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The Political Thought of Justice Antonin Scalia: A Hamiltonian Conservative

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> "[T]he views of Alexander Hamilton (a draftsman) bear [no] more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of Constitution."
>
> –Antonin Scalia[1]

Antonin Scalia, who served on the Supreme Court from 1986 to 2016, made his name as an originalist. He wrote extensively on the subject and gave countless addresses defending an originalist approach to constitutional interpretation. In fact, one of Scalia's lasting legacies will be the extent to which he popularized originalism and provided it with a certain level of respectability. Within the camp of originalists, Scalia is credited with shifting the focus from one of "original intent" to that of "original meaning." In a speech given at the Justice Department just days before he was officially nominated to the Supreme Court, Scalia argued that the framers did not believe their subjective views were an authoritative guide to interpreting the Constitution. Instead, he maintained that the goal of originalists should be to discern how the words of the Constitution were understood by the society that adopted them.[2] This article presents evidence that Justice Scalia did not always use an original meaning approach to interpret the Constitution.[3] At various times during his long public career Scalia conspicuously aligned himself with Alexander Hamilton and his constitutional principles. Even more importantly, his jurisprudence reflected a Hamiltonian understanding of the Constitution.

Hamiltonism

Alexander Hamilton's political philosophy started with a realistic view of human nature. Hamilton believed people were motivated primarily by passions and self-interest. Human nature was at its worst, he believed, in popular assemblies where "[r]egard to reputation has a less active influence" on the actions of men and where there is a tendency for mob rule.[4] "The voice of the people," Hamilton proclaimed, "has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right."[5] Hamilton's generally dark understanding of human nature did contain an important exception. He believed that "a few choice spirits" could rise above their own self-interest and make decisions on behalf of the people. Harking back to a classical idea of honor, Hamilton regarded the "love of fame" as "the ruling passion of the noblest minds" and that which provides the greatest stimulus for "arduous enterprises for the public benefit."[6] More than any other framer, Hamilton wanted to build republican government on a solid foundation. Thus, he became the founding generation's strongest defender of the least popular branches of government: the executive and judiciary. If given "a permanent share in the government," Hamilton believed that these two institutions could be counted on to "check the unsteadiness" of the mass of the people.[7]

Scalia the Hamiltonian

It is interesting that at various times during his public career Antonin Scalia unmistakably identified himself as a Hamiltonian. At a 1982 conference on federalism, Scalia invoked Hamilton, not Thomas Jefferson (or even James Madison!) for his views on the subject. "[I]f a resurrected and updated Alexander Hamilton had been invited to this conference," Scalia told his audience, "the subjects he would have expected to hear addressed are quite different from—and the tenor of his own remarks would have been quite the opposite of—what we have heard over the past few days."[8] It is clear that Scalia was not himself impressed with the substance and tenor of the papers he had heard. The conference was in need of a nationalist perspective, which Scalia was only too happy to provide. Because most conservatives were

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defenders of the free market, Scalia suggested floating federal legislation that prohibits (or at least limits) state regulation in such areas as the cable, construction, or housing industries. Why not limit, Scalia advised, state court tort theories of "enterprise liability" or "design defect," which subject interstate businesses to greatly increased damages? Or what about "antitrust" and "antiescape" laws that excessively penalize businesses? Scalia lamented that there was not a single federal statute that simply said: "the states shall not regulate." Scalia urged the members of the conference, "as Hamilton would have urged you—to keep in mind that the federal government is not bad but good. The trick is to use it wisely."[9]

