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***509 JUSTICE SCALIA'S TAX JURISPRUDENCE**

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I. Introduction

JUSTICE Scalia is an outspoken conservative acclaimed for his remarkable intellect and scholarship, and is noted for his adherence to the principle of judicial restraint. He pursues what he insists is an "originalist" path that relies on the Constitution's actual text in decision-making. He works hard to try to maintain constitutional interpretation that does not change from case to case.

Scalia is concerned that Congress writes imprecise legislation and then leaves its interpretation and application in the hands of administrative agencies and bureaucrats. Scalia supports a strong federal government. He has been an outspoken opponent of affirmative action or preferential treatment to correct past discrimination. Scalia is a minority voice on the Court in rejecting a constitutional basis for abortion, and sees no constitutional barrier to the death penalty. His reading of the First Amendment generally benefits those political interests he supports such as abortion protesters and prayer at public school graduations. On these issues he often casts a dissenting vote.

Scalia has said that "the Constitution is an enduring document but not a 'living' one, and "its meaning must be protected and not repeatedly altered to suit the whims of society." [\[FN1\]](#) Scalia states that an originalist or a textualist takes meaning from the Constitution "from its text, and that meaning does not change." [\[FN2\]](#) The text itself should be augmented only by examining what the Framers of the Constitution intended at the time, not by what a majority in society today might prefer. Scalia believes that his approach is the only way we can preserve the Constitution's guiding principles. Judges who do not adopt an originalist or "textualist" approach, according to Scalia, have no judicial philosophy and issue rulings based on the majority view of society at the time. He believes that the answer for advocates of controversial issues is to gather enough support from the public and pass laws, rather than to have the Supreme Court Justices continually revise their views of the Constitution in order to satisfy society.

So what happens when an "originalist"-concerned that Congress writes imprecise legislation and then leaves its interpretation and application in the hands of administrative agencies or, worse yet, the courts-is forced to deal with tax issues? This article takes a look at whether Scalia has been successful in trying to construct a coherent theory of constitutional interpretation that does not change from case to case, when those cases involve tax issues.

***510 II. By the Numbers: Which Justice Do You Want Writing the Opinion?**

Since being seated on the Court, Justice Scalia has authored an opinion in fifty tax cases. Of those fifty, the taxpayers [\[FN3\]](#) won twenty-one. Justice Scalia would have had the taxpayer win in 20.5 of those cases. [\[FN4\]](#) The Justices' statistics are set forth in the chart below.

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Some of the cases involved negative Commerce Clause challenges, which means that a taxpayer other than the one to whom the law applied was treated as the taxpayer. Such a victory would mean that some taxpayers would lose a tax benefit because it was determined to be an unconstitutional restraint of free trade (i.e., an unfair benefit for the home team). Viewing taxpayer victories as an inclination for lower taxes or loopholes would be incorrect. It may reflect Justice Scalia's vocal disapproval of the negative Commerce Clause.

*511 What may be more revealing, however, is to examine the "pure" tax cases-those cases dealing with interpretation of the tax statutes. Here we see that Justice Scalia is near the bottom in taxpayer victories, [\[FN5\]](#) joined by Rehnquist, but not by Thomas. [\[FN6\]](#)

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III. The Tax Cases

The tax cases are divided into a number of "tax related" topics:

- . Commerce Clause
- . Compensation Clause (judges' salaries)
- . "Pure tax" (statutory or treaty interpretation)
- . Free Exercise/Establishment/Due Process Clauses
- . Retroactive application of tax decisions
- . Legislative history

*512 A. The Commerce Clause Tax Cases

"During the first years of our history as an independent confederation, the National Government lacked the power to regulate commerce among the States. Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents a 'conflict of commercial regulations, destructive to the harmony of the States,' ensued." [\[FN7\]](#) One of the objectives in the adoption of the Constitution was to keep the commercial intercourse among the States free from all invidious and partial restraints. [\[FN8\]](#) Thus, [Article I § 8, cl. 3 of the U.S. Constitution](#) provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The fifteen case opinions authored by Justice Scalia falling in this category all involved a challenge to a state's tax scheme. The Constitution would seem to have nothing to do with a state's tax scheme, except that the power of Congress to regulate commerce among the several states might restrict the power of a state to affect interstate commerce through its tax laws. Justice Scalia expressed it this way:

[Concluding that a state's tax does not facially discriminate against interstate commerce] seems to me the most we can demand to certify compliance with the "negative Commerce Clause"-which is "negative" not only because it negates state regulation of commerce, but also because it does not appear in the Constitution. Under the real Commerce Clause ("The Congress shall have Power ... To regulate Commerce ... among the several States," U.S. Const., Art. I, § 8), it is for Congress to make the judgment that interstate commerce must be immunized from certain sorts of nondiscriminatory state action-a judgment that may embrace (as ours ought not) such imponderables as how much "value [is] fairly attributable to economic activity within the taxing State," and what constitutes "fair relation between a tax and the benefits conferred upon the taxpayer by the State." [\[FN9\]](#)

*513 Our pre-Constitution experience with allowing states to have free reign with economic regulations has lead us to believe that it is better to vest this power in the federal government, and it is necessary to safeguard commerce against the negative

effects of state legislation. Justice Scalia would agree in principal, but would place definite limits and boundaries upon our ability to govern the states actions to only those situations in which a state's tax facially discriminates against interstate commerce, and only then should the U.S. Government intervene. [\[FN10\]](#)

The question is, then, "Should the federal courts be deciding cases dealing with state tax issues absent some allegation that it interferes with interstate commerce and absent some sort of delegation of this authority by Congress?" Because Congress has failed to act on its constitutional mandate that it regulate Commerce, the Supreme Court has had to "create a 'negative' commerce clause" in order to protect the federal interest in interstate commerce. However, since, generally, it is the role of the courts to interpret the law, not having a constitutional mandate has put them in a terrible predicament of having to create one that they can interpret. Although it would create temporary chaos and would require senators (members of Congress) to pass legislation specifically against the constituents that voted them into office, perhaps the Supreme Court should, in the future, simply declare that unless the state statute violates the "express" Commerce Clause, there is no constitutional problem, and throw the problem right back into the lap of Congress.

There is a very negative aspect to cases involving "negative" Commerce Clause challenges. Some taxpayers would lose a tax benefit because it was determined to be an unconstitutional restraint of free trade. (For example, a freight tax on wheat coupled by a rebate on wheat grown in the state of tax.) Sometimes a taxpayer challenges an exemption granted to others. If the taxpayer wins, the exemption is disallowed and those who benefitted must pay more tax. The winning taxpayer is benefitted, if at all, by others having to pay more.

1. A Tax By Any Other Name

In *West Lynn Creamery v. Healy*, [\[FN11\]](#) Massachusetts subjected all milk sold by retailers to an assessment. Even though most of the milk sold in Massachusetts was from out-of-state dairies, all of the assessed funds were remitted back to Massachusetts dairies as a subsidy. Although the state argued that a subsidy would be valid, and the assessment applied to all milk, not just out-of-state milk, the Court declared the combination invalid. Justice Scalia wrote a concurring opinion:

There are at least four possible devices that would enable a State to produce the economic effect that Massachusetts has produced here: (1) a discriminatory tax upon the industry, imposing a higher liability on out-of-state members than on their in-state competitors; (2) a tax upon the industry that is nondiscriminatory in its assessment, but *514 that has an "exemption" or "credit" for in-state members; (3) a nondiscriminatory tax upon the industry, the revenues from which are placed into a segregated fund, which fund is disbursed as "rebates" or "subsidies" to in-state members of the industry (the situation at issue in this case); and (4) with or without nondiscriminatory taxation of the industry, a subsidy for the in-state members of the industry, funded from the State's general revenues. The fourth methodology, application of a state subsidy from general revenues, is so far removed from what we have hitherto held to be unconstitutional, that prohibiting it must be regarded as an extension of our negative-Commerce-Clause jurisprudence and therefore, to me, unacceptable. Indeed, in my view our negative-Commerce-Clause cases have already approved the use of such subsidies.

