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## Icons

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## ICONS

L.A. Powe, Jr.\*

Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (Sarah Crichton Bks. 2009). Pp. 434. \$28.00.

Melvin I. Urofsky, *Louis D. Brandeis: A Life* (Pantheon Bks. 2009). Pp. 955. \$40.00.

Truly good judicial biographies are a pleasure to read, but all too rare. Thus, it is stunning that two would appear in the same year. But *Louis D. Brandeis: A Life* by Melvin I. Urofsky and *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* by Joan Biskupic are excellent yet different biographies about two highly important but very different justices separated in taking their seats by seventy years. *Brandeis* is a magnum opus, the culmination of an academic career's research. *American Original* is Biskupic's second biography of a sitting justice<sup>1</sup> written by a reporter covering the Court at a time when press access to the justices has never been easier. Each author has captured both the man and the justice.

*Brandeis* is by far the bigger book because Brandeis had by far the more varied life. Consider the "biography question" - what would we write about a person who died of a heart attack upon being told of Senate confirmation?<sup>2</sup> Brandeis would merit a full-scale biography, and Urofsky devotes over half his book, 430 pages, to Brandeis before Woodrow Wilson nominated him. Brandeis was an important progressive, a presidential advisor, the public interest lawyer who fashioned the modern brief named for him, author of *Other People's Money* his muckraking anti-big business credo (which Wilson read and annotated),<sup>3</sup> and a leader of American Zionism.

Scalia, in Mark Tushnet's apt observation, "was in the top of the second rank law professors in his generation."<sup>4</sup> He was drawn to the action in Washington, D.C. during the Nixon Administration, and after being passed over for the Solicitor General's slot in 1981, he was promoted by Ronald Reagan to the District of Columbia Circuit Court of Appeals as part of that Administration's program to create try-out camps for

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1. Joan Biskupic, *Sandra Day O'Connor* (HarperCollins 2005).

2. There are two men who died between confirmation and taking their seats, Robert Hanson Harrison, one of Washington's initial choices, and Edwin M. Stanton, a Grant choice. Stanton, an important figure as Secretary of War from 1862-1868 and Buchanan's last Attorney General has merited a biography. Benjamin P. Thomas & Harold M. Hyman, *Stanton: The Life and Times of Lincoln's Secretary of War* (Alfred A. Knopf 1962). Harrison, who received six electoral votes in the first presidential election, has no biographer.

3. Philippa Strum, *Louis D. Brandeis: Justice for the People* 211 (Harvard U. Press 1984).

4. Mark V. Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* 148 (W. Norton & Co. 2005).

conservative academics. Unlike his friend and colleague Ruth Bader Ginsburg, he would not even have rated a chapter in a relevant book. But twenty-three years after his confirmation, the same amount of time as Brandeis's on the Court, his judicial career merits Biskupic's meticulous efforts. He may or may not be the most important justice of the last two decades, but he certainly is the most interesting.

The books are different. Brandeis and his contemporaries have been dead for decades. Thus Urofsky has written his book from traditional historical sources for Americans who died before Pearl Harbor. Fortunately, Brandeis was so important and in the public arena for so long that more than ample data is available. Scalia and his contemporaries are very much alive, and Biskupic supplemented the public record by interviewing Scalia (several times) and his contemporaries. Urofsky clearly admires Brandeis. It is less clear what Biskupic thinks of Scalia (although my guess is grudging admiration).

Beyond their statures at appointment, Brandeis and Scalia had other important differences. Scalia is a devout and very traditional Roman Catholic. Brandeis was a non-observant Jew. His successful private practice made Brandeis rich (although he always lived spartanly). Scalia, father of nine, has lived most of his adult life on either an academic or a government salary. Brandeis was a progressive through and through. Scalia could match that with his conservatism. Urofsky makes the case that Brandeis was both idealistic and pragmatic, hallmarks of a successful reformer. Biskupic makes no comparable claims about Scalia, and his take-no-prisoners style of writing - precisely the way Brandeis had practiced law - suggests neither idealism nor pragmatism, although his lack of a significant public record hinders comparisons.<sup>5</sup>

The road to confirmation could not have been more different for the two although each president's political calculations were understandable. Wilson was appealing to the reform bloc that had supported Theodore Roosevelt in the 1912 election; Reagan was appealing to white ethnics. There was so much opposition to Brandeis that the Senate, for the first time, had a committee hold hearings on a nominee (although Brandeis was not called to testify). The nomination opened a window showing "a clear demarcation between progressives and those opposed to the reform movement."<sup>6</sup> Seven of the sixteen living former presidents of the American Bar Association, a group including William Howard Taft and Elihu Root, opposed the nomination, as did the president of Harvard Abbott Lawrence Lowell and the Wall Street bar. There was more than a whiff of anti-Semitism in the air, and the battle raged on for months. It seems inconceivable that, with that type of opposition, Brandeis could have been confirmed in the late twentieth century. However, only one Democrat voted against the nomination and only three Republicans, all insurgents, voted for it.

