

Justice Scalia: An Originalist's Non-Originalist Approach to Political Party Cases

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Abstract. Supreme Court Justice Antonin Scalia was an avowed originalist. Despite his commitment to originalism, Justice Scalia's judicial opinions in cases that involve political parties are highly protective of the two-party system and often uphold the First Amendment rights of political parties. Justice Scalia's protective approach to the First Amendment rights of political parties is surprising because the framers of the Constitution deeply feared political parties and drafted the Constitution to limit the role that political parties could play in the new Republic. Justice Scalia, himself, never directly addressed the framers' dislike of political parties in his judicial opinions. Additionally, Justice Scalia never explained in his personal writings or in his judicial opinions how the framers' ideas about political parties should influence an originalist interpretation of the Constitution. No scholar has yet to write on this specific topic. The most similar works tend to focus on Scalia's approach to originalism within the broader context of First Amendment cases generally.

This Note examines this perplexity and attempts to identify the underlying values that guided Justice Scalia's approach to political party cases. This Note raises and rejects a few plausible explanations and ultimately concludes that Justice Scalia ignored the Founders' views on parties because he disagreed with the Founders on the topic of parties.

Introduction

During a lecture on constitutional law at the USC Gould School of Law, Supreme Court Justice Antonin Scalia praised the effects of the two-party system, asserting that the "framers

would have said, ‘Yes, this is just the way we wanted it.’”¹ Justice Scalia’s assertion is surprising considering the consensus among scholars that the framers feared political factions and drafted a “constitution against parties.”² Justice Scalia’s statement is even more surprising considering his preferred method of constitutional interpretation—originalism.³ As an originalist, Scalia interpreted the Constitution by looking to the original meaning of the text and using the Founders’ writings to help discern the original meaning of ambiguous constitutional text.⁴ Despite Justice Scalia’s dedication to originalism and the framers’ distaste for political parties, Scalia’s judicial opinions are protective of the two-party system and usually uphold the First Amendment claims of political parties.⁵ Justice Scalia never directly addressed the absence of political parties at the Founding or the framers’ dislike for political parties in his judicial opinions.⁶ Additionally, Scalia never explained in his personal writings or in his judicial opinions how the framers’ ideas about political parties should influence an originalist in interpreting the

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1. Lori Craig, *Scalia on Con Law: It’s all about standing*, USC GOULD SCH. OF L. (April 12, 2012), <https://gould.usc.edu/news/scalia-on-con-law-its-all-about-standing/>.
 2. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840*, at 40 (1969).
 3. DAVID M. DORSEN, *THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE’S LIBERAL OPINIONS* 16 (2017) (tracing the post-Warren court originalist movement to Scalia).
 4. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997) (stating that Scalia consults the Framers’ writings “not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of intelligent and informed people of the time, display how the text of the Constitution was originally understood”).
 5. *See infra* Part II.
 6. *See infra* Part II.

Constitution.⁷ Some theory or philosophy other than originalism seemed to guide Justice Scalia's approach to political party cases.

This paper will examine this apparent perplexity and attempt to identify the underlying values that guided Justice Scalia's approach to political party cases. I will begin by describing the framers' fears about political parties and discuss how these views influenced the drafting of the Constitution. Next, I will define originalism broadly and explain its role in First Amendment jurisprudence. I will then discuss Justice Scalia's approach to originalism, generally and within the context of First Amendment cases. Next, I will argue that Justice Scalia abandoned originalism when writing on political parties and instead allowed his desire for party strength and cohesion to guide his judicial opinions. Lastly, I will offer a few plausible explanations for Justice Scalia's seeming departure from originalism for political party cases.

I. Originalism and the Founders' views on parties

A. *The Founders' opposition to political parties*

George Washington dedicated a significant portion of his Farewell Address to warn against “the baneful effects of the spirit of the party.”⁸ Alexander Hamilton called political parties “the most fatal disease” of popular governments.⁹ And John Adams thought “a division of the republic into two great parties . .

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7. See *infra* Part II; see also Antonin Scalia, *Parties and the Nominating Process: The Legal Framework for Reform*, 4 COMMON SENSE 40, 40 (1981) (making no mention of the Founders' views on parties in a discussion of “the legal issues involved in reforming the presidential nominating process”).
 8. U.S. SENATE HIST. OFF., WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES 16 (2000), <https://www.govinfo.gov/content/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf>.
 9. RON CHERNOW, ALEXANDER HAMILTON 390 (2004).

. is to be dreaded as the greatest political evil under our Constitution.”¹⁰ If the framers—who disagreed bitterly on so much—could agree on one thing, it was their shared distaste for political parties.

Scholars agree that the Founders saw political parties as a significant threat to the new republic.¹¹ In his influential book, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840*, Richard Hofstadter advances the theory that the framers drafted a “constitution against parties.”¹² Hofstadter asserts that the framers wanted to avoid the political divisions that led to the violent English civil wars of the seventeenth century.¹³ Hofstadter contends that “at least three generations of Englishmen” associated political parties “with painfully deep and unbridgeable differences in national politics, with religious bigotry and clerical animus, with treason and the threat of foreign invasion, [and] with instability and dangers to liberty.”¹⁴ Hofstadter goes on to say that “[w]herever the Americans looked, whether to the politics of Georgian England, their own provincial capitals, or the republics of the historical past, they thought they saw in parties only a distracting and divisive force representing the claims of unbridled, selfish, special interests.”¹⁵ The framers certainly thought about parties at great

10. HOFSTADTER, *supra* note 2, at 38.

11. *See, e.g., id.* at 53–54 (noting that both the Federalist and Anti-Federalists feared the effects of political parties).

12. *Id.* at 40.

13. *See id.* at 12 (“Impeachment or attainder, exile or death had at times been the penalties paid by the losers [of politics]; and the opposition of the 1640’s was, of course, associated with a most violent outcome.”).

14. *Id.*

15. *Id.* at 40.

length while drafting the Constitution, but the idea of parties brought forth bitter memories of the corrupt English system.¹⁶

Hofstadter categorizes the views of eighteenth-century political philosophers on parties into three main camps.¹⁷ The first camp is the orthodox or Hamiltonian camp, which asserts that “parties are evils that can be avoided or abolished.”¹⁸ Second is the Madisonian or Humean camp, which claims that “though parties are indeed evil, their existence is an unavoidable by-product of a free state.”¹⁹ However, “[o]ne can check and limit parties . . . through a constitutional balance.”²⁰ Third is the Burke camp, which contends that “parties are not only inevitable but necessary and, on balance, good.”²¹ Hofstadter notes that the third camp, advanced by English philosopher Edmund Burke, was not embraced by any Founding-era American thinker at the time of the drafting of the Constitution.²² The Founders’ discussions of parties, instead, dealt with “their destructiveness, the history of . . . evils they brought upon mankind, [and] their significance as symptoms of disease in the body politic”²³ with only “an occasional flicker of dissent.”²⁴ Therefore, the framers drafted the Constitution from the perspectives of the first and second camps.