. . . The only difference between methodology (2) (discriminatory "exemption" from nondiscriminatory tax) and methodology (3) (discriminatory refund of non-discriminatory tax) is that the money is taken and returned rather than simply left with the favored in-state taxpayer in the first place. The difference between (3) and (4), on the other hand, is the difference between assisting in-state industry through discriminatory taxation and assisting in-state industry by other means.

I would therefore allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the State's general revenue fund. [\[FN12\]](#)

There appears to be a loophole here somewhere. It stems from the problem the Court faces every time it declares that the goal of the negative Commerce Clause is to prevent the States from engaging in protectionism. "The purpose of the negative Com-

merce Clause, we have often said, is to create a national market. It does not follow from that, however, and we have never held, that every state law which obstructs a national market violates the Commerce Clause." [\[FN13\]](#)

Which laws do obstruct a national market is, of course, the important answer. Justice Scalia's point is that on stare decisis grounds, we have to live with the negative Commerce Clause. However, on equally starry grounds, we also have to live with cases such as *Hughes v. Alexandria Scrap Corp.*, [\[FN14\]](#) which held that in some cases, discriminatory benefits to a state's residents may be justified.

Justice Scalia's lines seem to be a bit blurry. If the economic impact of his four methods of accomplishing Massachusetts' goal are the same, do we care which method we adopt? If we do care, we elevate form over substance. [\[FN15\]](#) His rationale seems to forget that this was a two-tiered approach:

Perhaps, as some commentators contend, that line comports with an important economic reality: A State is less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing, *515 nonprotectionist, purposes. I draw the line where I do because it is a clear, rational line at the limits of our extant negative-Commerce-Clause jurisprudence. [\[FN16\]](#)

So, while it may seem like Justice Scalia has created a loop hole, if you have an inadequate general fund with legislators fighting over social programs, salaries, mass transit, education, police and fire, and if you get a subsidy for milk producers out of this limited fund, perhaps it was deserved. At least, it will be the result of serious reflection and the determination by the state that of its many needs, this one was critical to the state's well-being.

Thus, Massachusetts could pass two independent laws. The first law (in time and importance) would be a subsidy, in all cases, in favor of the state dairy farmers. The second law, hidden away somewhere in the tax code, would be a nondiscriminatory milk tax, on all milk. Revenues from the milk tax should be paid directly to the state's general fund. The evil, in *West Lynn Creamery* was that the revenue from the tax directly funded the subsidy instead of going into the general fund where it would be available for numerous activities.

Maybe a little negativity is not a bad thing.

Which again raises the question posed implicitly by Justice Scalia's anti-negative Commerce Clause opinions. Since the clause applies to Congress, what would be the harm in letting them handle these problems?

2. The Negative-Negative Commerce Clause

Strangely enough, the Court recognizes that some discriminatory treatment of local commerce is permissible without violating the Commerce Clause. In *Camps Newfound/Owatonna Inc. v. Town of Harrison*, [\[FN17\]](#) the Court held:

The Town argues that its discriminatory tax exemption is, in economic reality, no different from a discriminatory subsidy of those charities that cater principally to local needs. Noting our statement in *West Lynn Creamery* that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business," the Town submits that since a discriminatory subsidy may be permissible, a discriminatory exemption must be, too. We have "never squarely confronted the constitutionality of subsidies," and we need not address these questions today. Assuming, arguendo, that the Town is correct that a direct subsidy benefitting only those nonprofits serving principally Maine residents would be permissible, our cases do not sanction a tax exemption serving similar ends. [\[FN18\]](#)

The town's argument was that this exemption for charities was equivalent to a subsidy, which the Court has held may sometimes be constitutional.

***516** We recognized long ago that a tax exemption can be viewed as a form of government spending. The distinction we have drawn for dormant Commerce Clause purposes does not turn on this point. [\[FN19\]](#)

In demonstrating that subsidies and exemptions are different, the Court digressed into an analysis of Establishment Clause cases. These cases hold that government's subsidy of charities, particularly religious charities, are quite possibly forbidden under the Establishment Clause.

In *Walz v. Tax Comm'n of City of New York*, notwithstanding our assumption that a direct subsidy of religious activity would be invalid, we held that New York's tax exemption for church property did not violate the Establishment Clause of the First Amendment. That holding rested, in part, on the premise that there is a constitutionally significant difference between subsidies and tax exemptions. [\[FN20\]](#)

A quick recap might be in order. The Supreme Court found that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." [\[FN21\]](#) The same, however, does not hold for a tax exemption serving similar ends. A tax exemption can be viewed as a form of government spending. [\[FN22\]](#) However, the Supreme Court held that New York's tax exemption for church property did not violate the Establishment Clause of the First Amendment since it did not establish anything by merely not collecting anything from the church. [\[FN23\]](#) That holding rested, in part, on the premise that there is a constitutionally significant difference between subsidies and tax exemptions. [\[FN24\]](#)

***517** Thus, if Maine wants to benefit its citizens by making it easier for charitable organizations, including summer camps, to operate, how does it go about doing that? Does it risk offending the Establishment Clause by offering subsidies? If so, that would be permissible under *West Lynn Creamery*. Or does it offer an exemption? If so, under *Walz*, that should be permissible as not constituting government sponsorship of charities. Presumably, if the state offers a subsidy, it may violate the Establishment Clause, but not the Commerce Clause. On the other hand, an exemption skips past the Establishment Clause but implicates the Commerce Clause.

As Justice Scalia points out in his dissenting opinion of *Camps Newfoundland/Owatonna*:

But the principle involved in our disapproval of Maine's exemption limitation has broad application elsewhere. A State will be unable, for example, to exempt private schools that serve its citizens from state and local real estate taxes unless it exempts as well private schools attended predominantly or entirely by students from out of State. A State that provides a tax exemption for real property used exclusively for the purpose of feeding the poor must provide an exemption for the facilities of an organization devoted exclusively to feeding the poor in another country. These results may well be in accord with the parable of the Good Samaritan, but they have nothing to do with the Commerce Clause. [\[FN25\]](#)

As Justice Thomas, with whom Justice Scalia joined, argues this property tax exemption had nothing to do with interstate commerce. [\[FN26\]](#) In fact, it had to do with real property that had little chance of moving outside the state of Maine at all. [\[FN27\]](#) The majority's contention that this is a burden on interstate commerce is an enormous leap of logic. [\[FN28\]](#)

What is involved is a state's own tax policy in affecting social goals that benefit its citizens. [\[FN29\]](#) There are no out-of-state competitors, as in the situation where the state of Maine was granting a property tax exemption. [\[FN30\]](#) Any entity claiming (or not being able to claim) the exemption would have to own property within the state, and would thus be a resident, at least for the purposes of this tax. [\[FN31\]](#)

***518** After all, the Court today relies not on any discrimination against out-of-state nonprofits, but on the supposed discrimination against nonresident would-be recipients of charity (the nonprofits' "customers"); surely those individuals are similarly discriminated against in the direct distribution of state benefits. The problem, of course, is not limited to municipal employ-

ment and free public schooling, but extends also to libraries, orphanages, homeless shelters, and refuges for battered women. One could hardly explain the constitutionality of a State's limiting its provision of these to its own residents on the theory that the State is a "market participant." These are traditional governmental functions, far removed from commercial activity and utterly unconnected to any genuine private market. [\[FN32\]](#)

This decision results in the invalidation of a negative tax, using the negative Commerce Clause plus some negative logic. [\[FN33\]](#) There would not be another permissible way to accomplish this same goal, as a direct subsidy could be challenged on First Amendment grounds as well.