Scalia, by contrast, was nominated when William Rehnquist was promoted to the center seat. Senate Democrats aimed all their fire and energy in a stupid failed attempt to block Rehnquist, and they "were exhausted."<sup>7</sup> Scalia was fed soft ball questions which

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5. Biskupic does note that in the 1970s Scalia "still had bursts of idealism." Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* 66 (Sarah Crichton Bks. 2009).

6. Melvin I. Urofsky, *Louis D. Brandeis: A Life* 437 (Pantheon Bks. 2009).

7. Biskupic, *supra* n. 5, at 101.

he freely ducked if he wished and sailed to a 98-0 confirmation vote. Democratic Senator Joseph Biden stated that he “was greatly encouraged by Judge Scalia’s statement that he does not have an agenda of cases he is seeking to overturn . . . He is not a rigid man.”<sup>8</sup> In the twenty-first century, such a vote and such credulity would also be inconceivable.

Brandeis’s extrajudicial activities were astounding. He wrote to and talked with reformers, remained active in American Zionism, held Monday afternoon teas where seemingly anyone could drop in and be quizzed and receive advice, met with President Franklin D. Roosevelt any number of times, advised cabinet secretaries and other prominent New Dealers - National Recovery Administration head General Hugh Johnson too often. When a congressman or senator delivered a speech with which Brandeis agreed, “he would be invited over, in his clerk’s phrase, as a ‘tacit laying on of hands.’”<sup>9</sup>

Ideas about judicial propriety have significantly changed since Brandeis (and Felix Frankfurter and William O. Douglas) served, and Scalia, a hunter and opera buff, appears to have limited his off the Bench activities to delivering speeches and attending forums where he is uncommonly willing to discuss live constitutional issues. If there is more, Biskupic has not uncovered it (and it is doubtful there is more or that if there were it would be discoverable).

Yet one can find many similarities perhaps of equal importance. Both were first-generation Americans. Both were advocates; indeed, zealots seems apt. Each thought of himself as a teacher although each understood that any number of their Brethren were unteachable. Hence, each hoped to reach a wider audience, including non-lawyers, and in these endeavors each was successful, so successful indeed that each became, over time, an icon for his own selected constituency. Not surprisingly, both their most important and memorable opinions are dissents.

Brandeis’s dissents are explicable by the facts that the Progressive impulse had died sometime shortly after he took his seat and that he always served with at least five conservatives.<sup>10</sup> Scalia has served during the Age of Reagan when conservatism has reigned supreme and there has always been a majority of Republicans on his Court. But the cultural war issues that so inflame him - abortion,<sup>11</sup> gays, religion, and race<sup>12</sup> - have not been ones where conservatives have prevailed.

Both Brandeis and Scalia professed to be concerned with the judicial role in a democracy and wished to minimize judicial intrusions into democratic decision making. Brandeis’s Court was checking legislative initiatives, many of which he ardently supported, to deal with the newly emerged industrial America and this caused him to advocate a living Constitution with a strong dose of judicial restraint. Near the end of his career, in *Ashwander v. Tennessee Valley Authority*,<sup>13</sup> he summed up this corollary to

8. *Id.* at 121.

9. Urofsky, *supra* n. 6, at 723.

10. Until his last eighteen months on the Bench.

11. Biskupic does not discuss *Rust v. Sullivan*, 500 U.S. 173 (1991) or the abortion protest cases, e.g. *Hill v. Colo.*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting), for the light they shed on abortion (in contrast to free speech). Of course Scalia is hardly alone in voting these speech cases as if they were abortion cases.

12. For the record, Brandeis did not single race out for special treatment and voted with the majority in every race case during his tenure.

