest and more realistic solutions.¹⁶⁴ (At any event, the attribution of professional bad faith to judges most certainly cuts against the self-understanding of most members of the judiciary, and is a hard one to substantiate.)

Instead, the principal reason for the conservative allegation (that non-formalist interpretation is bound to result in judges imposing their ideological preferences on the law) is based on conservatives' deep-seated skepticism over the possibility of objective rational deliberations in the areas of public policy and justice. If

¹⁶⁰ Cf. Jack Wade Nowlin, *Conceptualizing the Dangers of the "Least Dangerous" Branch: A Typology of Judicial Constitutional Violation*, 39 CONN. L. REV. 1211 (2007) (examining judicial bad faith in constitutional cases).

¹⁶¹ Cf. *id.* at 1259-60.

¹⁶² Compare *Smith v. United States*, 508 U.S. 223 (1993) (O'Connor, J., majority opinion) (textualist analysis) with *id.* at 241 (Scalia, J., dissenting) (textualist analysis).

¹⁶³ Compare *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J., majority opinion) (originalist analysis) with *id.* at 636 (Stevens, J., dissenting) (originalist analysis).

¹⁶⁴ See, e.g., RONALD DWORIN AND CONTEMPORARY JURISPRUDENCE 272, 274 (Marshall Cohen, ed. 1984).

there is no objective rationality in these domains, there could be no correct legal results based on such deliberations—only personal value judgments. The problem with judicial discretion is therefore much more fundamental than mere bad faith: even if judges operate in perfect *good* faith, they are still bound to impose their own predilections on the law, for lack of a choice.¹⁶⁵

Indeed, skepticism vis-à-vis the possibility of objective rational decision-making in the formulation of public policy or morality has long played an important role in conservatism's intellectual foundations. Edmund Burke, the 18th Century iconic conservative intellectual, put things this way:

We know that we have made no discoveries; and we think that no discoveries are to be made, in morality; nor many in the great principles of government, nor in the ideas of liberty, which were understood long before we were born . . . We preserve the whole of our feelings still native and entire, unsophisticated by pedantry. . .¹⁶⁶

Burke disdained the French philosophes and their cherished Enlightenment, and saw the bloodshed and upheaval

¹⁶⁵ See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 17-18 (1998) ("Under the . . . self delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires. . ."). See also Antonin Scalia, *Originalism: the Lesser Evil*, 57 U. CINN. L. REV. 849, 863 (1989) ("Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. . . Nonoriginalism, which under one or another formulation invokes 'fundamental values' as the touchstone of constitutionality, plays precisely to this weakness. It is 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.'").

¹⁶⁶ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE: AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 128 (London, J. Dodsley 1790).

of the French Revolution as a pernicious culmination of this new reliance on reason:¹⁶⁷

All the pleasing illusions, which made power gentle and obedience liberal, which harmonized the different shades of life, and which, by a bland assimilation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason. . . . [I]n this enlightened age I am bold enough to confess, that we are generally men of untaught feelings; that instead of casting away all our old prejudices, we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.¹⁶⁸

For Burke, conservatism was justified because tradition represented the accumulated wisdom of millennia, while reason lacked the potency to correct that wisdom.¹⁶⁹ Conservatism harks to past practices and traditions precisely because of its skepticism of man's ability

¹⁶⁷ *Id.* at 127 ("Thanks to our sullen resistance to innovation, thanks to the cold sluggishness of our national character, we still bear the stamp of our forefathers. We have not (as I conceive) lost the generosity and dignity of thinking of the fourteenth century; nor as yet have we subtilized ourselves into savages. We are not the converts of Rousseau; we are not the disciples of Voltaire; Helvetius has made no progress amongst us.").

¹⁶⁸ *Id.* at 114-29.