Despite the framers’ strong distaste for political parties, the framers (especially those in the second camp) assumed that

16. *See id.* at 12 (noting that “violence in politics was an Englishman’s birthright”).

17. *Id.* at 16.

18. *Id.*

19. *Id.* at 24.

20. *Id.*

21. *Id.* at 29.

22. *Id.* at 29, 35.

23. *Id.* at 35 (quoting BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 125 (1968)).

24. HOFSTADTER, *supra* note 2, at 35.

partisan opposition would occasionally arise.²⁵ However, the framers predicted that well-designed constitutional checks and balances would prevent permanent partisan structures or a two-party system from forming.²⁶ The framers' plans to counteract the influence of parties are best articulated in *Federalist 10*, authored by James Madison. According to Madison, the fundamental role of the government is to limit the selfishness of human nature, which politically manifests itself in factions.²⁷ One of the greatest advantages of the new constitutional government would be its ability to “break and control the violence of faction.”²⁸ In contemplating how to eliminate factions, Madison identified two possible remedies: destroy liberty or give all citizens the same opinion.²⁹ Madison asserted that the first remedy “was worse than the disease,” and the second remedy “is as impracticable as the first would be unwise.”³⁰

Madison concluded that because a free society could not eliminate factions, the Constitution must limit their effects.³¹ Typically, in a republic, minority factions will be defeated by regular vote, and they will be “unable to execute and mask its violence under the forms of the Constitution.”³² Madison viewed majority factions as more dangerous and difficult to counter.³³ But Madison saw representative government and an expansive republic as the cures.³⁴ A representative government, as opposed

25. *Id.* at 53.

26. *See id.* at 8, 64.

27. *Id.* at 64. Madison and other eighteenth-century writers used the terms “party” and “faction” synonymously. *Id.* at 10, 64.

28. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

29. *Id.* at 78.

30. *Id.*

31. *Id.* at 80.

32. *Id.*

33. *See id.*

34. *See id.* at 82.

to a direct democracy, will control the effects of majority factions because chosen representatives will “best discern the true interest of their country[,] and [their] patriotism and love of justice will be least likely to sacrifice . . . to temporary or partial considerations.”³⁵ Furthermore, a geographically sizeable republic will necessarily “take in a greater variety of parties and interests” and may offer security against the risk that “any one party [is] able to outnumber and oppress the rest.”³⁶

Although the Founders “had a keen terror of party spirit and its evil consequences . . . almost as soon as their national government was in operation, [they] found it necessary to establish parties” and “began to realize that they could not govern under [the Constitution] without the help of such organizations.”³⁷ However, the framers’ early parties were unlike the parties of today. The Federalists and Republicans did not view themselves as alternating parties within a persisting two-party system.³⁸ Instead, each side expected “to eliminate party conflict by persuading and absorbing the more acceptable and ‘innocent’ members of the other,” ultimately hoping to put the other party “out of business.”³⁹ The Republicans viewed the one-party period that followed the Alien and Sedition Act not as an anomaly “but as evidence of the correctness of their views and the success of the American system.”⁴⁰

Overall, the Founders intended “to create not a system of party government under a constitution but rather a constitutional government that would check and control parties.”⁴¹ Therefore, I contend with Justice Scalia’s statement that the

35. *Id.*

36. *Id.* at 83–84.

37. HOFSTADTER, *supra* note 2, at viii.

38. *Id.* at 8.

39. *Id.*

40. *Id.*

41. *Id.* at 53.

“framers would have said, ‘Yes, this is just the way we wanted it.’”⁴² The Founders would likely disapprove of the longstanding two-party system that persists today under their “constitution against parties.”⁴³

B. What is originalism?

Originalism is the theory that judges must adhere to the original meaning of the Constitution when interpreting its text.⁴⁴ Originalists focus their analysis on the original meaning of constitutional text at the time of ratification and the intentions of the framers who drafted the Constitution.⁴⁵ Originalists will consult various historical materials from the Founding Era to discern original meaning, often beyond just the framers’ writings.⁴⁶ Originalists argue that principled jurisprudence is impossible without originalism because other methods of interpretation allow “judges or Justices to say that the Constitution meant what they wanted it to mean.”⁴⁷ In other words, originalists are “committed to the view that original intent, or original meaning, is not only relevant but also authoritative” and “that we are in some sense obligated to follow the intent, or plain meaning, of the framers.”⁴⁸

Scholars assert that originalism “in its present form is a relatively recent phenomenon.”⁴⁹ In his 2017 book, *The Unexpected*

42. Craig, *supra* note 1.

43. HOFSTADTER, *supra* note 2, at 40.

44. Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM’N L. & POL’Y 385, 387 (2012).

45. *Id.* at 386.

46. *Id.* at 387.

47. DORSEN, *supra* note 3, at 16.

48. Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 331 (2005).

49. DORSEN, *supra* note 3, at 16.

Scalia: A Conservative Justice's Liberal Opinions, David Dorsen calls originalism a reaction to the Warren Court's "liberal or even radical decisions that were unhinged from the traditional view of the Constitution."⁵⁰ Dorsen claims that Judge Robert Bork and Attorney General Edwin Meese prompted jurists to adopt original *intent* as the proper method of constitutional interpretation beginning in the mid-1980s.⁵¹ However, Dorsen asserts that Justice Scalia modified this originalist movement by advocating for judges to look to the original *meaning* of the Constitution and to consult the framers' writings only to help clarify that original meaning.⁵²

C. *Justice Scalia's approach to originalism*

Justice Scalia subscribed to a form of originalism he described as "original meaning" originalism.⁵³ Scholars have termed Scalia's preferred method of constitutional interpretation as "public meaning originalism" because Scalia believed judges should look to "the practices at the time of the framing . . . to discern what a rational person at the time of the Constitution's framing and ratification would have taken the document's words to mean."⁵⁴ Scalia approached constitutional interpretation as a specialized form of statutory interpretation.⁵⁵ In Scalia's own words, the problem of constitutional interpretation was "distinctive, not because the usual principles of interpretation apply, but because the usual principles are being applied to an unusual text."⁵⁶ He went on to say "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original

50. *Id.*

51. *Id.*

52. *Id.* at 16–17.

53. Silver & Kozlowski, *supra* note 44, at 387.

54. *Id.*

55. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37 (1997).