13. 297 U.S. 288, 341 (1936).

judicial restraint - avoidance of constitutional decisions whenever possible and selecting the narrowest rationale when a constitutional decision was necessitated.<sup>14</sup> In the wake of World War I and the Red Scare, Brandeis made an exception for civil liberties where his deference and restraint largely vanished. A typical Brandeis opinion marshaled facts in order to show that the legislative judgment was reasonable, and, if in dissent, to show the majority was second-guessing the legislature.<sup>15</sup>

Scalia has served in the wake of the Warren (and Burger) Court(s), and he advocates applying the original meaning of the Constitution as a check of what he deems to be judicial excesses. He maintains a healthy skepticism about the ability of judges to “solve the real problems of the people.”<sup>16</sup> One will never find him quoting John Marshall in *McCulloch v. Maryland*:<sup>17</sup> “This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”<sup>18</sup> Scalia tempers his originalism with a recognition that the United States cannot be returned to the eighteenth century. As he famously put it, distinguishing himself from his fellow originalist Clarence Thomas, “I’m a textualist. I’m an originalist. I’m not a nut.”<sup>19</sup> A typical Scalia opinion will offer some history surrounding 1789 and if a dissent, especially involving a cultural wars issue, it will likely be dripping in sarcasm (to show how absurd the majority is).<sup>20</sup>

Both Brandeis and Scalia offer judicial philosophies designed to sustain democratic decisions. It is easy for the two to validate legislative actions with which they agree. So initially, let us look at examples of their philosophies sustaining government actions where there can be no doubt that they do not approve of them. In Brandeis’s case the example is *New State Ice Company v. Liebmann*<sup>21</sup> where he dissented; in Scalia’s it is his majority opinion in *Crawford v. Washington*,<sup>22</sup> one of the opinions Scalia claims to be “most proud of.”<sup>23</sup>

*New State Ice* arose when Oklahoma decided to treat the manufacture and sale of ice as a public utility that required a certificate of convenience and necessity before entering the business. New State, an existing business that had obtained a certificate, sued Liebmann, a new entrant who lacked a certificate, to halt his business. Applying existing law, the Court held that ice manufacturing was not a “business affected with a

14. When I was taking Constitutional Law, *Ashwander* was a principal case. It is not mentioned in Sullivan & Gunther, *Constitutional Law* (16th ed. 2007) and receives a simple citation in Stone, Seidman, Sunstein, Tushnet & Karlan, *Constitutional Law* (6th ed. 2009).

15. “During the Taft years no opinion better captures Brandeis’s efforts to educate the Court than his dissent in *Jay Burns Baking Co. v. Bryan* [264 U.S. 504] (1924).” Urofsky, *supra* n. 6, at 596.

16. Biskupic, *supra* n. 5, at 70. After joining the majority in *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), he added: “that the point at which life becomes ‘worthless,’ and the point at which the means necessary to preserve it become ‘extraordinary’ or ‘inappropriate,’ are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.” *Id.* at 293.

17. 17 U.S. 316 (1819).

18. *Id.* at 415.

19. David G. Savage, *The Nation: Court’s New Tilt could Put Scalia on a Roll* L.A. Times A.1 (Feb. 20, 2007).

20. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992).

21. 285 U.S. 262, 280 (1932).

22. 541 U.S. 36 (2004).

23. Biskupic, *supra* n. 5, at 291.

public interest” and therefore was beyond state regulation.

The Oklahoma law functionally gave pre-existing businesses protection against any new competition by forbidding entry. Given Brandeis’s hatred for monopolies, he was wholly out of sympathy with the Oklahoma law; yet he voted to sustain it, and in doing so he authored the most recurrent mantra of American federalism. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”<sup>24</sup>

Crawford had been convicted despite a claim of self-defense because his wife’s evidence, read to the jury and relied on in closing, apparently swayed the verdict. She did not testify in person because state law precluded one spouse from testifying against the other without the other’s permission. The trial court had admitted her statements to the police on the ground that they were reliable and the state supreme court agreed because the statement “bore guarantees of trustworthiness.”<sup>25</sup>

Relying on the Confrontation Clause, Scalia reversed in an opinion offering history beginning with Sir Walter Raleigh’s conviction for treason where testimony before the Privy Council had been admitted despite Raleigh having no opportunity for cross examination. Subsequently one of the judges reflected that “the justice of England has never been so degraded and injured.”<sup>26</sup> Thereafter Scalia continues with English legal developments through the seventeenth century.<sup>27</sup> He then turns to the Colonies where controversial examination practices existed as well but with opposition.<sup>28</sup> After Independence, the new declarations of liberties included guarantees of confrontation and several state decisions contemporaneous to the Constitution showed that out of court declarations could only be admitted if the accused had been present when they were made.<sup>29</sup> Scalia followed with a tour of the Court’s own decisions, finding most results but not rationales, had been faithful to the original meaning. He then specifically repudiated *Roberts v. Ohio*<sup>30</sup> and its reliance on the reliability rationale used by the Washington court.