B. It's All About the Money ...

The American public enjoys a love/hate relationship with tax laws. On the one hand, tax laws are viewed with some suspicion because they are so technically drafted as to become arcane in their effort at exactitude. On the other hand, the public is willing to pay a large premium to practitioners who can decipher the arcane and find loopholes.

As in other areas, Justice Scalia tends to err on the side of literalism, and for tax lawyers, that's a good thing. Transactional lawyers, and in particular, tax lawyers, make a living by being able to tell a client that a deal will or will not work. Period. "It depends" is not a good answer, nor is it comforting to find mixed signals coming from the courts.

In *United States v. Hatter*, [\[FN34\]](#) the first of three payroll tax decisions, Justice Scalia argued that the term "compensation" as used in the Compensation Clause [\[FN35\]](#) includes not only cash paid, but exemptions from tax as well. [\[FN36\]](#)

Prior to 1981, federal employees were not part of the Medicare or Social Security programs, and did not have to pay those payroll taxes. In 1982, Congress changed the Medicare law to include federal employees. Therefore, federal judges, and all other federal employees began to have Medicare taxes withheld from their salaries. [\[FN37\]](#)

In 1983, Congress changed the Social Security laws, requiring all newly hired federal employees to participate in Social Security. Most current federal employees (about 96%) were given the option to participate in that program. The remaining *519 4%-including all federal judges-were required to participate, or opt into a separate contributory retirement program. [\[FN38\]](#)

A number of federal judges filed suit, [\[FN39\]](#) claiming the changes violated the Compensation Clause. [\[FN40\]](#) The majority, lead by Justice Breyer, began by overruling *Evans v. Gore*, [\[FN41\]](#) a 1920 decision, which held that a federal judge sitting before the ratification of the Sixteenth Amendment could not be subjected to the federal income tax. [\[FN42\]](#) Congress, the *Evans* Court argued, could not indirectly do via a tax what it could not do directly by a salary reduction. [\[FN43\]](#) Justice Holmes' dissent argued that the purpose behind the Compensation Clause was to protect the independence of the judiciary, and that there is no threat to their independence to require them to pay taxes that the rest of the country pays. [\[FN44\]](#)

The majority turned this into an argument that nondiscriminatory taxes do not violate the Compensation Clause. [\[FN45\]](#) Justice Scalia disagreed with that argument:

My disagreement with the Court arises from its focus upon the issue of discrimination, which turns out to be dispositive with respect to the Medicare tax. The Court holds "that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect." Since "the Medicare tax is just such a nondiscriminatory tax," the Court concludes that "application of [that] tax law to federal judges is [c]onstitutional."

But we are dealing here with a "Compensation Clause," not a "Discrimination Clause." As we have said, "the Constitution makes no exceptions for 'nondiscriminatory' reductions" in judicial compensation. A reduction in compensation is a reduction

in compensation, even if all federal employees are subjected to the same cut. [\[FN46\]](#)

*520 Justice Scalia then argued that the compensation granted to the judges before 1982 included an exemption from the Medicare tax, and withdrawing this exemption is a diminution of the compensation. [\[FN47\]](#) Later in his opinion, Justice Scalia made it clear that the Social Security changes are unconstitutional because of the same flaw.

On my analysis, it would not matter if every federal employee had been made subject to the Social Security tax along with judges, so long as one of the previous entitlements of their federal employment had been exemption from that tax. Federal judges cannot, consistent with the Constitution, have their compensation diminished. If this case involved salary cuts to pay for Social Security, rather than taxes to pay for Social Security, the irrelevance of whether other federal employees were covered by the operative legislation would be clear. [\[FN48\]](#)

Justice Scalia reasoned that discrimination had nothing to do with the Compensation Clause, stating: "I agree with the Court, therefore, that Evans was wrongly decided-not, however, because in Evans there was no discrimination, but because in Evans the universal application of the tax demonstrated that the Government was not reducing the compensation of its judges but was acting as sovereign rather than employer, imposing a general tax." [\[FN49\]](#) Thus, the dividing line is not whether there was discrimination, but whether Congress was reducing compensation as the holder of the purse strings.

Is there a point at which taxing is equivalent to putting fiscal pressure on the judges? Yes.

We also agree with Evans insofar as it holds that the Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay, say, by ordering a lower salary. Otherwise a legislature could circumvent even the most basic Compensation Clause protection by enacting a discriminatory tax law, for example, that precisely but indirectly achieved the forbidden effect. [\[FN50\]](#)

In *United States v. Cleveland Indians Baseball Co.*, the Cleveland Indians baseball team agreed to pay back wages to several of its former players. [\[FN51\]](#) Under the Treasury Regulations, the team was required to treat those payments as wages in the year paid, subjecting them to FICA and FUTA liability. [\[FN52\]](#) The team sued for a refund, relying upon precedent in the Sixth Circuit that held the payments should be deemed wages for the years in which they should have been paid. [\[FN53\]](#)

Justice Scalia briefly responded to the majorities' lengthy analysis of what Congress meant by the term "wages paid," noting that the payments in question were not wages. The players were no longer employed by the team, and even if *521 they were, this was an award of damages. It might be made in lieu of wages, but it was not, strictly speaking, wages. [\[FN54\]](#)

The statute did not cover this payment, but the Regulations did. Since the Court deferred to a reasonable position of the agency, the government won. [\[FN55\]](#)

In the third case, *Jefferson County v. Acker*, several federal judges in Alabama were sued for a license tax they failed to pay. [\[FN56\]](#) They removed the suit to federal court, claiming that the tax violated the intergovernmental immunity doctrine. [\[FN57\]](#) While agreeing that the judges should lose, Justice Scalia disagreed with the majority's position that removal was proper. [\[FN58\]](#) An officer of the federal courts is allowed to remove a suit "for any act under color of office or in the performance of his duties." [\[FN59\]](#) Justice Scalia's contention was that the suit was for nonpayment of taxes, which was not under color of office nor was it a part of the judges' duties. Removal, therefore should have been improper. [\[FN60\]](#)

For tax lawyers, these three cases show that a technical reading of the exact language of statutes or of the Constitution may pay off.