56. *Id.*

meaning of the text, not what the draftsmen intended.”⁵⁷ Scalia admitted to consulting the framers and their writings from time to time but “not because they were Framers and therefore their intent is authoritative and must be law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”⁵⁸

Scalia endorsed public meaning originalism because he believed it produced the best results consistent with a constitutional government.⁵⁹ Compared to other methods of interpretation, Scalia believed originalism was “the lesser evil” and more compatible with a constitutional, democratic system.⁶⁰ Scalia noted that the “purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.”⁶¹ Furthermore, Scalia believed the Constitution required “society to devote . . . the long and hard consideration required for a constitutional amendment” before departing from the original values expressed in the Constitution.⁶²

Scalia critiqued non-originalist methods of interpretation as unprincipled and prone to subjectivity.⁶³ For example, proponents of a living constitution claim that the Constitution adapts

57. *Id.* at 38.

58. *Id.*

59. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (“Having described what I consider the principal difficulties with the originalist and nonoriginalist approaches, I suppose I owe it to the listener to say which of the two evils I prefer. It is originalism.”).

60. *Id.* at 849, 862.

61. *Id.* at 862.

62. *Id.*

63. DORSEN, *supra* note 3, at 17.

to meet the changes of society, tempered only by fundamental values, abstract moral principles, and respect for existing law.⁶⁴ Scalia, however, hoped for “the living Constitution . . . [to] die.”⁶⁵ Instead, he preferred a “dead, dead, dead” constitution.⁶⁶ Scalia rejected the living constitution theory because “[i]t is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’ Thus, by the adoption of such a criterion judicial personalization of the law is enormously facilitated.”⁶⁷ Originalism, therefore, best protects against judges mistaking “their own predilections for the law.”⁶⁸

D. *First Amendment originalism*

Even an avowed originalist will concede that originalism is difficult to apply to cases arising under the First Amendment.⁶⁹ A lack of historical information exists recounting the original meaning of the First Amendment, and, notably, the Founders did not debate the First Amendment’s meaning or its merits.⁷⁰ Additionally, when deciding upon the exact wording of the First Amendment, the First Senate kept no records of its meetings.⁷¹ One of the most prominent originalists, Judge Robert Bork, acknowledged that the “framers seem to have had no coherent

64. *Id.* at 18.

65. David G. Savage, *Justice Scalia: Americans ‘Should Learn to Love Gridlock,’* L.A. TIMES (Oct. 5, 2011, 12:00 AM), <https://www.latimes.com/politics/la-xpm-2011-oct-05-la-pn-scalia-testifies-20111005-story.html>.

66. Katie Glueck, *Scalia: The Constitution is ‘Dead,’* POLITICO (Jan. 29, 2013, 8:26 AM), <https://www.politico.com/story/2013/01/scalia-the-constitution-is-dead-086853>.

67. Scalia, *supra* note 58, at 863.

68. *Id.*

69. Silver & Kozlowski, *supra* note 44, at 390.

70. *Id.*

71. *Id.*

theory of free speech and appear not to have been overly concerned with the subject.”⁷² Furthermore, scholars have not formed a consensus on the original meaning of the First Amendment. For example, Professors Matthew D. Bunker and Clay Calvert contend that the Founding generation understood the freedom of speech according to William Blackstone’s definition, which only barred prior restraints on speech and accepted subsequent punishment for speech.⁷³ Other scholars, like Professor David Rabban, have asserted that the original meaning of the First Amendment was more protective of speech than Blackstone’s view because the Founders subscribed to the English Radical Whig tradition, which “stressed the importance of free political expression to popular sovereignty and effective government.”⁷⁴ Finally, modern First Amendment jurisprudence is derived largely from Justice Holmes’s and Justice Brandeis’s dissenting opinions in early twentieth-century freedom of expression cases—rather than from the intentions and writings of the Founders.⁷⁵

Furthermore, originalism is particularly difficult to apply to First Amendment political party cases because the Supreme

72. *Id.* (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971)).

73. Silver & Kozlowski, *supra* note 44, at 390–91, 391 n.31.

74. David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 801 (1985) (arguing that the First Amendment should be understood in the context of the “popular and democratic movements in England and the United States in the 1790s”).

75. See Elizabeth R. Purdy, *Oliver Wendell Holmes Jr.*, THE FIRST AMEND. ENCYC. (Sep. 19, 2023), <https://www.mtsu.edu/first-amendment/article/1337/oliver-wendell-holmes-jr> (describing Justice Holmes as “a civil libertarian who protected the First Amendment from encroachments”); Mary Welek Atwell, *Louis Brandeis*, THE FIRST AMEND. ENCYC. (Nov. 22, 2023), <https://www.mtsu.edu/first-amendment/article/1316/louis-brandeis> (noting that Brandeis and Holmes dissented from the Court to argue “that the First Amendment protected political opinions”).

Court did not recognize the freedom of association—which protects party autonomy—until 1958.⁷⁶ In *NAACP v. Alabama ex rel. Patterson*, the Court recognized that the “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”⁷⁷ The Supreme Court did not base its protection of the freedom to associate on any originalist justification nor discuss the intentions of the drafters of the Fourteenth Amendment.⁷⁸ Although the Supreme Court later affirmed that freedom of association also finds protection in the First Amendment’s Free Speech and Assembly Clauses,⁷⁹ originalism still does not lend itself easily to the First Amendment for the reasons discussed above. Accordingly, modern protection of the freedom to associate flows primarily from stare decisis and respect for existing law rather than an originalist method of constitutional interpretation.⁸⁰

E. Justice Scalia’s First Amendment originalism

Many scholars believe that Justice Scalia’s First Amendment jurisprudence has little connection to the original meaning of the

76. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that the Fourteenth Amendment guarantees members of civil rights groups the right to associate free from state interference).

77. *Id.* at 460.

78. See *id.* at 460–66.

79. See *Bates v. City of Little Rock*, 361 U.S. 516, 522–23 (1960) (noting that the freedom of speech and assembly clauses “lie at the foundation of a government based upon the consent of an informed citizenry”).

80. See David Lat, *Justice Scalia, Originalism, Free Speech and the First Amendment*, STAN. L. SCH. (Nov. 22, 2016), <https://law.stanford.edu/press/justice-scalia-originalism-free-speech-first-amendment/> (noting that “Justice Scalia’s protectiveness of the First Amendment flowed more from his views on stare decisis and his respect for precedent, rather than his originalist approach to constitutional interpretation”).