The history of the Confrontation Clause was solid because there were so many cases facing the issue in the seventeenth and eighteenth centuries, and Scalia fully embraced the history despite his lack of enthusiasm for criminal defendants. Earlier there had been a strong precursor of his position when he dissented in *Maryland v. Craig*,<sup>31</sup> one of the day care sexual abuse cases from the supposed epidemic in the 1980s. What made the *Craig* dissent significant was that it was joined by the Court’s liberals William Brennan, Thurgood Marshall, and John Paul Stevens.

Just as it is important to see the justices’ judicial philosophies in situations where they sustained action that the two disagreed with, it is equally useful to see examples

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24. *New St. Ice Co.*, 285 U.S. at 311.

25. *Crawford*, 541 U.S. at 41.

26. *Id.* at 44.

27. *Id.* at 43-46.

28. *Id.*

29. *Id.*

30. 448 U.S. 56 (1980).

31. 497 U.S. 836 (1990).

where their philosophies pointed one way and their policy preferences another, and the two followed the policy preferences. Since for the most part policy and philosophy align, it is where they split that one can detect which trumps the other. In Brandeis's case, *Wolff Packing*,<sup>32</sup> *Schechter Poultry*,<sup>33</sup> and *Erie Railroad*<sup>34</sup> are examples of policy trumping philosophy. In Scalia's case the examples are *Locke v. Davey*,<sup>35</sup> race cases generally, and the ubiquitous *Bush v. Gore*.<sup>36</sup>

Immediately after World War I, Kansas faced a cold winter with a lack of coal because of a strike. The state responded by mandating compulsory arbitration of labor disputes involving the production of food, clothing, or fuel. In *Wolff Packing* a unanimous Court held the statute unconstitutional because the businesses, neither licensed nor monopolies, were not in the narrow class of those affected with the public interest. Although Brandeis might have gone along because of the ethic of limiting dissents, Urofsky believes that Brandeis joined because he disapproved of compulsory arbitration of labor disputes.<sup>37</sup> Yet what Kansas had done in *Wolff Packing* was to experiment, exactly what Oklahoma would do in *New State Ice*. But unlike the latter, Brandeis was willing to stop the Kansas experiment before it was even tried even though the only justification was the Due Process Clause.

The National Industrial Recovery Act ("NIRA"), passed during the Hundred Days, was the cornerstone of the New Deal's initial effort at economic recovery. Brandeis thought differently. He correctly believed that the NIRA favored big business and would be used to harm smaller competitors. In March 1934, he told his daughter that the National Recovery Administration was "going from bad to worse."<sup>38</sup> Two months later he told Hugh Johnson, the NIRA administrator, that the best course of action was to liquidate the NIRA as soon as possible. Throughout the two years of its existence he told top New Dealers, including FDR "that he considered the program wrongheaded as well as impossible to administer."<sup>39</sup> He then joined the majority opinion in *Schechter Poultry* killing the NIRA as both an unconstitutional delegation of legislative power and, on the facts, exceeding the commerce power.

While the NIRA was wrongheaded, FDR had called for experimentation and promised to switch courses if programs did not work. Because of his fears of bigness, Brandeis did not see the federal government as a laboratory, but perhaps given the exigencies of the Depression he could have cut the president some slack. Urofsky makes clear that Brandeis "wanted to jolt the president and his advisors awake,"<sup>40</sup> but jolting the president awake is not a judicial function no matter how sure Brandeis was in his fears of big business.

*Erie Railroad* gave Brandeis a long-awaited opportunity to write his belief that

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32. *Chas. Wolff Packing Co. v. Ct. of Indus. Rel.*, 262 U.S. 522 (1923).

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

34. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64 (1938)

35. 540 U.S. 712 (2004).

36. 531 U.S. 98 (2000).

37. Urofsky, *supra* n. 6, at 602.

38. *Id.* at 701.

39. *Id.* at 705.