Scalia revealed a Hamiltonian predisposition in other speeches. In his 1986 speech at the Justice Department, Scalia criticized the earliest version of originalism (i.e., original intent), which was then being championed most prominently by Attorney General Edwin Meese. Even though Scalia agreed with Meese's basic objective, namely, that the goal of constitutional interpretation should be based on what a provision originally meant not on how it has evolved over time, he disagreed with the idea that the focus should be on the framers' *intent*. Scalia maintained that if the framers themselves were asked if the Constitution should be interpreted on the basis of their own subjective intentions, they would have unequivocally said "no." For evidence of this, Scalia cited explicit statements by prominent framers, including Hamilton's observation in his opinion on the national bank: "Whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself."[10] Rather, Scalia defended a method of constitutional interpretation based on "original meaning," which he described as the search for "the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended." However, in stark contrast to his rejection of the use of legislative history in interpreting statutes,[11] Scalia claimed it was not "irrelevant" to consider the views of "the most knowledgeable people of the time" in trying to understand what the words of the Constitution originally meant. Scalia then committed what might be considered a Freudian slip. Instead of citing Madison, the so-called "father" of the Constitution, as the intellectual force behind the Constitution, Scalia gave that distinction to Hamilton: "It is not that 'the Constitution must mean this because Alexander Hamilton thought it meant this, and he wrote it'; but rather that 'the Constitution must mean this because Alexander Hamilton, who for Pete's sake must have understood the thing, thought it meant this.'"[12]

Scalia's Hamiltonian Philosophy

As a judge, Scalia's originalist jurisprudence reflected the two main pillars of Hamilton's political philosophy: a strong distrust of popular democracy and an elite theory of who governs. Notwithstanding Scalia's strenuous criticism of "an imperial judiciary," he was not a populist. In one separation-of-powers case, Scalia wrote the majority opinion striking down a congressional law for attempting to reopen civil actions previously determined by the Court to be time barred. To support the Court's ruling, Scalia recounted the history of why the Founders supported judicial review in the first place. "The vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies," wrote Scalia, "increased the frequency of legislative correction of [judicial] judgments." "'The period 1780–1787,'" he added, "was a period of 'constitutional reaction' to these developments, 'which … leaped suddenly to its climax in the Philadelphia Convention.'"[13]

Scalia was also acutely aware of the antidemocratic role he performed as a judge. He relished telling audiences that his "most important job as a judge was to say no to the people."[14] In one speech he expanded on this theme. The reason judges have life tenure, Scalia explained, is so they "can tell the people to go take a walk. The most important thing I do in my job is to tell the majority that it can't do what it wants to do, because the Constitution forbids it. I stand between you and the majority, with the Constitution in my hand. And essentially, I tell the people, you know, 'people be damned, you cannot do this. The Constitution forbids you.'"[15]

Like Hamilton, Scalia also defended an elite governing class. We shall see that Scalia's advocacy of a formalistic interpretation of separation of powers, his broad interpretation of executive power, and his defense of the standard of good behavior for federal judges all reflected an elite theory of who governs. But there were other aspects of Scalia's jurisprudence that supported an elite governing class. As a federal judge, Scalia strictly interpreted the three-part test used to determine legal standing. In one case Scalia wrote the Court's decision holding that the "some day" intentions of members of a wildlife conservation group to return to areas around the world where animals were endangered did not "support a finding of the 'actual

or imminent' injury" required by prior case law. Scalia also criticized Congress for attempting to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts . . . ."[16]

Scalia was also a sharp critic of the regulation of money in politics. In judicial opinions he maintained that government restrictions on the use of corporate treasury funds for electioneering communications constituted viewpoint discrimination.[17] He also argued that *Buckley v. Valeo* (1976) "was wrongly decided" because, in his view, there was not a constitutional distinction between campaign expenditures and contributions.[18] Both of these perspectives can be said to have supported a Hamiltonian conception of who governs. At the time of the founding, Hamilton maintained that the "rich and well born" ought to have a permanent share in the government, because "they will check the unsteadiness of the [mass of the people], and as they cannot receive any advantage by a change, they therefore will ever maintain good government."[19]

Scalia's criticism of the landmark case *New York Times v. Sullivan* (1964) also reflected an elite view of American democracy. In *Sullivan*, the Court required proof of actual malice before a public official could win a libel suit. In judicial opinions Scalia took strong exception to the "public bumping" and heavy burden placed on public officials as a result of *Sullivan*.[20] In speeches he maintained that the Court's decision in *Sullivan* was inconsistent with the original meaning of the First Amendment.[21]