First Amendment.⁸¹ For example, a study by Professors Derigan Silver and Dan V. Kozlowski found that Justice Scalia used originalism in only thirty percent of his freedom of expression opinions through the 2010 term.⁸² However, this same study noted that although Justice Scalia did not typically cite materials written by the Founders in his First Amendment opinions, he often made historical appeals and references to longstanding American traditions.⁸³ Silver and Kozlowski, therefore, reclassify Justice Scalia’s originalism as “traditionalism” because of “his focus on the ‘traditions’ or ‘long accepted practices of the American people.’”⁸⁴ As a traditionalist, Justice Scalia more often cited “historical references or long-held American traditions to support his originalism than material written by or about the framers themselves.”⁸⁵ For example, in *Doe v. Reed*, Justice Scalia chronicled the history of American voting practices from the colonial period through the late nineteenth century to conclude that the First Amendment does not protect anonymous voting.⁸⁶ Similarly, in *Citizens United v. FEC*, Scalia carefully traced the history of corporations in America from the Founding Era through 1936 to conclude that the First Amendment protects corporate speech.⁸⁷ Scalia’s First Amendment opinions

81. DORSEN, *supra* note 3, at 27.

82. Silver & Kozlowski, *supra* note 44, at 402. Scalia used originalism even less in other areas of constitutional law. For example, one study found that Scalia used originalism in less than nineteen percent of his Fourth Amendment opinions. Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 80 (2018).

83. Silver & Kozlowski, *supra* note 44, at 415–16.

84. *Id.* at 415 (quoting 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in judgment)).

85. *Id.* at 416.

86. *Doe v. Reed*, 561 U.S. 186, 222–28 (2010) (Scalia, J., concurring in judgment).

87. *Citizens United v. FEC*, 558 U.S. 310, 387–90, 389–90 n.5 (2010) (Scalia, J., concurring).

frequently cite to history and tradition—but often from time periods outside of the Founding and ratification.

Sometimes, however, Scalia made only brief mentions of historical practices and tradition in his First Amendment opinions.⁸⁸ For example, in *Barnes v. Glen Theatre, Inc.*, Scalia asserted that no historical basis existed for protecting nude dancing without citing any historical materials.⁸⁹ Similarly, in *Republican Party v. White*, Scalia claimed that the framers did not support judicial elections but, again, provided no historical citations to support this claim.⁹⁰ And in *R.A.V. v. City of St. Paul*, Scalia declared that the First Amendment has traditionally not protected speech of “slight social value” without providing any concrete historical support for this claim.⁹¹

Scalia defended his use of tradition in the same way he defended originalism more generally.⁹² For example, in his 1990 dissent in *Rutan v. Republican Party of Illinois*—a political party case—Scalia claimed that adhering to longstanding American traditions is the only way to ensure the Court’s decisions do not reflect the “shifting” philosophies of the majority of the justices.⁹³ Scalia wrote:

[T]raditions are themselves the stuff out of which the Court’s principles are to be formed. . . . I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored

88. Silver & Kozlowski, *supra* note 44, at 407.

89. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574–75 (1991) (Scalia, J., concurring in judgment).

90. *Republican Party v. White*, 536 U.S. 765, 787–88 (2002).

91. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

92. *See, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (defending the use of tradition in constitutional interpretation).

93. *Id.*

by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.⁹⁴

Overall, Justice Scalia used originalism, in the strict sense, sparingly in his First Amendment opinions. Scalia's First Amendment jurisprudence is better described as traditionalist than originalist because he more often based his opinions on long-accepted practices of the American people than on the intentions or writings of the framers. Scalia believed deferring to longstanding tradition would guard against deciding cases on subjective grounds.

II. Justice Scalia's theory on political parties

A. Justice Scalia's rejection of originalism for political party cases

Justice Scalia's use of originalism and traditionalism in political party cases was largely inconsistent. Just as with many of his other First Amendment opinions, Justice Scalia's political party opinions often centered on "the 'traditions' or 'long accepted practices of the American people.'"⁹⁵ He typically made few references to the framers' writings and, instead, focused more broadly on longstanding American traditions to support his conclusions. However, in some opinions, he did not make a single appeal to traditionalism or originalism.⁹⁶ Most notably, Scalia did not acknowledge the framers' distaste for political parties in any of his opinions involving the political parties—even when he discussed the Founding Era. If some coherent theory does underlie Scalia's political party jurisprudence, it does not appear to be originalism or traditionalism.

94. *Id.*

95. Silver & Kozlowski, *supra* note 44, at 415 (quoting 44 Liquormart v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in judgment)).

96. *See generally* Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (Scalia, J., dissenting).

In some of his political party opinions, Scalia did not rely at all on traditionalism, originalism, or even history. For example, in *Tashjian v. Republican Party of Connecticut*, Scalia dissented from the majority because he believed a state law permitting closed primary elections imposed only a minor barrier to the rights of participation by independent voters in candidate selection.⁹⁷ Scalia did not discuss history, tradition, or the Founders' intentions in his dissent. Moreover, in *Washington State Grange v. Washington Republican Party*, Scalia dissented because he believed a Washington law that allowed non-member candidates to identify with a party violated political parties' freedom of association.⁹⁸ Again, any reference to originalism, traditionalism, or history was absent from Scalia's dissent. Similarly, in *FEC v. Wisconsin Right to Life*, Scalia made no appeal to tradition, history, or the Founders' intentions other than briefly noting that "laws targeting political speech are the principal object of the First Amendment guarantee."⁹⁹

Although some of Justice Scalia's political party opinions do not reference originalism, traditionalism, or history, many of his opinions include some sort of discussion of American traditions. For example, in *New York State Board of Elections v. Lopez Torres*, Justice Scalia discussed the history of party conventions in the United States to uphold a state law that required political parties to nominate candidates at a convention.¹⁰⁰ In keeping with his view that the Court should not find longstanding American practices unconstitutional,¹⁰¹ Scalia wrote, "[p]arty conventions,

97. *Id.* at 234–35.

98. *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 422, 462 (2008) (Scalia, J., dissenting).

99. *FEC v. Wis. Right to Life*, 551 U.S. 449, 494 (2007) (Scalia, J., concurring in part and concurring in judgment).

100. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 206–07 (2008).

101. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("[W]hen a practice not expressly prohibited by the

with their attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates. . . . Selection by convention has never been thought unconstitutional, even when the delegates were not selected by primary but by party caucuses.”¹⁰² Scalia defended the constitutionality of the patronage system on similar grounds in his dissent in *Rutan v. Republican Party of Illinois*.¹⁰³ Scalia called patronage “an unbroken tradition” that has existed “from the earliest days of the Republic.”¹⁰⁴ Scalia referenced the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines to support this assertion.¹⁰⁵ Scalia then argued that “when a practice not expressly prohibited by the text of 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.”¹⁰⁶ Remarkably, however, Scalia did not address the Founders’ views on parties in *Rutan*, even though Justice Steven’s concurring opinion noted that the Founders viewed the party system as “a pathology.”¹⁰⁷

Scalia also relied on traditionalism in *California Democratic Party v. Jones*.¹⁰⁸ Writing for the majority, Scalia held that California’s blanket-primary system violated the First Amendment

text of 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.”).

102. *Lopez Torres*, 552 U.S. at 206.