40. *Id.*

Joseph Story's opinion in *Swift v. Tyson*<sup>41</sup> was an unconstitutional usurpation of power.<sup>42</sup> In doing so he was also "writing his personal view into law"<sup>43</sup> as well as violating several canons of his recent *Ashwander* opinion. First, the constitutional issue was not presented to any court. Second, he could have limited *Swift* to its initial area of commercial transactions.<sup>44</sup> Third, when he attacked Story's interpretation of section 34 the Judiciary Act of 1789 as historically wrong, that was enough to overrule *Swift* without reaching any constitutional issue. But Brandeis wished to slay the idea of federal common law (in areas where Congress had no legislative power) forever and to do so he had to reach the constitutional issue. It was as if the older Brandeis became, the harder he found it to control his preferences.

*Locke v. Davey* involved a Washington law, compelled by the state constitution, that excluded from tax-financed scholarships, students at religious colleges and those majoring in theology. All other students were eligible for the scholarships. Rehnquist's majority upheld the law by a conclusion that a state may fund or not fund religious instruction. The opinion noted opposition to funding clergy at the time of the Constitution and cited the many contemporaneous state constitutions that "prohibited any tax dollars to the clergy."<sup>45</sup>

In dissent, Scalia offered but a single paragraph on history to distinguish the majority's history. "One can concede the Framers' hostility to funding clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all."<sup>46</sup> True enough, but Scalia the originalist must show that the Religion Clauses as understood in 1791 would mandate state funding for religious institutions when the state funded similar private ones. He made no effort to do so undoubtedly because the task would prove impossible. Concluding his dissent he wrote that "one need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction."<sup>47</sup> Perhaps, but the Washington constitutional provision dates from the nineteenth century and Scalia's concern for the deeply religious, which he supported with consistent votes for prayer at school events,<sup>48</sup> vouchers,<sup>49</sup> and displays of the Ten Commandments,<sup>50</sup> placed him at odds with the democratic decisions of Washington state in conformity with both its constitution and those from the Founding Era.

In an interview with Biskupic, Scalia asked "If I were an evolving constitutionalist, how could I keep my religion out of it?"<sup>51</sup> In a different interview Scalia asserted one

41. 41 U.S. 1 (1842).

42. Urosky acknowledges his debt to Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution* (Yale U. Press 2000). Urosky, *supra* n. 6 at 898.

43. *Id.* at 746.

44. Tony A. Freyer, *Swift and Erie: The Trials of an Ephemeral Landmark Case*, 34 J. S. Ct. Hist. 261 (2009).

45. *Locke*, 540 U.S. at 723.

46. *Id.* at 727 (Scalia, J., dissenting).

47. *Id.* at 733.

48. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992)

49. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

50. *See McCreary Co. v. ACLU*, 545 U.S. 844 (2005).

51. Biskupic, *supra* n. 5, at 209.



should not “separate your religious life from your intellectual life. They’re not separate.”<sup>52</sup> The latter appears more descriptively accurate of his votes.

Scalia believes, with the first Justice Harlan, that the Constitution is color-blind. Affirmative action is as bad as Jim Crow! he asserted to Biskupic.<sup>53</sup> He believes that the only justification for a race conscious remedy is proven racial discrimination against an individual. His bluntest statement is a terse concurring opinion in *Adarand Constructors, Inc. v. Pena*.<sup>54</sup>

To pursue the concept of racial entitlement - even for the most admirable and benign of purposes - is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.<sup>55</sup>

Scalia has fashioned himself into the champion of the white ethnic, worrying that affirmative action and disparate treatment will unconstitutionally harm “the Polish factory worker’s kid.”<sup>56</sup>

The Court, and especially its conservatives, has never embraced the history of 1865-1870 with any of the enthusiasm of their embrace of 1787-1791. Yet, as Thurgood Marshall powerfully put it during the bicentennial, the Constitution that Americans were celebrating was really the post-1868 Constitution.<sup>57</sup> Those who brought the Reconstruction Amendments also brought the Freedman’s Bureau, a federal agency whose mission was to aid the newly freed slaves - hardly a color-blind idea. The overwhelming purpose of the Fourteenth Amendment, whether articulated grudgingly in *Slaughter-House*<sup>58</sup> or with more enthusiasm in *Strauder*<sup>59</sup> was to protect blacks - not the children of immigrants<sup>60</sup> from hostile legislation. The closest Scalia ever gets to an embrace of the original history of the Fourteenth is when he embraces a rationale like that of *Pace v. Alabama*<sup>61</sup> in a dissent that announced that racially preemptive challenges were okay because “when a group, like all others, has been made subject to peremptory challenge on the basis of its group characteristic, its members have not been treated differently but the same.”<sup>62</sup>

Woops, I buried the lead. *Adarand* was a federal case. Even if Scalia brushes aside the history surrounding 1868, there can be no claim that the original meaning of the Fifth Amendment’s Due Process Clause was either no racial discrimination or no affirmative action. Instead Scalia’s views on race are those of the Republican Party under Ronald Reagan.<sup>63</sup> The Constitution is color-blind in no small part because white ethnics could be

52. *Id.* at 210.