¹⁶⁹ See generally M. MORTON AUERBACH, *THE CONSERVATIVE ILLUSION* 41 (Columbia Univ. Press 1959).

to reason his way into new insights regarding social policy and morality.¹⁷⁰

This idea, which lies at the heart of conservative thought and belief, continues to animate modern conservatism. Michael Oakeshott, a central intellectual figure in contemporary conservatism,¹⁷¹ rose to prominence with a book entitled *Rationalism in Politics*, which warned against over-reliance on rationality in the formulation of public policy, and criticized the failure to “doubt[] the power of . . . ‘reason’ . . . to determine the worth of a thing, the truth of an opinion or the propriety of an action.”¹⁷² Similar skepticism is regularly expressed by popular conservative figures, from politicians to talk-show radio hosts (and perhaps can even be glimpsed in widespread conservative rejection of scientific theories, like the theory of evolution or the science behind climate change).¹⁷³ In short, conservatism justifies its adherence to the ways of yore by doubting the usefulness of reason in formulating better habits of thought and action in human affairs. (In this, conservatism is in direct contradiction with the basic tenets of the Enlightenment, and consequently with much of modernity – though post-modernism is a different matter...)

In the legal domain, this skepticism assumes the form of a theory about legislation and the role of the judiciary in a constitutional democracy. In a democracy, so goes the argument, value judgments must be made by representatives of the people elected in free periodic elections, and a non-elected judiciary appointed for life should abstain from engaging in such determinations. Since there

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Timothy Fuller, *The Work of Michael Oakeshott*, 19 POL. THEORY 3 (1991).

¹⁷² MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 6 (Timothy Fuller, ed., 2d ed. 1991).

¹⁷³ See, e.g., Karl W. Giberson & Randall J. Stephens, *The Evangelical Rejection of Reason*, N.Y. TIMES, Oct. 11, 2011, <http://www.nytimes.com/2011/10/18/opinion/the-evangelical-rejection-of-reason.html> (describing the anti-intellectualism and the rejection of science by Republican presidential candidates).

can be no objective rational deliberations, or objectively correct results, in the domains of public policy and morality, judges employing such considerations would necessarily impose their own conceptions of justice and public policy on the legal materials. Only legal formalism allows the judiciary to engage in legal interpretation that befits its proper institutional and constitutional roles, because only with legal formalism are judges prevented from engaging in the sort of discussions that necessarily devolve into ideological policy preferences. In short, conservative skepticism of reason accounts for much of the conservative affinity for legal formalism.

In fact, conservative formalists believe that judicial deliberations over issues of policy or justice lack objective rationality at two levels: first at the level of substance, since there is no objectively rational standard in matters of public policy or morality, only ideological preferences; and second as a matter of legislative purpose or intent, since statutes often do not reflect any rational or coherent policy determination, only “messy legislative compromises.”¹⁷⁴ Legislative enactments—say the formalists—often represent no coherent or rational policies or values¹⁷⁵ The legislative process, with its political give-and-take and legislative compromises, often results in legislative enactments that lack rational coherence or a unifying purpose.¹⁷⁶ Thus non-formalistic methodologies of legal interpreta-

¹⁷⁴ John F. Manning, *What Divides Textualists from Positivists*, 106 COLUM. L. REV. 70, 77 (2006). Let me briefly add that the conservative argument, standing alone, is guilty of begging the question, since the lack of a rational or coherent legislative preference does not yet establish that judges should not impose such rationality and coherence, as a matter of their institutional and constitutional roles.

¹⁷⁵ See John F. Manning, *Competing Presumptions about Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2050 (2006) (arguing for textualism over purposivism because in the latter “judges risk substituting their own preferences for the unruly but democratic preferences of the legislature”).

¹⁷⁶ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2412 (2003) (“[I]ndividual legislators’ preferences cannot realistically be aggregated into a coherent collective decision, and that legislative outcomes often turn on procedural idiosyncrasies that make the legislature’s final choice, at least in some sense, arbitrary.”).

tion “rest[] on the assumption that interpretation should proceed as if a reasonable person were framing coherent legislative policy. But measured against the true workings of the legislative process, that is an unreasonably optimistic view.”¹⁷⁷ Legislative enactments are often neither reasonable nor coherent. Justice Scalia put that point as follows:

There are pretty absurd statutes out there. That is what you get from legislative compromise. . . . Legislation is often the product of unseen and unknowable compromise. That's why we talk about ‘backroom deals.’ And it is now the Court's position—and properly so—that ‘[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President, . . . are not for us to judge or second-guess.’¹⁷⁸

Scalia goes on to remark on a formalistically-decided case that “[t]he [legislative] compromise in [the case] was quite absurd—made no sense”¹⁷⁹ The result reached by the Supreme Court was therefore “certainly absurd as a matter of substance. But we enforced [the statute] as written because the text was clear, and we presumed that the opposing factions in Congress had bargained for just such a result.”¹⁸⁰ The place of reason in this universe is very limited indeed.