C. Pure Tax Cases-Statutory Interpretation

In *O'Gilvie v. United States*, the surviving spouse of a tort victim sought to exclude both the compensatory and the punitive portions of the awarded damages. [FN61] At the time, § 104(a)(2) provided an exclusion from income for "any damages received on account of personal injuries or sickness." [FN62]

The majority traced through committee reports and determined that Congress must have meant that only compensatory damages were excluded from income. [FN63] Justice Scalia, in an opinion that basically said "damages are damages" wrote: So, to trace the Court's reasoning: The statute must exclude punitive damages because the Committee Report must have had in mind a 1918 Treasury Decision, whose text no more supports exclusion of punitive damages than does the text of the statute itself, but which must have meant to exclude punitive damages since it was based on the "return-of-capital" theory, though, inconsistently with that theory, it did not exclude the much more common category of compensation for lost income. Congress supposedly knew all of this, and a reasonably diligent lawyer could figure it out by mistrusting the inclusive language of the statute, consulting the Committee Report, surmising that the Treasury Decision of 1918 underlay that Report, mistrusting the inclusive language of the Treasury Decision, and discerning that Treasury could have overlooked lost-income compensatories, but could not have overlooked punitives. I think not. The sure and *522 proper guide, it seems to me, is the language of the statute, inclusive by nature and doubly inclusive by contrast with surrounding provisions. [FN64]

What about the term "property" then? In *United States v. Craft*, the IRS assessed over \$480,000 in unpaid income tax liabilities against Don Craft. [FN65] When he did not pay, a federal tax lien attached to "all property and rights to property, whether real or personal, belonging to" him. [FN66] At the time Mr. Craft and his wife owned a piece of real property in Grand Rapids, Michigan, as tenants by the entirety. After notice of the lien was filed, the couple tried to deed the husband's interest to the wife. [FN67]

The Government claimed that its lien had attached to the husband's interest in the tenancy by the entirety. [FN68] The wife argued that state law prevented such a lien from attaching: "[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone." [FN69] Justice Scalia made a thoughtful point in his dissent:

I join Justice Thomas's dissent, which points out (to no relevant response from the Court) that a State's decision to treat the marital partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members, is no more novel and no more "artificial" than a State's decision to treat the commercial partnership as a separate legal entity, whose property cannot be encumbered by the debts of its individual members.

I write separately to observe that the Court nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects. It is regrettable that the Court has eliminated a large part of this traditional protection retained by many States. [FN70]

Damages may be damages, but apparently property is not always property, according to Justice Scalia. While a strict reading of the statute would seem to say that the tax lien could attach to anything the husband may have owned, Scalia seems to be trying to forge an exception for marital property. His reference to partnership property is strained. As the majority pointed out, even if state law allows the partnership to own property, the lien would still attach to what the partner did own-his partnership interest. Just how that analogy would figure in a marriage is unknown. Would Justice Scalia argue that the federal tax lien should attach to the marriage itself? Or some type of marital interest? Luckily, we did not end up down that road.

*523 In *In re Estate of Romani*, the taxpayer died owing judgments to both a private creditor and the government, but the estate did not have enough money to pay both claims. [FN71] Justice Scalia agreed with the decision of the Court that the gov-

ernment's claim would take second place to a previously filed state law claim. [FN72] At issue was whether a provision, which provided that the government's claim would come first, prevailed over the Federal Tax Lien Act of 1966. [FN73] Congress had considered legislation that would have explicitly subordinated the provision, but had failed to pass it. [FN74] Justice Scalia took issue with the argument that this provided a clue to Congressional intent:

I join the opinion of the Court except that portion which takes seriously, and thus encourages in the future, an argument that should be laughed out of court.

...First and most obviously, Congress cannot express its will by a failure to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law. The Constitution sets forth the only manner in which the Members of Congress have the power to impose their will upon the country: by a bill that passes both Houses and is either signed by the President or repassed by a supermajority after his veto. 1489 Art. I, § 7. Everything else the Members of Congress do is either prelude or internal organization. Congress can no more express its will by not legislating than an individual Member can express his will by not voting.

Second, even if Congress could express its will by not legislating, the will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones. "[L]ater enacted laws do not declare the meaning of earlier law." If the enacted intent of a later Congress cannot change the meaning of an earlier statute, then it should go without saying that the later unenacted intent cannot possibly do so. It should go without saying, and it should go without arguing as well. [FN75]

In tax law, the doctrine of legislative reenactment provides that a regulation may obtain the force of law through reenactment of its underlying statute. [FN76] However, reenactment without change in relevant statutory language and mere congressional inaction are at best unreliable indications of congressional intent to adopt an administrative construction of a statute. [FN77] The inference of congressional approval is stronger when legislative history contains some indication that Congress was *524 aware of and approved the administrative construction. [FN78] Obviously, the same should hold true with conflicting statutes.

D. Legislative History

In *United States v. Stuart*, the Court was called upon to answer the question of whether, when requested by Canadian Tax Authorities, the IRS needed to conduct an inquiry into whether the information was being sought for a proper purpose. [FN79] The majority held that the treaty in question did not require such an inquiry, but then buttressed its decision by further stating that the legislative history supported that position. In his concurring opinion, Justice Scalia argued that this was sloppy, and opened possible misunderstandings by lower courts:

Of course, no one can be opposed to giving effect to "the intent of the Treaty parties." The critical question, however, is whether that is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns' carefully framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a "genuine" contrary intent elsewhere. To ask that question is to answer it.

One can readily understand the appeal of making the additional argument that the plain language of a treaty (which is conclusive) does indeed effectuate the genuine intent as shown elsewhere—just as one can understand the appeal, in statutory cases, of pointing out that what the statute provides (which is conclusive) happens to be sound social policy. Here the implication is that, had the extrinsic evidence contradicted the plain language of the Treaty it would govern. That is indeed what we mistakenly said in the earlier case that the Court cites as authority for its approach. In *Sumitomo Shoji America, Inc. v. Avagliano*, we stated that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" The authority quoted for that proposition in fact does not support it. In *Maximov*, confronted with an argument appealing to the "intent or

expectations" of the signatories, we responded that "[t]he immediate and compelling answer to this contention is that the language of the Convention itself not only fails to support the petitioner's view, but is contrary to it." We then continued: "Moreover, it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." The import of the highlighted adverb is, of course, that it would be inappropriate to sanction a deviation from clear text even if there were indications of contrary intent. Our *Sumitomo* dictum separated the last clause of this quotation from its context to support precisely the opposite of what it said. Regrettably, *525 that passage from *Sumitomo* is already being quoted by lower courts as "[t]he general rule in interpreting treaties." [FN80]

Contrast these strong admonitions against the use of legislative history to divine the intent of Congress or the Framers with this tidbit from Justice Scalia:

"To be put in jeopardy" does not remotely mean "to be punished," so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions. Compare the proposal of the House of Representatives, for which the Senate substituted language similar to the current text of the Clause: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." The view that the Double Jeopardy Clause does not prohibit multiple punishments is, as Justice Frankfurter observed, "confirmed by history. For legislation providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." [FN81]

Apparently, there must be a qualifier to Romani. "Everything else the Members of Congress do is either prelude or internal organization," [FN82] unless the term is really old, and we don't use it much anymore.

In *Begier v. IRS*, the bankruptcy trustee of an airline debtor tried to recover the airline's prepetition payments of trust fund taxes to the IRS. [FN83] The Court held that the payments of income, FICA, and excise taxes collected from its customers were not transfers of "property of the debtor, but were instead transfers of property held in trust." [FN84] Scalia agreed with the result, but not the reasoning:

Representative Edwards, the House floor manager for the bill that enacted the Bankruptcy Code, said on the floor that "[t]he courts should permit the use of reasonable assumptions" regarding the tracing of tax trust funds. We do not know that anyone except the presiding officer was present to hear Representative Edwards. Indeed, we do not know for sure that Representative Edwards' words were even uttered on the floor rather than inserted into the Congressional Record afterwards. If Representative Edwards did speak these words, and if there were others present, they must have been surprised to hear him talking about the tracing of 26 U.S.C. § 7501 tax trust funds, inasmuch as the bill under consideration did not relate to the Internal Revenue Code but the Bankruptcy Code, and contained no provision even mentioning *526 trust-fund taxes. Only the Senate bill, and not the House proposal, had mentioned trust-fund taxes-and even the former had said nothing whatever about the tracing of tax trust funds. Only the Senate Committee Report on the unenacted provision of the Senate bill had discussed that subject. Nonetheless, on the basis of Representative Edwards' statement, today's opinion concludes that "[t]he courts are directed" (presumably it means directed by the entire Congress, and not just Representative Edwards) "to apply 'reasonable assumptions' to govern the tracing of funds." I do not agree. Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record, much less in excerpts from the Congressional Record that do not clarify the text of any pending legislative proposal. [FN85]

Maybe it is the fact that Justice Scalia has to keep researching the legislative history that makes him so against it.