Scalia's elite conception of the U.S. governmental system was also apparent in his criticism of the Seventeenth Amendment, which allowed for the direct election of U.S. senators. In a 2010 debate with Justice Breyer, Scalia described the Seventeenth Amendment as "a burst of progressivism," which resulted in a decline of states' rights. On the basis of these remarks, Scalia was described as jumping on the anti-Seventeenth Amendment bandwagon.[22] However, Scalia's negative view of the Seventeenth Amendment dates back to at least the late 1980s. In a speech at American University, Scalia remarked that the Seventeenth Amendment signaled "the beginning of the end for the states." Under the original Constitution, U.S. senators were chosen by state legislatures and thus could be held accountable by those legislatures for their decisions. That all changed, Scalia explained, with the adoption of the Seventeenth Amendment. Senators are now elected by popular vote and are less beholden to the interests of the states. Scalia lamented this development, but said there is little the courts can do. Federalism "is a losing battle and has been a losing battle since the adoption of the Seventeenth Amendment," he observed.[23]

Hamiltonian Constitutional Principles

Even though Hamilton did not have the opportunity to provide a comprehensive account of his own political philosophy, his "science of politics" can be said to have included at least five distinct constitutional principles: (1) a formalistic interpretation of separation of powers, which would protect the least dangerous branches of government from encroachment by Congress; (2) an energetic executive whose officeholders would be able to compete with Congress in the establishment of national policy; (3) a theory of public administration that was distinguished by its emphasis on unity, discretion, and policymaking; (4) an independent judiciary, which would provide a check on majoritarian legislation and whose judges are protected with the standard of good behavior; (5) and a political process approach to federalism where the primary protection of the states comes from the structure of the government. Justice Scalia noticeably aligned himself with Hamilton on each of these constitutional principles.

Separation of Powers

It would not be an exaggeration to say that separation of powers was Justice Scalia's strongest doctrinal commitment. He once referred to the doctrine as "the cornerstone of [the U.S.] Constitution and the North Star of [the] founding fathers' constellation."[24] Like Madison and Hamilton, Scalia defended separation of powers as the primary safeguard of individual liberty. He also shared with Madison and Hamilton a fundamental distrust of congressional power. In a 2013 interview Scalia said it was laughable that the presidency could ever be described as "imperial." To the contrary, he stated that under the Constitution the "900-pound gorilla" in Washington is Congress. "If Congress can get its act together," Scalia insisted, "it can roll over the president."[25] Scalia's concern about congressional usurpation of power led him to be the Court's staunchest defender of a formalistic interpretation of separation of powers—a position first championed by Alexander Hamilton.[26] Accordingly, other than the few instances in which a sharing of powers is contemplated under the Constitution, Scalia

maintained that the three branches of government should be kept strictly separate.

Justice Scalia's formalistic interpretation of separation of powers was prominently displayed in classic disputes between Congress and the president. As a court of appeals judge, Scalia wrote the opinion for a three-judge panel of the D.C. District Court that struck down the removal provision of the Balanced Budget and Emergency Deficit Control Act of 1985.[27] Under the act the comptroller general was required to make spending recommendations to the president but was removable from office by a joint resolution of Congress. "What has been at issue in the congressional-executive dispute over the power of removal that began in the First Congress," wrote Scalia, "is not control over the officer but, ultimately, control over the governmental functions that he performs."[28]

Another example of Scalia's formalistic interpretation of separation of powers came in *Mistretta v. United States* (1989).[29] At issue in that case was the creation of the U.S. Sentencing Commission whose members were appointed by the president, by and with the advice and consent of the Senate, but were removable by the president only for "good cause." The majority, in an opinion by Justice Blackmun, rejected the petitioner's arguments that the act conferred excessive rulemaking authority on the commission in violation of the nondelegation doctrine and that placement of the commission in the judicial branch violated the doctrine of separation of powers. Scalia dissented alone. For the only time in his judicial career, Scalia argued that a federal law violated the nondelegation doctrine. What made the delegation of rulemaking authority different in this case, reasoned Scalia, was that it was not subject to executive or judicial control. "The power to make law at issue here," he observed, "is not ancillary but quite naked."[30]