¹⁷⁷ Manning, *supra* note 176, at 70, 102.

¹⁷⁸ Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1614 (2012).

¹⁷⁹ *Id.* at 1615.

¹⁸⁰ *Id.* at 1614; *see also* *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 460-1 (2002) (“Where the statutory language is clear and unambiguous, we need neither accept nor reject a particular “plausible” explanation for why Congress would have written a statute. . . . The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess.”).

G. CRITICAL LEGAL STUDIES

Adoption of legal formalism is not a *necessary* consequence of this skepticism of reason. Many on the left, including many in legal academia, have aligned themselves with such skepticism without also embracing formalism.¹⁸¹ Scholars associated with the Critical Legal Studies movement (CLS) have long denied the objective rationality of legal reasoning (with book titles like *The Enchantment Of Reason*¹⁸²); but they never came to endorse legal formalism as a possible way out of that difficulty. To the contrary: legal formalism is one of the targets of CLS criticism.¹⁸³

But CLS has no solution to the problem raised by the alleged failure of legal reasoning, and in fact CLS scholars are admittedly not concerned with finding one: CLS is a critical school of thought with no interest in redeeming legal practice from the charge of illegitimate policy-making. Many CLS scholars do not believe that this is at all possible: for them the law is irredeemably political.¹⁸⁴

But for those who are interested in a positive proposal—like the conservative opponents of the liberal Warren Court—legal formalism is a natural solution to the difficulty of skepticism. If there are no objectively rational solutions to questions of public policy and

¹⁸¹ Richard Rorty is probably the most notable example of a post-modern leftist American philosopher. See, e.g., Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1816 (1990) (“The pragmatists provided good philosophical arguments against some of the philosophical presuppositions of formalism.”).

¹⁸² PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

¹⁸³ See, e.g., Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 215 (2009) (“So, as a working theory of law, comprehensive formalism is impossible. Too much of what we consider to be ‘law,’ and likely would wish to retain as integral to what we call law, would have to be jettisoned or declared errant, spurious, or otherwise pathological. For a judge to be a comprehensive formalist would render him antediluvian. For a lawyer to be a comprehensive formalist would be malpractice.”).

¹⁸⁴ But see E. Dana Neacsu, *CLS Stands for Critical Legal Studies, if Anyone Remembers*, 8 J. L. & POL’Y 415 (2000) (noting that CLS may be able to resurrect itself by embracing its Marxist roots).

morality, so that any such deliberations are irremediably a matter of mere ideology, formalism may be the way to go.

III. CONCLUSION: FORMALISM, CONSERVATISM, AND DEMOCRACY

After a century of being widely discredited, legal formalism has made a comeback into the heart of American legal practice. A new type of formalism is sweeping through large swaths of Supreme Court jurisprudence, propagated in the opinions of the Court's conservative justices (sometimes with the unwitting connivance of the liberal ones).¹⁸⁵ Justified as a preserver of democracy, executed via methodologies more simple and straightforward than those of the old formalism, and coming at an opportune moment in the history of legal theory, this new legal formalism fell on fertile ground.¹⁸⁶

This formalistic resurgence has been in the making for decades, and there is little surprise in its clear upswing under the conservative Roberts Court: after all, legal formalism has been almost uniquely a conservative project. Still, the link between conservatism and formalism—so important for the understanding of current Supreme Court jurisprudence—remains the subject of various competing, often incompatible, and frequently very thin explanations: from sheer opportunism, to archaism, to deregulation, to the purported advancement of personal responsibility.¹⁸⁷

Ultimately, however, all explanations converge on the reduction of judicial discretion as the key component of the new formalism. And this conservative aversion to wide judicial discretion is traceable, in turn, to deep skepticism over rational deliberations in the domains of public policy and justice.¹⁸⁸ At the root of the con-

¹⁸⁵ See *supra* Part I.

¹⁸⁶ See *supra* Part II.A.

¹⁸⁷ See *supra* Part II.