53. *Id.* at 159.

54. 515 U.S. 200 (1995).

55. *Id.* at 239.

56. Biskupic, *supra* n. 5, at 160.

57. Al Kamen, *Marshall Blasts Celebration of Constitution Bicentennial*, Wash. Post. A1 (May 7, 1987).

58. See *Slaughter-House Cases*, 83 U.S. 36 (1872).

59. See *Strauder v. W. Va.*, 100 U.S. 303 (1879).

60. *But see id.* at 308: “Nor if a law should be passed excluding [from jury service] all naturalized Celtic Irishmen, would there [be] any doubt of its inconsistency with the spirit of the amendment.”

61. 106 U.S. 583 (1883) (interracial sex may be punished more severely than sex by couples of same race).

62. *Powers v. Ohio*, 499 U.S. 400, 423 (1991) (Scalia, J. dissenting) (emphasis deleted).

63. H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 Const. Commentary 641,

brought into the Republican Party, but African Americans could not. Original meanings had nothing to do with it.

Leaving aside Scalia's Orwellian justification for the stay of the Florida vote count and the one time only note of the per curiam opinion,<sup>64</sup> Biskupic notes three separate inconsistencies in Scalia's vote on the merits of *Bush v. Gore*: (1) interfering with the Florida courts does not match his views on federalism; (2) the concurring opinion offered no original meaning support for the conclusions about Article II; and (3) the Equal Protection rationale did not match Scalia's Fourteenth Amendment jurisprudence. Leaving aside Scalia's Orwellian justification for the stay and the one time only note of the per curiam, I am willing to give Scalia a pass on (1) and (2). There may not have been time to do an originalist opinion on Article II, and Scalia never bought into federalism as the Arizonans had. To Biskupic's criticisms I wish to add another (which I believe she would agree with since she provides the materials for it): Scalia's post-decision verbal behavior from "Get over it" to "we were the laughing stock of the world."<sup>65</sup>

Scalia holds to a thin Equal Protection Clause.<sup>66</sup> As he explained dissenting in the Virginia Military Institute gender discrimination case, "it is my view that when a practice not expressly prohibited by the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."<sup>67</sup> Before *Bush v. Gore* there were highly contested outcomes in 1800 and 1876 and the Court never dreamed of deciding either of them. It took Congressional creation of an electoral commission to bring five (but not nine) Supreme Court justices into the election of 1876. And while Equal Protection jurisprudence since 1962 has dealt with state voting, Scalia knows that with the exception of section two, the Fourteenth Amendment's original meaning excluded voting.<sup>68</sup>

Furthermore, there is something offensive about "Get over it" which he uttered to law students, Leslie Stahl, Brian Lamb, and I am sure many others. In context it seems to say "We cheated, we won, and it's history." That is true, but it is not a justification for cheating. Nor is his laughing stock rationale. During his time on the Court, the United States had been condemned all over Europe for the use of capital punishment and Scalia could not care less.<sup>69</sup>

Brandeis and Scalia merit the excellent biographies that Melvin Urofsky and Joan Biskupic have written. Brandeis had and Scalia is having an impressive career. Both are icons with exceptionally loyal followers in no small part because of their claim of adherence to principle, and it probably should come as no surprise that no justice is

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664 (2004).

64. *Bush*, 531 U.S. at 109 ("consideration is limited to the present circumstances . . .").

65. Biskupic, *supra* n. 5, at 248.

66. *Id.* at 156.

67. *U.S. v. Va.*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990)).

68. *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

69. Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789-2008*, at 333, 339 (Harvard U. Press 2009).

perfect. But it is easy to be principled when principles map preferences. As Brandeis' and Scalia's decisions show, strong preferences trump principles.<sup>70</sup>

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70. Scalia might counter with *Crawford* and *Tex. v. Johnson*, 491 U.S. 387 (1989) and he would have a point. But based on the language in his opinions, it is the cultural wars issues that represent his deepest preferences and those were my focus.