E. Literal Interpretation

In another interpretive case, *United States v. Burke*, the Court had occasion to revisit the definition of the Code's [\[FN86\]](#) personal injury award exclusion. [\[FN87\]](#) The majority adopted the Treasury Regulation's formulation, that in addition to being received on account of personal physical injuries, the damages must also be received on account of "tort or tort type rights." [\[FN88\]](#) Justice Scalia correctly noted that nowhere in the statute did Congress place the words "tort or tort type rights."

The Court accepts at the outset of its analysis the Internal Revenue Service (IRS) regulation (dating from 1960) that identifies "personal injuries" under this exclusion with the violation of, generically, "tort or tort type rights,"-thus extending the coverage of the provision to "'dignitary' or nonphysical tort[s] such as defamation." Thereafter, the opinion simply considers the criterion for determining whether "tort or tort type rights" are at stake, the issue on which it disagrees with the dissent.

In my view there is no basis for accepting, without qualification, the IRS' "tort rights" formulation, since it is not within the range of reasonable interpretation of the statutory text.

In deciding whether the words go beyond their more narrow and more normal meaning here, the critical factor, in my view, is the fact that "personal injuries" appears not in isolation but as part of the phrase "personal injuries or sickness." As the Court has said repeatedly, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." The term "sickness" connotes a "[d]iseased condition; illness; [or] ill health," and I think that its companion must similarly be read to connote injuries to physical (or mental) health. It is almost as odd to believe that the first part of the phrase *527 "personal injuries or sickness" encompasses defamation, as it would be to believe that the first part of the phrase "five feet, two inches" refers to pedal extremities. [\[FN89\]](#)

In *Cheek v. United States*, Cheek was convicted on six counts of failing to file a return and three counts of willfully attempting to evade his tax. [\[FN90\]](#) He admitted that he had not filed his returns, but testified that he had not acted willfully because he sincerely believed, based on his indoctrination by a tax evasion group and his own study, that the tax laws were unconstitutional and that his actions were lawful. [\[FN91\]](#) The trial court stated that "an honest but unreasonable belief is not a defense and does not negate willfulness." [\[FN92\]](#)

The majority of the Supreme Court held that a good-faith belief that one is not violating the law negates willfulness, whether or not the belief is reasonable. [\[FN93\]](#) Justice Scalia wrote:

[I]t seems to me impossible to say that the word [willful] refers to consciousness that some legal text exists, without consciousness that that legal text is binding, i.e., with the good-faith belief that it is not a valid law. [\[FN94\]](#)

Our legislative history indicates that we are ruled by law. However, when there is silence in the statute, we are ruled by what the inference is. One could have inferred that we should carry the "ruled by law" argument to its conclusion. However, the justices stopped short and took a literal reading that willfulness requires a conscious belief that the particular legal rule existed and that it was valid. This "good-faith" belief opens the door to numerous future tax protest challenges.

In the *McDermott's* case, the law never spoke on the issue of after-acquired property where competing liens were in place. [\[FN95\]](#) The Court argued that the "intent" of the statute was that the government would win, but since Congress did not address this question, this was putting words in their mouths.

Since Congress has not spoken, it would appear that there is no "law" by which we can be governed. Is this then a function of the Court? To patch the law together into a makeshift quilt, at least until Congress fashions a new piece of cloth?

Of course, interpretation may be in the eye of the beholder; Justice Scalia's brand of textualism tries to walk a very straight and conservative line. [\[FN96\]](#) According to *528 Justice Scalia, "I trust that in our search for a neutral and rational interpretive methodology we have now come to rest, so that the symbol of our profession may remain the scales, not the seesaw." [\[FN97\]](#)

F. Religion and Tax Cases

In three of the tax cases, the Court entertained challenges to exemptions from generally applicable state taxes. [\[FN98\]](#) In all three cases Justice Scalia dissented, stating that the tax exemptions granted to the religious groups were at least allowed by the Constitution, if not required. [\[FN99\]](#)

In *Arkansas Writers' Project, Inc. v. Ragland*, the state imposed a general 4% sales tax on sales of tangible personal property, but exempted religious, professional, trade and sports journals printed in the state. [\[FN100\]](#) The majority subjected the tax to strict scrutiny, under the *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* decision. [\[FN101\]](#)

The problem here is that the Arkansas statute was a generally applicable statute. It had a purpose for assisting small scale publications (the religious, sports and professional journals) that would survive ordinary scrutiny. [\[FN102\]](#) The problem was that there were no more than three journals published in Arkansas that did not meet those requirements, and so those three journals were the only ones to pay the tax. [\[FN103\]](#) The majority felt that this was singling out the press because of its content, and invalidated the tax scheme. [\[FN104\]](#)

On the other hand, Justice Scalia felt the Court did not provide a workable framework for future cases.

The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right is that-unlike direct restriction or prohibition-such a denial does not, as a general rule, have any significant coercive effect. It may, of course, be manipulated so as to do so, in which case the courts will *529 be available to provide relief. But that is not remotely the case here. It is implausible that the 4% sales tax, generally applicable to all sales in the State with the few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, this appellant's publication.

[T]he majority casts doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject matter. The United States Postal Service, for example, grants a special bulk rate to written material disseminated by certain nonprofit organizations-religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations. Must this preference be justified by a "compelling governmental need" because a nonprofit organization devoted to some other purpose-dissemination of information about boxing, for example-does not receive the special rate? The Kennedy Center, which is subsidized by the Federal Government in the amount of up to \$23 million per year, see [20 U.S.C. § 76n\(a\)](#), is authorized by statute to "present classical and contemporary music, opera, drama, dance, and poetry." § 76j. Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded? Are government research grant programs or the funding activities of the Corporation for Public Broadcasting, see [47 U.S.C. § 396\(g\)\(2\)](#), subject to strict scrutiny because they provide money for the study or exposition of some subjects but not others? [\[FN105\]](#)

In *Texas Monthly, Inc. v. Bullock*, the publisher of a general interest magazine paid under protest a Texas sales tax that exempted "[p]eriodicals published or distributed by a religious faith consist[ing] wholly of writings promulgating the teachings of the faith and books consist[ing] wholly of writings sacred to a religious faith." [\[FN106\]](#) The publisher then sued to recover its payments in state court. [\[FN107\]](#)

The plurality, lead by Justice Brennan, urged a tax expenditure model upon the Court:

Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become "indirect and vicari-

ous 'donors.'" Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. [\[FN108\]](#)

Justice Blackmun recognized:

I find it more difficult to reconcile in this case the Free Exercise and Establishment Clause values. The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for *530 religious books is forbidden. This tension between mandated and prohibited religious exemptions is well recognized. Of course, identifying the problem does not resolve it.