¹⁸⁸ See *supra* Part II.B.

servative attraction to formalism lies a deep skepticism of the powers of reason.¹⁸⁹

Unsurprisingly, this article did not tackle the formidable philosophical question at the heart of this debate—viz, the issue of objective rationality in the domains of morality and public policy. (Interested readers can find a plethora of literature on the subject, including Ronald Dworkin’s major recent work, *Justice for Hedgehogs*.¹⁹⁰) But I do want to conclude with a few words about the claim that legal formalism is justified by its faithfulness to democracy, and that anything but formalism is bound to result in the judicial usurpation of legislative power.

One person who wrote extensively on the relation between democracy and skepticism of reason is the renowned philosopher Karl Popper. In a number of works, including his celebrated *The Open Society and Its Enemies*, Popper explored the antagonism between so-called “open societies”—which, per Popper’s definition, are committed to answering social, moral, and political questions through critical rational deliberations—and “closed societies” marked by commitment to unquestioned authority and tradition.¹⁹¹

According to Popper, there is a great contrast in the intellectual foundations of open and closed societies: specifically, a great contrast in their respective approaches to rational objectivity in the domains of public policy and morality. Popper writes:

[W]e can interpret traditionalism as the belief that, in the absence of an objective and discernable truth, we are faced with the choice between accepting the authority of tradition, and chaos Rationalism [by contrast] has . . . always claimed the right of reason . . . to criticize, and to re-

¹⁸⁹ See *supra* Part II.E.

¹⁹⁰ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (1st ed. 2011) see also THOMAS A. SPRAGENS, *REASON AND DEMOCRACY* (1st ed. 1990).

¹⁹¹ See generally KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966).

ject, any tradition and any authority, as being based on sheer unreason or prejudice or accident.¹⁹²

Popper then proceeds to link rational skepticism with authoritarianism, and rationalism with democracy: democracy, says Popper, requires a belief in rationalism and in the ability of reason to beneficially shape public policy and moral norms.¹⁹³ Thus, Popper identifies the spirit of democracy with a humanistic belief in man's ability to reason through social and moral difficulties, and claims that skepticism of that ability leads to the production of "closed societies" having authoritarian tendencies. (Notably, this attempt to link conservatism to authoritarianism has its counterpart in psychological studies linking conservatism to the so-called "authoritarian personality."¹⁹⁴) According to Popper, conservative thought tends to lead to authoritarian thought¹⁹⁵ – which is why "[i]n *The Open Society*, Popper is consistently scathing about conservatives and conservatism."¹⁹⁶

Whatever one thinks about these philosophical or psychological speculations, legal formalism does seem to have a distinct authoritarian streak. After all, legal formalism is an interpretive methodology that insists on blind submission to the authority of text or history, no matter how unjust or unreasonable the consequences may be.¹⁹⁷ And legal formalists adhere to substantive positions that, arguably, allow for greater measures of authoritarianism than the po-

¹⁹² KARL POPPER, *CONJECTURES AND REFUTATIONS* 7 (1st ed. 1968).

¹⁹³ The school of thought known as "deliberative democracy" has given this claim its most detailed articulation to date. See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans. 1996).

¹⁹⁴ See, e.g., GEORGE LAKOFF, *supra* note 141; A.G. Smithers & D.M. Lobley, *Dogmatism, Social Attitudes and Personality*, 17 *BRIT. J. OF SOC'Y & CLINICAL PSYCHOLOGY* 135, 135-42 (1978). But see Jonathan Haidt, *THE RIGHTEOUS MIND: WHY PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (Pantheon 2012).

¹⁹⁵ See *supra* notes 186-87 and accompanying text.

¹⁹⁶ JEREMY SHEARMUR, *THE POLITICAL THOUGHT OF KARL POPPER* 71 (1st ed. 1996).

¹⁹⁷ See, e.g., *infra* notes 202-204 and accompanying text.

sitions of their liberal counterparts. Justice Scalia, for example, favors a strong executive with weak legislative control;¹⁹⁸ objects to constitutional restrictions on government intrusion into the private sphere, including the criminalization of private sexual conduct (Scalia thinks that the government may constitutionally criminalize the use of contraceptives or adultery and masturbation);¹⁹⁹ calls for broader police powers in the areas of searches and seizures²⁰⁰ and police interrogations,²⁰¹ and weaker right to counsel protections for criminal defendants;²⁰² thinks that the First Amendment allows the government to criminalize political speech that happens to assist terrorist organizations, even if its aim is peaceful;²⁰³ believes that the government may criminalize all sort of factual lies;²⁰⁴ and thinks that the First Amendment is not offended when a government em-

¹⁹⁸ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting) (opining that a law allowing the appointment of an independent counsel to investigate the crimes of executive officials is an unconstitutional violation of executive constitutional powers if insulated from full executive branch control).