103. *See Rutan*, 497 U.S. at 95 (Scalia, J., dissenting) (arguing for the constitutionality of patronage because of its historical presence in American politics).

104. *Id.* at 96–97.

105. *Id.* at 93.

106. *Id.* at 95.

107. *Id.* at 82 n.3 (Stevens, J., concurring).

108. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“The formation of national political parties was almost concurrent with the formation of the Republic itself.”).

rights of political parties.¹⁰⁹ Scalia emphasized the “tradition of political associations in which citizens band together to promote candidates who espouse their political views.”¹¹⁰ He then noted that “[t]he formation of national political parties was *almost* concurrent with the formation of the Republic itself.”¹¹¹ Scalia’s analysis in *Jones* is best described as traditionalist because, for a strict originalist, the “almost concurrent” would make all the difference. However, Scalia chose to base his reasoning on the longstanding traditions of the American people and not on the writings or practices of the Founders.

Scalia’s campaign finance opinions are the most originalist of the opinions he wrote in cases involving political parties. While Scalia’s opinions in party nomination and patronage cases focus more on longstanding American traditions, Scalia’s campaign finance opinions often cite to the framers and the ratification period specifically.¹¹² For example, in *Citizens United v. FEC*, Scalia wrote one his most detailed historical discussions¹¹³ solely to dispute Justice Stevens’s use of originalism.¹¹⁴ In a dissent, Justice Stevens contended that the framers did not like corporations and, therefore, did not intend for the First Amendment to protect the activities of corporations.¹¹⁵ In response, Justice Scalia wrote, “The Framers didn’t like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech.”¹¹⁶ Scalia then chronicled the history of corporations in the United States from the

109. *Id.* at 586.

110. *Id.* at 574.

111. *Id.* (emphasis added).

112. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 386–89 (2010) (Scalia, J., concurring) (discussing the Founders’ views on corporations).

113. Silver & Kozlowski, *supra* note 44, at 405.

114. *Citizens United*, 558 U.S. at 385.

115. *Id.* at 427–28 (Stevens, J., concurring in part and dissenting in part).

116. *Id.* at 386 (Scalia, J., concurring).

Founding Era through 1936, when the Supreme Court first recognized the First Amendment rights of corporations.¹¹⁷ According to Scalia, no historical evidence existed to support the contention that the Founders did not intend for the First Amendment to apply to groups like corporations.¹¹⁸

Scalia also discussed the Founders' intentions in his dissent in *Austin v. Michigan Chamber of Commerce*.¹¹⁹ Scalia even referred to specific Founders, Madison and Jefferson, which was an infrequent practice for Scalia when writing on any area of the law.¹²⁰ In his dissent, Scalia argued that states cannot constitutionally restrict corporations' political independent expenditures.¹²¹ Scalia rejected "calibrating political speech to the degree of public opinion that supports it" because the "Founders designed, of course, a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular."¹²² Scalia was confident that Jefferson and Madison would disapprove of the majority opinion.¹²³ Furthermore, Scalia quoted Alexander Tocqueville, who believed eliminating powerful associations would "impoverish the public debate."¹²⁴ Scalia believed the Founders would endorse Tocqueville's view (although he did not provide any evidence to support this assertion).¹²⁵

117. *Id.* at 387–89, 389 n.5.

118. *Id.* at 393.

119. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 693 (1990) (Scalia, J., dissenting).

120. *Id.* at 693; see Silver & Kozlowski, *supra* note 44, at 408 (identifying "one of the few times [Scalia] referenced directly to a specific framer").

121. *Austin*, 494 U.S. at 679–680.

122. *Id.* at 693.

123. *Id.*

124. *Id.* at 693–94.

125. *Id.* at 693.

Overall, Justice Scalia's approach to political party cases is largely inconsistent. In some opinions, Scalia makes no appeal to originalism, traditionalism, or history. In others, he discusses longstanding American traditions at length. And finally, in campaign finance cases, Scalia tends to look to the intentions of the Founders and the historical practices of the Founding Era. Most notable, however, is the absence of any discussion on the Founders' distaste for political parties. As an avowed originalist, it seems odd that Justice Scalia never directly addressed the Founders' views on political parties or explained how the Founders' opinions should influence an originalist's interpretation of the Constitution. Therefore, if some overarching theory explains Scalia's political party jurisprudence, it does not appear to be originalism or traditionalism. The remainder of Part II of this paper will attempt to articulate the actual underlying values of Scalia's political party opinions.

B. The underlying values of Justice Scalia's political party opinions

Justice Scalia's majority opinion in *California Democratic Party v. Jones* reflects a hands-off, libertarian approach to the state regulation of political parties. In *Jones*, Scalia held that a law establishing "blanket primaries" violated the First Amendment rights of political parties.¹²⁶ In 1996, California voters adopted Proposition 198, which changed California's partisan primary system from a closed primary to a blanket primary.¹²⁷ Under the blanket primary system, "[a]ll persons entitled to vote, including those not affiliated with any political party, [had] the right to vote . . . for any candidate regardless of the candidate's political affiliation."¹²⁸ California's four major political

126. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000) (quoting CAL. ELEC. CODE §§ 2001, 2151 (West 2000)).

127. *Id.* at 570.

128. *Id.* (quoting CAL. ELEC. CODE § 2001 (West 2000)).

parties challenged Proposition 198 as violating their freedom of association.¹²⁹ Scalia agreed with the parties and asserted that primaries are not “wholly public affairs that States may regulate freely.”¹³⁰ Any regulation must adhere to the “limits imposed by the Constitution” and the “special protections [the First Amendment] accords” to the nomination process.¹³¹ Scalia held that Proposition 198 violated the First Amendment because it forced political parties to associate with unwanted outsiders.¹³² Even worse, it created a “clear and present danger” that rival party members would determine a political party’s nominee.¹³³ Additionally, Scalia did not find any of the seven asserted state interests—including producing a representative electorate, overcoming partisanship, promoting fairness, increasing voter turnout, and protecting privacy—compelling under the circumstances.¹³⁴ He further concluded that Proposition 198 was not narrowly tailored to meet these state interests.¹³⁵

Scalia’s opinion in *Jones* reflects a belief that political parties should be able to select their nominees free from state involvement because the First Amendment vigorously protects this process. Like Professors Samuel Issacharoff and Richard H. Pildes, Scalia seemed to view the democratic process as a market.¹³⁶ And the Scalia of *Jones* strongly preferred for political parties to operate in a free market. Scalia did not think that the seven asserted

129. *Jones*, 530 U.S. at 571.

130. *Id.* at 572–73.

131. *Id.* at 573, 575.

132. *Id.* at 577.

133. *Id.* at 578.

134. *See id.* at 582–84.

135. *Id.* at 585.

136. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (analyzing the state regulation of politics through a “theoretical framework by borrowing from the last generation of academic thought in private law”).

state interests were compelling enough to justify the state regulation of a party's nomination process.¹³⁷ Although Scalia acknowledged that the state could sometimes regulate the nomination process of parties, like to eliminate racially discriminatory voting practices, Scalia appeared hesitant to allow state regulations in contexts beyond the limited few already recognized by the Court.¹³⁸ Scalia believed that the nomination process deserved exceptionally high protections from state regulation because “[t]he moment of choosing the party’s nominee . . . is ‘the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’”¹³⁹ After reading *Jones*, one might assume that Justice Scalia approached political party cases from a libertarian, laissez-faire perspective.

However, this theory quickly breaks down when considering Scalia's dissent in *Tashjian v. Republican Party of Connecticut*. In *Tashjian*, Scalia concluded that a Connecticut law that required voters in a party's primary to be registered members of that primary did not violate the Republican Party's First Amendment rights.¹⁴⁰ Scalia accused the majority of creating a freedom of association issue “where none exists.”¹⁴¹ He thought that a Connecticut voter who votes in the Republican primary but refuses to become a Republican Party member “forms no more meaningful an ‘association’ with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster.”¹⁴² Scalia then rejected the majority's

137. See *Jones*, 530 U.S. at 582–84.

138. See *id.* at 572–73 (identifying Supreme Court cases that upheld state regulations of party internal processes).

139. *Id.* at 575 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986)).

140. *Tashjian*, 479 U.S. at 235 (1986) (Scalia, J., dissenting).

141. *Id.*

142. *Id.*

characterization of the Connecticut law “as an attempt to ‘protec[t] the integrity of the Party against the Party itself.’”¹⁴³ Scalia was not convinced that most rank-and-file party members would oppose the Connecticut law because the decision to challenge the law “was not made by democratic ballot, but by the Party’s state convention.”¹⁴⁴ Scalia concluded that state regulation was appropriate to “protect the general party membership against this sort of minority control” by party leadership.¹⁴⁵

In *Tashjian*, Scalia accepted state regulation of a party’s nomination process—a stance seemingly opposite from his opinion in *Jones*. However, unlike California’s Proposition 198, the Connecticut law enforced ideological cohesion within parties by ensuring only party members influenced nomination decisions. Proposition 198, instead, allowed non-member votes to dilute party member votes. A desire for a robust two-party system of ideologically cohesive parties can help explain the difference between these opinions. Furthermore, both of Scalia’s opinions in *Jones* and *Tashjian* indicate that Scalia viewed parties as existing to serve the interests of the rank-and-file party members.¹⁴⁶ In *Tashjian*, Scalia was unwilling to strike down a law that prevented the dilution of rank-and-file party member votes—especially without knowing whether most rank-and-file party members opposed the law. Similarly, in *Jones*, Scalia protected the influence of rank-and-file party members by holding that Proposition 198, a law that diluted party member votes, violated the First Amendment.

Scalia’s concurrence in *Citizens United v. FEC*, however, complicates this theory. In *Citizens United*, Scalia joined the majority opinion, which concluded that the Bipartisan Campaign

143. *Id.* at 236.

144. *Id.*

145. *Id.*

146. *See supra* notes 138 & 143 and accompanying text.

Reform Act of 2002 unconstitutionally burdened corporate political speech.¹⁴⁷ The Court rejected the argument that the government has a compelling interest in limiting “the corrosive and distortive effects of immense aggregations of wealth” accumulated by corporations and directed into political campaigns.¹⁴⁸ Scalia wrote a separate concurrence to emphasize that the First Amendment protects the speech of corporations, even though the Founders disliked corporations.¹⁴⁹ Scalia’s defense of corporate speech is inconsistent with his earlier emphasis on preserving the input of rank-and-file party members. If large corporations and wealthy individuals can influence the political process with little restriction, the speech of rank-and-file party members becomes easily overshadowed.¹⁵⁰

Scalia’s opinions in patronage cases further complicate his views on political parties. In *Rutan v. Republican Party of Illinois*, Scalia dissented from the majority opinion to argue for the constitutionality of political patronage.¹⁵¹ In *Rutan*, Scalia chronicled the long history of patronage in American politics and asserted that the Court should not use the First Amendment to overturn “accepted political norms.”¹⁵² Scalia described the benefits of patronage at length—although he claimed to do so not to endorse the system but “to demonstrate that a legislature could reasonably determine that [patronage’s] benefits outweigh its ‘coercive’ effects.”¹⁵³ Scalia noted that patronage “fosters the

147. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

148. *Id.* at 348–49 (quoting *Austin v. Mich. Chamber of Com.*, 494 U.S. 653, 660 (1990)).

149. *Citizens United*, 558 U.S. at 386 (Scalia, J., concurring).

150. *See Austin*, 494 U.S. at 660 (explaining that restrictions on corporate political expenditures “ensur[e] that expenditures reflect actual public support for the political ideas espoused by corporations”).

151. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting).

152. *Id.* at 95–96.

153. *Id.* at 104.

two-party system,” and its supporters assert it “stabilizes political parties,” “prevents excessive political fragmentation,”¹⁵⁴ and is “a necessary evil” for strong party organizations.¹⁵⁵ Scalia’s patronage opinions are inconsistent with the theory that Scalia valued the input of rank-and-file party members because patronage empowers party leadership.¹⁵⁶ Strong party leadership can better counter the influence of rank-and-file party members.

Perhaps the best way to understand the underlying values of Justice Scalia’s political party jurisprudence is to say that Scalia valued party strength and party cohesion. For example, in *Washington State Grange v. Washington State Republican Party*, Scalia dissented to argue for the unconstitutionality of a Washington law that allowed political candidates to identify with a party without being a party member.¹⁵⁷ Scalia argued that the law violated the Republican Party’s freedom of association because “[t]he views of the self-identified party supporter color perception of the party’s message, and that self-identification on the ballot, with no space for party repudiation or party identification of its own candidate, impairs the party’s advocacy of its standard bearer.”¹⁵⁸ Scalia did not believe that Washington’s interest in “blunt[ing] the ability of political parties with noncentrist views to endorse and advocate their own candidates,” as he put it, was

154. *Id.* at 104, 106.

155. *Id.* at 104 (quoting MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR: POLITICAL PATRONAGE FROM THE CLUBHOUSE TO THE WHITE HOUSE* 36 (1971)).

156. *See Elrod v. Burns*, 427 U.S. 347, 355–56 (1976) (explaining that patronage “prevents support of competing political interests” and thus “tips the electoral process in favor of the incumbent party”).

157. *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 462 (2008) (Scalia, J., dissenting).