To recognize this possible reconciliation of the competing First Amendment considerations is one thing; to impose it upon a State as its only legislative choice is something else. Justice Scalia rightly points out, that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them. The Press Clause adds yet a third hazard to a State's safe passage through the legislative waters concerning the taxation of books and journals. We in the Judiciary must be wary of interpreting these three constitutional Clauses in a manner that negates the legislative role altogether. [\[FN109\]](#)

Justice Blackmun contended that the Texas statute did violate the Establishment Clause, but left the difficult question of when the Free Exercise Clause requires a religious exemption for another day. [\[FN110\]](#)

After asserting that the Free Exercise Clause requires government to make some religion-specific exceptions to generally applicable laws, [\[FN111\]](#) he asserts that if a sales tax exemption is not, in fact, required under the Free Exercise Clause, it is so far removed from entanglement under the Establishment Clause that it should not be invalid. [\[FN112\]](#)

Quite obviously, a sales tax exemption aids religion, since it makes it less costly for religions to disseminate their beliefs. But that has never been enough to strike down an enactment under the Establishment Clause. "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." To be sure, we have set our face against the subsidizing of religion-and in other contexts we have suggested that tax exemptions and subsidies are equivalent. We have not treated them as equivalent, however, in the Establishment Clause context, and with good reason. "In the case of direct subsidy, the state forcibly divertsthe income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." In *Walz* we pointed out that the primary effect of a tax exemption was not to sponsor religious activity but to "restric[t] the fiscal relationship between church and state" and to "complement and reinforce the desired separation insulating each from the other." [\[FN113\]](#)

The third case, *Camps*, was discussed earlier in this article. [\[FN114\]](#) What these three cases reveal is that at least a plurality of the Court will draw very narrow bounds around any tax exemptions for religious purposes. In fact, Justice Blackmun saw *531 only the tip of the iceberg. Not only must the Free Exercise and Establishment Clauses be reconciled (with these opinions hinting that Establishment takes precedence), but the Press Clause, the Commerce Clause, and perhaps others must be weighed in the balance. To be considered valid, the exemption must include a number of other, nonreligious charities in its purview, and according to *Camps Newfound*, must not be tailored to impact the interstate flow of commerce. That indeed is a tall order.

Justice Scalia's omens of doom may actually be right on the money. Subsidies are out of the question, and religion-specific exemptions seem to fall very easily. Proponents of the Office of Faith-Based Action and private school vouchers should take note.

G. Retroactivity

Generally speaking, since a court decides what the law is, for tax cases, the decisions apply retroactively back to the enactment of the tax. [\[FN115\]](#) That rule, however, can work some interesting havoc.

In *United States v. Carlton*, the executor took a rather aggressive position and claimed a loss for stock he bought after the decedent's death, but sold to an Employee Stock Ownership Plan (ESOP) before filing of the estate tax return. [\[FN116\]](#) A year later, Congress amended the statute to provide that the stock must be held by the decedent prior to death. [\[FN117\]](#) This change was to be applied retroactively. [\[FN118\]](#) The majority held the amendment to be a curative measure, and the estate lost. [\[FN119\]](#) Justice Scalia disagreed.

If I thought that "substantive due process" were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation. Although there is not much precision in the concept "harsh and oppressive," which is what the Court has adopted as its test of substantive due process unconstitutionality in the field of retroactive tax legislation, surely it would cover a retroactive amendment that cost a taxpayer who relied on the original statute's clear meaning over \$600,000. [\[FN120\]](#)

Since the majority's opinion relied upon substantive Due Process grounds, Scalia compared this case to other substantive Due Process cases, in which governmental regulation (and especially retroactive regulation) is routinely struck down. [\[FN121\]](#) It does seem odd that since property rights are explicitly mentioned in the Constitution, that they would be given lesser status than other substantive Due Process rights:

***532** The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called "economic rights" (even though the Due Process Clause explicitly applies to "property") unquestionably involves policymaking rather than neutral legal analysis. I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away. [\[FN122\]](#)

In *Harper v. Virginia Department of Taxation*, the state of Virginia, following the decision of the U.S. Supreme Court in *Davis v. Michigan Department of Treasury*, [\[FN123\]](#) amended its statute which taxed the retirement benefits paid by the Federal government but exempted similar benefits paid by the state. [\[FN124\]](#) A group of federal retirees sued for refunds of state taxes they paid prior to the amendment. [\[FN125\]](#) The Court held for the retirees. [\[FN126\]](#)

Justice Scalia wrote a concurring opinion, cataloguing the jurisprudence of retroactivity and stare decisis.

What most provokes comment in the dissent, however, is not its insistence that today a rigid doctrine of stare decisis forbids tinkering with retroactivity, which four Terms ago did not; but rather the irony of its invoking stare decisis in defense of prospective decisionmaking at all. Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent. Thus, the dissent is saying, in effect, that stare decisis demands the preservation of methods of destroying stare decisis recently invented in violation of stare decisis.

Contrary to the dissent's assertion that *Chevron Oil* articulated "our traditional retroactivity analysis," the jurisprudence it reflects "came into being," as Justice Harlan observed, less than 30 years ago with *Linkletter v. Walker*. It is so un-ancient that one of the current Members of this Court was sitting when it was invented. The true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice. *Linkletter* itself recognized that "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." And before *Linkletter*, the academic proponents of prospective judicial decisionmaking acknowledged that their proposal contradicted traditional practice. Indeed, the roots of the contrary tradition are so deep that Justice Holmes was

prepared to hazard the guess that "[j]udicial decisions have had retrospective operation for near a thousand years."

Justice O'Connor asserts that "[w]hen the Court changes its mind, the law changes with it." That concept is quite foreign to the American legal and constitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw *533 power. The conception of the judicial role that he possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be "the province and duty of the judicial department to say what the law is, "-not what the law shall be.

Prospective decisionmaking was known to foe and friend alike as a practical tool of judicial activism, born out of disregard for stare decisis.

...Whether cause or effect, there is no doubt that the era which gave birth to the prospectivity principle was marked by a new-found disregard for stare decisis. It was an era when this Court cast overboard numerous settled decisions, and indeed even whole areas of law, with an unceremonious "heave-ho." To argue now that one of the jurisprudential tools of judicial activism from that period should be extended on grounds of stare decisis can only be described as paradoxical.

In sum, I join the opinion of the Court because the doctrine of prospective decisionmaking is not in fact protected by our flexible rule of stare decisis; and because no friend of stare decisis would want it to be. [\[FN127\]](#)

IV. Conclusion

Justice Scalia is more than a brilliant, outspoken conservative, he is a staunch advocate for literalism and judicial restraint. He is dedicated to relying on the Constitution's actual text in decision-making and trying to maintain constitutional interpretation that does not change from case to case. In this respect he is an advocate for stare decisis.

Scalia continues to bring to light the problems concerned with Congress' imprecisely worded legislation, but refuses to read into the legislation, instead preferring to force a statement from Congress. Scalia adheres to his statement that "the Constitution('s) meaning must be protected and not repeatedly altered to suit the whims of society." [\[FN128\]](#) The Constitution must be interpreted "from its text, and that meaning does not change." [\[FN129\]](#)

Because of his dedication to a literal interpretation of the Constitution, he is opposed to interpreting laws by innuendo through legislative history, the lack of a statement by Congress or any other act that is not reduced to writing through the proper channels. He has made numerous statements illustrating the dangers of such "interpretation." He has attempted to make a literal reading of the tax law. This is a breath of fresh air for tax attorneys. He has upheld long standing concepts such as the legislative reenactment doctrine in the spirit of its previous reading. And in the area of religious tax exemptions and subsidies, he has attempted to hold tight to the line in definition and neutrality.