¹⁹⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., concurring) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”).

²⁰⁰ See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (5-3 conservative majority opinion written by Justice Scalia, expanding search and seizure power under the Federal Material Witness statute).

²⁰¹ See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (5-4 conservative majority opinion joined by Justice Scalia, limiting the reach of defendants’ Fifth Amendment right to remain silent).

²⁰² See *Montejo v. Louisiana*, 556 U.S. 778 (2009) (5-4 conservative majority opinion written by Justice Scalia, overruling *Michigan v. Jackson*, 475 U.S. 625 (1986) and limiting the reach of defendants’ Sixth Amendment right to counsel).

²⁰³ See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (6-3 conservative majority opinion joined by Justice Scalia, rejecting a claim of a First Amendment violation).

²⁰⁴ See *United States v. Alvarez*, 132 S. Ct. 2537, 2556-2565 (2012) (Alito, J., joined by Scalia, J., dissenting) (rejecting a claim of a First amendment violation).

ployee is fired for making comments criticizing the functioning of his employer.²⁰⁵

True, Scalia also opposes broad governmental powers over economic regulations,²⁰⁶ gun controls,²⁰⁷ campaign finance,²⁰⁸ and government-imposed anti-discrimination policies;²⁰⁹ and he also favors more state power at the expense of federal authority.²¹⁰ But it seems to me that authoritarianism is better epitomized by extensive police powers, intrusion into citizens' private lives, and restrictions on people's speech²¹¹ than by gun control, economic regulations, or attempts to equalize the financial prowess of political campaigns.

Be that as it may, there is, in fact, good cause for optimism: the future of formalism cannot be promising. In the end, the refusal to engage in substantive deliberations over issues of policy and justice produces an unrealistic, and often dishonest, form of legal interpretation. (Indeed even the justices who regularly join formalistic opinions, and even write them, have shown willingness to flout

²⁰⁵ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (5-4 conservative majority opinion joined by Justice Scalia, rejecting a claim of a First Amendment violation).

²⁰⁶ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Kelo v. City of New London*, 545 U.S. 469 (2005) (a 5-4 liberal majority opinion, with Justice Scalia joining Justice Thomas' dissent).

²⁰⁷ See *D.C. v. Heller*, 554 U.S. 570 (2008) (Scalia, J., majority opinion); *McDonald v. Chicago*, 130 S. Ct. 3020, 3050-58 (2010) (Scalia, J., concurring).

²⁰⁸ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 385-93 (2010) (Scalia, J., concurring).

²⁰⁹ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (a 5-4 conservative majority opinion, with Justice Scalia joining the majority).

²¹⁰ See *United States v. Lopez*, 514 U.S. 549 (1995).

²¹¹ See generally Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725 (2011) ("The Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government's national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.").

formalism whenever the stakes proved too high.²¹²) Legal formalism may be experiencing a temporary resurgence, but its methodology will never be widely shared, or consistently used. In the meantime we should keep the limelight on this unreasonable form of judicial decision-making, and on its unfortunate impact on a growing body of law.

²¹² Justice Alito, for example, subscribed without qualification to Justice Scalia's originalist opinion in *Heller*, but then mocked the helpfulness of originalism in such cases as *U.S. v. Jones*, 132 S.Ct. 945 (2012) (Alito, J., concurring) ("[I]t is almost impossible to think of late-18th-century situations that are analogous to [the secretion of a GPS device in a vehicle]. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner? . . . [T]his would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience."). Alito also mocked Justice Scalia's originalist questioning during oral argument in *Brown v. Entertainment Merchants Association*, where he quipped: that "Well, I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?" Transcript of Oral Argument at 17, *Brown v. Entertainment Merchants Ass'n*, 132 S.Ct. 81 (2011) available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf). Justice Scalia also ignored his cherished originalism in *McDonald*, 130 S.Ct. at 530 (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'")