158. *Id.*

compelling.¹⁵⁹ Nor did he find the law to be narrowly tailored to advance that interest.¹⁶⁰

Scalia's dissent in *Washington State Grange* indicates that Scalia believed the Court should protect a party's ability to operate as a group of insiders. Scalia argued that the Washington law unconstitutionally forced outsiders—those who refused to become party members—upon the party. Party outsiders threaten group cohesion and ideological consistency because, by definition, they do not fully endorse the party's platform. But Scalia saw great value in a two-party system of strong, cohesive parties. Scalia's opinions in *Jones*, *Tashjian*, *Citizens United*, and *Rutan* support this theory as well because, as Professor Issacharoff put it, parties at different points in history have controlled “the fundraising ability of the party itself, the insider control of the political agenda and the nomination process, and the ability to induce loyalty to the party,” among other areas of influence.¹⁶¹

Scalia's dislike of campaign finance reforms¹⁶² indicates that Scalia believed in party strength and cohesion. In Issacharoff's 2017 article, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, the author discusses how modern campaign finance reforms have eroded party strength.¹⁶³ Issacharoff argues that “[t]he new campaign finance regime ‘puts individuals and relatively small coalitions on a fairly equal footing

159. *Id.* at 470.

160. *Id.* at 471.

161. Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845, 849 (2017).

162. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring) (arguing that the First Amendment protects corporate political speech); *McConnell v. FEC*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part) (“This is a sad day for the freedom of speech.”).

163. Issacharoff, *supra* note 158, at 862.

with political parties.’”¹⁶⁴ In contrast, “money mediated through parties tempers the ardor of the more polarizing contributors, and disciplines the candidates to the governance message of the party.”¹⁶⁵ When the party could control campaign resources, donors and candidates had less ability to act independently.¹⁶⁶ However, in the absence of party control of campaign resources, party infrastructure can no longer “block a candidate who bypasses the party and appeals directly for support in the electorate.”¹⁶⁷ Therefore, Scalia’s dislike of the modern campaign finance regime is best understood as relating to his preference for strong, cohesive parties.

Scalia’s defense of patronage can also be understood in this way. In *Outsourcing Politics*, Issacharoff asserts that “the prospect of public employment was the glue that held together the party apparatus.” Patronage promotes party cohesion by incentivizing loyalty and punishing those who divert from the party’s platform.¹⁶⁸ Issacharoff attributes the decline of party strength partially to legislative and judicial patronage reforms that began in the late nineteenth century.¹⁶⁹ Scalia, however, believed the patronage system could combat the declining strength of parties.¹⁷⁰ In his dissent in *Rutan*, Scalia criticized the majority for its “inadequate appreciation of the systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups.”¹⁷¹ Overall,

164. *Id.* at 869 (quoting BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY* 202 (2015)).

165. Issacharoff, *supra* note 158, at 869.

166. *Id.*

167. *Id.* at 870

168. *Id.*

169. *See id.* at 872–75 (describing the historical decline of political patronage in American politics).

170. *Id.* at 875.

171. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 103–04 (1990) (Scalia, J., dissenting).

Scalia's defense of patronage further supports the idea that Scalia believed in party strength and cohesion.

Lastly, Scalia's desire to confine party primaries to party members reflects a belief in party strength and cohesion. In *Outsourcing Politics*, Issacharoff asserts that "the main disciplining device enjoyed by political parties has been the capacity to ensure that any candidate for office be committed to its core political agenda."¹⁷² If non-members can participate in a party's nomination contest, the party cannot ensure that the elected candidate will support the party's platform fully. This idea explains why Scalia defended the Connecticut law in *Tashjian* but argued that the Washington law in *Washington State Grange* and Proposition 198 in *Jones* were unconstitutional. The Connecticut law in *Tashjian* restricted non-members from voting in a party's primary, but the Washington law in *Washington State Grange* and Proposition 198 in *Jones* allowed non-members to participate in a party's nomination contest.¹⁷³

Overall, Scalia's judicial opinions reflect his deeply complicated beliefs about the roles of political parties in a constitutional democracy. Scalia's opinion in *Jones* indicates that Justice Scalia approached state regulations of political parties from a libertarian, hands-off perspective. However, this theory is wholly inconsistent with Scalia's dissent in *Tashjian*. Scalia's opinions in both *Tashjian* and *Jones* promote the influence of rank-and-file party members, but this explanation is inconsistent with Scalia's opinions in *Rutan* and *Citizens United*. These opinions endorsed practices that counter the influence of rank-and-file party members and empower the party elite. Therefore, the best way to describe Justice Scalia's views on political parties is that he

172. Issacharoff, *supra* note 158, at 875.

173. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 470 (2008) (Scalia, J., dissenting); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 567 (2000).

believed in strong, cohesive political parties. Scalia thought parties should be able to exclude those they do not want and reward the party faithful. He saw value in unsavory practices like patronage and corporate campaign contributions. In other words, Justice Scalia resisted an “overly romantic and individualized conception of democracy”¹⁷⁴ in favor of a healthy two-party system.

III. Explanations

Justice Scalia rejected originalism when writing on political parties and ignored the Founders’ warnings on the dangers of political parties. Instead of originalism, Scalia allowed his belief in party strength and cohesion to guide his judicial opinions. This theory, however, begs the question of why: Why did Scalia abandon his deep dedication to originalism when writing on political parties? Part III of this paper will offer a few explanations.

A. *A Citizens United explanation*

If one could ask Justice Scalia today how the Founders’ views on political parties should inform an originalist interpretation of the First Amendment, he might answer the question with an approach much like his concurring opinion in *Citizens United*. In *Citizens United*, Scalia rejected the idea that because the framers did not like corporations, they did not intend for the First Amendment to protect corporations.¹⁷⁵ Scalia would probably say that just because the framers did not like political parties, that does not mean they did not intend for political parties to enjoy First Amendment rights like any other group of citizens. Scalia would likely say that “the Framers’ personal affection or

174. Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 852 (2014).

175. *Citizens United v. FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring).

disaffection for [political parties] is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted,” but it cannot act “as a freestanding substitute for that text.”¹⁷⁶ Like his opinion in *Citizens United*, Scalia would then assert that the First Amendment “makes no distinction between types of speakers.”¹⁷⁷ Therefore, the text of the First Amendment unambiguously encompasses political parties. Any further inquiry into the intentions of the framers would be pointless.

But this explanation is unsatisfying. While Scalia’s *Citizens United* dissent might explain Scalia’s approach to campaign finance cases, it does little to explain why Justice Scalia ignored the Founders’ beliefs when writing on patronage or party nomination contests. For example, if Justice Scalia believed the First Amendment “makes no distinction between types of speakers,”¹⁷⁸ why did he think the First Amendment rights of political parties trumped the First Amendment rights of public employees in patronage cases?¹⁷⁹ This explanation does little to explain that question. Additionally, if Justice Scalia believed that the First Amendment protected political parties unequivocally, why was he accepting of some state regulation as constitutional in cases like *Tashjian*? Again, this explanation offers little insight into that question.