In short, even in the tax area, Justice Scalia has maintained the basic tenets of his philosophy on the Court: the law should be literally interpreted and then, only from the written word from Congress. What a novel idea. Critics may decry Scalia's *534 conservatism in substantive Due Process cases or First Amendment cases, but his brand of originalism is welcome news to tax attorneys. The last thing a transactional attorney wants is expansionism in terms of filling in where Congress left off. What we do like is straight interpretation of terms, leaving to Congress the job of fixing their own mistakes.

[\[FN1\]](#). Professor of Law, Franklin Pierce Law Center. J.D. 1994, Brigham Young University; LL.M. 2000, University of Washington.

[\[FN2\]](#). Assistant Professor, Southern Utah University. J.D. 1984, University of California, Davis; LL.M. 1989, McGeorge School of Law.

[\[FN1\]](#). Justice Antonin Scalia, Address given to Marquette Law Students (Mar. 13, 2001).

[FN2]. Id.

[FN3]. "Taxpayers" may need to be defined. In some of the cases, for example, [Wyoming v. Oklahoma](#), 502 U.S. 437 (1993), the term "taxpayer" will not have its usual meaning. For discussion purposes, "government" will refer to the party who imposed the tax under consideration, and "taxpayer" will mean the party challenging the tax (or application thereof).

[FN4]. "Half" wins occurred in a few cases in which there was more than one issue or more than one tax in dispute. See, e.g., [County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation](#), 502 U.S. 251 (1992); [Am. Trucking Ass'n's Inc. v. Smith](#), 496 U.S. 167 (1990).

[FN5]. With only eight decisions, it would be fair to say that Justice Breyer hasn't yet formed as long a track record as Justice Scalia.

[FN6]. Which disagrees with the characterization made by one commentator that Scalia, Rehnquist, and Thomas formed "the triumvirate of the most consistently conservative, pro-government justices on the Court." J. Kelly Strader, [The Judicial Politics of White Collar Crime](#), 50 *Hastings L.J.* 1199, 1240 (1999). For another interesting chart demonstrating the Justices' pro-government proclivities in criminal cases, see Christopher E. Smith, [The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas](#), 43 *Drake L. Rev.* 593, 597 (1995).

[FN7]. [Camps Newfound/Owatonna, Inc. v. Town of Harrison](#), 520 U.S. 564, 571 (1997) (quoting [Gibbons v. Ogden](#), 22 U.S. (9 Wheat.) 1, 77 (1824) (Johnson, J., concurring)).

[FN8]. [Gibbons v. Ogden](#), 22 U.S. (9 Wheat.) 1, 78 (1824). See also [West Lynn Creamery, Inc. v. Healy](#), 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison").

[FN9]. [Oklahoma Tax Comm'n v. Jefferson Lines](#), 514 U.S. 175, 201 (1995) (Scalia, J., concurring) (emphasis added). See also [Transp. Co. v. Parkersburg](#), 107 U.S. 691, 701 (1883) ("It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce"). We have subsequently endorsed Justice Johnson's appraisal of the central importance of federal control over interstate and foreign commerce and, more narrowly, his conclusion that the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. "In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." [Freeman v. Hewit](#), 329 U.S. 249, 252 (1946) (internal citations omitted). Our decisions on this point reflect, "upon fullest consideration, the course of adjudication unbroken through the Nation's history." Id. See also [H.P. Hood & Sons, Inc. v. Du Mond](#), 336 U.S. 525, 534-35 (1949). Although Congress unquestionably has the power to repudiate or substantially modify that course of adjudication, it has not done so.

[FN10]. See [Camps Newfound/Owatonna](#), 520 U.S. at 614 (Scalia, J., dissenting). See also [Transp. Co. v. Parkersburg](#), 107 U.S. 691, 701 (1883) ("It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce.").

[FN11]. [512 U.S. 186 \(1994\)](#).

[FN12]. [Id. at 210-11](#) (Scalia, J., concurring).

[FN13]. [Id. at 207.](#)

[FN14]. [426 U.S. 794, 809-10 \(1976\).](#)

[FN15]. We do that a lot, often for no other reason than that we can make the taxpayer choose the hardest, most difficult form. If you want the benefit, the government can make you beg for it.

[FN16]. [West Lynn Creamery, 512 U.S. at 211-12.](#)

[FN17]. [520 U.S. 564, 609 \(1997\).](#)

[FN18]. [Id. at 589](#) (internal citations omitted).

[FN19]. [Id.](#) (internal citations omitted).

[FN20]. [Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 590 \(1997\)](#) (internal citation omitted).

We cannot read that New York's statute as attempting to establish religion; it [is] simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

...Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll."

[Walz v. Tax Comm'n of New York, 397 U.S. 664, 673-75 \(1970\)](#). As Justice Brennan noted: "Tax exemptions and general subsidies ... are qualitatively different." [Id. at 690](#) (Brennan, J., concurring).

[FN21]. [West Lynn Creamery, 512 U.S. at 199.](#)

[FN22]. See [Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 \(1983\)](#).

[FN23]. [Walz, 397 U.S. at 673](#) ("New York's statute [cannot be read] as attempting to establish religion; it simply spar[es] the exercise of religion from the burden of property taxation levied on private profit institutions.").

[FN24]. [Id. at 675](#) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'"). As Justice Brennan noted: "Tax exemptions and general subsidies are qualitatively different." [Id. at 690](#) (Brennan, J., concurring).

[FN25]. [Camps, 520 U.S. at 608-09.](#)

[FN26]. [Id. at 609.](#)

[FN27]. See [id. at 638-40.](#)

[FN28]. [Id. at 609.](#)

[FN29]. See [id. at 603-04](#). Similarly, the Court has in some cases rejected attempts by a State to limit use of the State's own natural resources to that State's residents. *Id.* at 516. See, e.g., [Hughes v. Oklahoma, 441 U.S. 322 \(1979\)](#). But in other cases, the Court has upheld just such preferential access. See, e.g., [Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 955-57 \(1982\)](#). Cf. [Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371 \(1978\)](#). Again, the distinctions turned on often subtle policy judgments, not the text of the Constitution.

[FN30]. See [Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 603-05 \(1997\)](#).

[FN31]. See *id.*

[FN32]. *Id.* at 605.

[FN33]. See *id.*

[FN34]. [532 U.S. 557 \(2001\)](#).

[FN35]. [U.S. Const. art. III, § 1](#).

[FN36]. [Hatter, 532 U.S. at 583](#).

[FN37]. [Id. at 560-64](#).

[FN38]. *Id.*

[FN39]. *Id.* at 564.

[FN40]. [U.S. Const. art. III, § 1](#) (judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

[FN41]. [253 U.S. 245 \(1920\)](#).

[FN42]. See [Hatter, 532 U.S. at 566 \(citing Evans, 253 U.S. at 264\)](#).

[FN43]. See [id. at 569 \(citing Evans, 253 U.S. at 264\)](#).

[FN44]. See [United States v. Hatter, 532 U.S. 557, 570 \(2001\) \(citing Evans, 253 U.S. at 265\)](#).

[FN45]. See [Hatter, 232 U.S. at 571](#). The majority relied upon *O'Malley v. Woodrough*:

To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of [Article III, s 1](#). To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

[O'Malley v. Woodrough, 307 U.S. 277, 282 \(1939\)](#) (footnote omitted).

[FN46]. [Hatter, 532 U.S. at 582 \(quoting United States v. Will, 449 U.S. 200, 227 & n.31 \(1980\) \(citation omitted\)\)](#).

[FN47]. [Hatter, 532 U.S. at 583.](#)

[FN48]. [Id. at 586.](#)

[FN49]. [Id. at 584.](#)

[FN50]. [Id. at 569](#) (citation omitted).

[FN51]. [532 U.S. 200, 204 \(2001\).](#)

[FN52]. [Id. at 205.](#)

[FN53]. [Id. at 207.](#)

[FN54]. [Id. at 221.](#)

[FN55]. [Id. at 220.](#)

[FN56]. [527 U.S. 423, 428-30 \(1999\).](#)

[FN57]. [Id.](#)

[FN58]. [Id. at 444.](#)

[FN59]. [28 U.S.C. § 1442\(a\)\(3\) \(1988\).](#)

[FN60]. [Jefferson County, 527 U.S. at 447-48.](#)

[FN61]. [519 U.S. 79, 81 \(1996\).](#)

[FN62]. [26 U.S.C. § 104\(a\)\(2\) \(1988\).](#)

[FN63]. [O'Gilvie, 529 U.S. at 86-87.](#)

[FN64]. [Id. at 98.](#)

[FN65]. [122 S. Ct. 1414, 1419 \(2002\).](#)

[FN66]. [26 U.S.C. § 6321 \(1988\).](#)

[FN67]. [Craft, 122 S. Ct. at 1419.](#)

[FN68]. [Id.](#)

[FN69]. [Id. at 1425](#) (quoting [Sanford v. Bertrau, 169 N.W. 880, 881 \(1918\)](#)).

[FN70]. [Craft, 122 S. Ct. at 1426](#) (Scalia, J., dissenting).

[FN71]. [523 U.S. 517, 520 \(1998\).](#)

[FN72]. [Id. at 535.](#)

[FN73]. [Id. at 522](#) (citing [31 U.S.C. § 3713](#)).

[FN74]. [Id. at 533.](#)

[FN75]. [Id. at 535-36](#) (citation omitted).

[FN76]. [T.R. McCoy, 802 F.2d 762 \(4th Cir. 1986\).](#)

[FN77]. See [Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 184-87 \(1994\)](#); [C.I.R. v. Glenshaw Glass Co., 348 U.S. 426, 431 \(1955\)](#). See also [S.E.C. v. Sloan, 436 U.S. 103, 120-21 \(1978\)](#); [United States v. Board of Comm'rs of Sheffield, 435 U.S. 110, 134 \(1978\)](#).

[FN78]. See [Central Bank, 114 S. Ct. at 184-87](#); [United States v. Riverside Bayview Homes, 474 U.S. 121, 137 \(1985\)](#); [Fletcher v. Warden, United States Penitentiary, 641 F.2d 850, 854 \(10th Cir.\)](#), cert. denied [453 U.S. 912 \(1981\)](#).

[FN79]. [489 U.S. 353, 355-56 \(1989\).](#)

[FN80]. [Id. at 372](#) (internal citations omitted).

[FN81]. [Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 798 \(1994\)](#) (internal citations omitted).

[FN82]. [United States v. Estate of Romani, 523 U.S. 517, 536 \(1998\).](#)

[FN83]. [Begier v. IRS, 496 U.S. 53, 55-56 \(1990\).](#)

[FN84]. [Id. at 67.](#)

[FN85]. [Id. at 67-68.](#)

[FN86]. [26 U.S.C. § 104 \(1988\).](#)

[FN87]. [United States v. Burke, 504 U.S. 229, 230 \(1992\).](#)

[FN88]. [Id. at 242.](#)

[FN89]. [Id.](#) (internal citations omitted).

[FN90]. [498 U.S. 192, 194 \(1990\).](#)

[FN91]. [Id. at 195-96.](#)

[FN92]. [Id. at 197.](#)

[FN93]. [Id. at 206-07.](#)

[FN94]. [Id. at 209.](#)

[FN95]. [United States v. McDermott, 507 U.S. 447 \(1993\)](#).

[FN96]. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 38-47 (1994) (outlining and criticizing "plain meaning" textualism, which focuses only on the "ordinary meanings of words and accepted precepts of grammar and syntax," and "holistic textualism," which permits consideration of contextual factors such as the traditional meaning of words, the statute's overall structure, and any policy presumptions articulated in the statute); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 223-35 (2000) (describing a "soft plain meaning rule"). See also Antonin Scalia, *A Matter of Interpretation* 23- 29 (1997); Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *Harv. J.L. & Pub. Pol'y* 59, 59 n.1 (1988).

[FN97]. [Patterson v. Shumate, 504 U.S. 753, 766-67 \(1992\)](#).

[FN98]. [Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 567 \(1997\)](#); [Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 \(1989\)](#); [Arkansas Writers's Project, Inc. v. Ragland, 481 U.S. 221, 223 \(1987\)](#).

[FN99]. See [Camps, 520 U.S. at 595-609](#); [Texas Monthly, 489 U.S. at 29- 33](#); [Ragland, 481 U.S. at 235-38](#).

[FN100]. [Ragland, 482 U.S. at 224](#).

[FN101]. *Id.* at 225. The court in the *Minneapolis Star* stated:

A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

[Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 \(1983\)](#).

[FN102]. [Ragland, 481 U.S. at 224](#).

[FN103]. *Id.*

[FN104]. *Id.* at 231-33.

[FN105]. [Ragland, 481 U.S. at 237-38](#) (Scalia, J., dissenting) (internal citations omitted).

[FN106]. [Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 \(1989\)](#).

[FN107]. *Id.* at 6.

[FN108]. *Id.* at 14-15.

[FN109]. *Id.* at 27-28.

[FN110]. *Id.* at 26-27.

[FN111]. See *id.* at 38 (Scalia in his dissent cites: [Sherbert v. Verner, 374 U.S. 398 \(1963\)](#), [Wisconsin v. Yoder, 406 U.S. 205 \(1972\)](#), [Thomas v. Review Bd. of Indep. Employment Sec. Div., 450 U.S. 707 \(1981\)](#), and [Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 \(1987\)](#)).

[\[FN112\]](#). See id. at 42.

[\[FN113\]](#). Id. at 42-43.

[\[FN114\]](#). See supra Section III(A)(2).

[\[FN115\]](#). [Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 90 \(1993\)](#) ("[W]e hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.").

[\[FN116\]](#). [512 U.S. 26, 28 \(1994\)](#) (utilizing the § 2057 deduction).

[\[FN117\]](#). See id.

[\[FN118\]](#). See id. at 29.

[\[FN119\]](#). See id. at 31, 33-35.

[\[FN120\]](#). Id. at 39.

[\[FN121\]](#). See id. at 40-42.

[\[FN122\]](#). Id. at 41-42.

[\[FN123\]](#). [489 U.S. 803 \(1989\)](#).

[\[FN124\]](#). [Harper, 509 U.S. at 89-90, 99](#).

[\[FN125\]](#). [Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 91 \(1993\)](#).

[\[FN126\]](#). Id. at 99.

[\[FN127\]](#). Id. at 106-10 (internal citations omitted).

[\[FN128\]](#). Justice Antonin Scalia, Address given to Marquette Law Students (Mar. 13, 2001).

[\[FN129\]](#). Id.

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