B. *A political gridlock explanation*

Scalia might have defended his political party jurisprudence as aligning with the Founders’ desire to create a system of political competition and gridlock. Justice Scalia saw gridlock as an intentional feature of the constitutional system.¹⁸⁰ For example,

176. *Id.*

177. *Id.*

178. *Id.*

179. *See supra* notes 159–63 and accompanying text.

180. Savage, *supra* note 64.

in a 2011 address to the Senate Judiciary Committee, Scalia praised political gridlock because it prevents an excess of legislation.¹⁸¹ He encouraged Americans to “learn to love the separation of powers, which means learning to love gridlock, which the framers believed would be the main protection of minorities.”¹⁸² Likewise, in a lecture on constitutional law at the USC Gould School of Law, Scalia praised the two-party system because, like the structural divide between the branches of the federal government, it makes passing legislation very difficult.¹⁸³ Today, legal scholars attribute much of the political gridlock and competition to the two-party system.¹⁸⁴ Therefore, Scalia might have said that his protectiveness of the two-party system was not at odds with the Founders’ most fundamental goals in drafting the Constitution because parties advance political gridlock.

Unfortunately, this explanation is just as unsatisfying as the first. Political parties can cause gridlock when the executive and legislative branches are of different political parties. However, when the “House, Senate, and presidency are . . . unified,” gridlock and political competition “may all but disappear.”¹⁸⁵ Accordingly, “party competition can either create or dissolve interbranch competition, depending on whether [the] government is unified or divided by party.”¹⁸⁶ Therefore, Scalia’s vision of a strong two-party system would aid in creating gridlock only

181. *Id.*

182. *Id.*

183. Craig, *supra* note 1.

184. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (“Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties.”).

185. *Id.* at 2315.

186. *Id.*

when the House, Senate, and presidency are of different parties. But “[s]ince 1832, government has more often been unified” than divided.¹⁸⁷ In sum, a gridlock-type explanation to Scalia’s rejection of originalism seems only to work part of the time—when the executive and legislative branches of government are of different parties.

C. *A Madisonian explanation*

If asked, Justice Scalia almost certainly would have acknowledged that the framers did intend for the Constitution to check political parties. However, Scalia might have argued that those checks did not lie in the First Amendment. He might have explained that the Founders wanted to limit the effects of parties, but they did not intend for every provision of the Constitution to aid in that goal. Nor did they intend to restrict political parties in every way possible.¹⁸⁸ Instead, Scalia would likely point to *Federalist 10*, in which Madison explained that the constitutional checks on political parties come from a representative government and an expansive republic.¹⁸⁹ Inserting additional checks on political parties through the First Amendment would be inappropriate and perhaps contrary to the wishes of the Founders. In fact, the Founders would probably see limiting the First Amendment rights of political parties as, in the words of Madison, one of those remedies “worse than the disease.”¹⁹⁰ Overall, Scalia would probably not view his political party jurisprudence as inconsistent with the framers’ intention because the framers did

187. *Id.* at 2330.

188. *See* THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (“It could never be more truly said than of the first remedy that it was worse than the disease. . . . The second expedient is as impracticable as the first would be unwise.”).

189. *Id.* at 82–83.

190. *Id.* at 78.

not intend for the First Amendment to act as a check on political parties.

This explanation is unsatisfying for the same reasons as the first explanation: It does little to explain Justice Scalia's approach to patronage or party primary cases. For example, if Justice Scalia believed that the Founders did not intend for the First Amendment to check the powers of political parties, why did he accept some state regulation as constitutional in cases like *Tashjian*? Moreover, if the First Amendment protects both political parties and individuals, why do the First Amendment rights of political parties win out over the rights of public employees in patronage cases? This explanation does little to answer these questions. Furthermore, because Madison saw representative government as one of the two major checks on political parties, he likely would have disapproved of the Court using the First Amendment in party associational rights cases to shield parties from restrictions imposed by a representative government.

D. Justice Scalia disagreed with the Founders on political parties

The best way—and perhaps the only way—to understand Justice Scalia's rejection of originalism in political party cases is to say that Justice Scalia thought the Founders' views on parties were wrong. As discussed in Part II, Scalia saw great value in a two-party system of strong, cohesive parties. He likely disagreed with Hamilton that political parties were “the most fatal disease” of popular governments.¹⁹¹ And unlike Washington, “the baneful effects of the spirit of the party”¹⁹² probably did not keep Scalia up at night. Therefore, Justice Scalia's judicial opinions

191. CHERNOW, *supra* note 9, at 390.

192. U.S. SENATE HIST. OFF., *supra* note 8.

on political parties demonstrate what Scalia thought a Justice should do when the Founders were wrong: Just ignore them.

In his judicial opinions, Scalia never addressed the absence of political parties at the Founding or the framers' distaste for political parties.¹⁹³ Additionally, Scalia never explained in his personal writings how the framers' ideas about political parties should influence an originalist interpretation of the Constitution.¹⁹⁴ Instead, Scalia ignored the entire history of the Founders' views on political parties. This choice was likely intentional. Justice Scalia could not have credibly argued that the Court should overlook the Founders' intentions in political party cases but adhere to them when answering other constitutional questions. In other words, Justice Scalia ignored the history of the Founders' views on political parties to ensure that he could credibly use originalism in other areas of constitutional law and still promote a strong two-party system when deciding political party cases.

Conclusion

Justice Scalia's judicial opinions in political party cases reflect Scalia's complicated beliefs on the appropriate role of political parties in a constitutional democracy. Scalia did not use originalism to guide his political party opinions because he entirely ignored the absence of parties at the Founding and the Founders' distaste for political parties. Moreover, a libertarian approach or a desire to promote the input of rank-and-file party members is inconsistent with some of Scalia's opinions in cases like *Tashjian*, *Rutan*, and *Citizens United*. The only unifying feature of Justice Scalia's political party opinions is his desire for a two-party system of strong, cohesive parties.

193. See *supra* Part II.

194. See, e.g., Scalia, *supra* note 7, at 40 (making no mention of the Founders' views on parties in a discussion of "the legal issues involved in reforming the presidential nominating process").

Justice Scalia likely departed from his deep commitment to originalism when writing on political parties because he disagreed with the Founders' views on political parties. Unlike the Founders, Scalia did not view political parties as a great threat to the republic. Instead, he believed in a healthy two-party system and unsavory practices like political patronage and corporate campaign contributions. Justice Scalia ignored the Founders' views on parties rather than address his disagreement head-on because this acknowledgment would threaten his credibility to use originalism when writing in other areas of constitutional law.