However, Scalia's most important separation-of-powers opinion remains *Morrison v. Olson,*[31] which was handed down during his second term on the Court! *Morrison* involved a challenge to Title VI of the Ethics in Government Act of 1978, which allowed for the appointment of independent counsels to investigate alleged federal crimes by high-ranking officials in the executive branch. In a 7-to-1 decision, the Court held that the special prosecutor was an "inferior" officer of the United States who, pursuant to the Appointments Clause, could be appointed by a court of law. The Court also held that the law did not impede the president's ability to perform his constitutional duties. In solo dissent Scalia argued that the special prosecutor was a "principal" officer of the United States, who must be nominated by the president and confirmed by the Senate to be in compliance with the Appointments Clause. Rather than spend too much time on that relatively "technical" point, Scalia devoted most of his opinion to showing how the act violated "the absolutely central guarantee of just Government": separation of powers.

Scalia portrayed this case as about power. Usually, separation-of-powers questions "come before the Court clad, so to speak, in sheep's clothing," wrote Scalia, "[b]ut this wolf comes as a wolf." Scalia described the criminal investigation of Assistant Attorney General Ted Olson as a "bitter power dispute between the President and the Legislative Branch." He also gave several reasons for why he believed the law would "enfeeble" the institution of the presidency. "By its short-sighted action today," Scalia warned, "I fear the Court has permanently encumbered the Republic with an institution that will do it great harm."[32]

Energetic Executive

One of Alexander Hamilton's most important legacies was the case he made for a strong executive. "Energy in the executive," he declared in *Federalist* 70, "is a leading character in the definition of good government."[33] Unlike Congress, where slow and deliberate action was regarded as desirable, Hamilton viewed the presidency as the one institution of government capable of acting with speed. For the president to fulfill the many responsibilities of the office, Hamilton defended an expansive interpretation of Article II. In a famous debate with James Madison over the scope of executive power, Hamilton contended that Article II's Vesting Clause constituted a broad grant of discretionary authority to the president, "subject only to the *exceptions* and *qualifications* which are expressed in the instrument" as well as "principles of free government."[34]

Justice Scalia's views on executive power most clearly identified him as a Hamiltonian. In his article defending originalism as "the lesser of two evils," Scalia defined "executive power" as including all those "traditional powers of English Kings," except those "expressly reassigned" under the Constitution or "inherently incompatible with republican government."[35] Scalia employed Hamilton's broad interpretation of executive power in many substantive areas, including the president's authority to enter into treaties and executive agreements, the president's ability to withhold sensitive national security information

from Congress and the public (i.e., executive privilege), presidential immunity from court-ordered injunctive and declaratory relief, and civil immunity from lawsuits.

Scalia also defended the "sole organ" theory of the presidency in foreign affairs, a concept that traces back to Hamilton.[36] As a court of appeals judge Scalia wrote two important opinions arguing that the judiciary had limited authority to review the actions of the president in the international arena.[37] In one case Scalia criticized the court for getting involved in a controversy about which "judges know little." He also maintained that an injunction issued by the court would "undermine … confidence in the ability of the United States to speak and act with a single voice … ."[38]

During the "War on Terror" Scalia defended the president's powers as commander in chief. Following the September 11, 2001, terrorist attacks against the United States, Scalia supported the Bush administration's war policies, including its decision to deny habeas corpus relief to foreign national "enemy combatants" held at Guantanamo Bay, Cuba.[39] In *Boumediene v. Bush* (2008),[40] the Court struck down a provision of the Military Commissions Act of 2006 because it denied habeas corpus relief to the Gitmo detainees. Scalia dissented. He argued that foreign enemy combatants were not entitled to the constitutional privilege of habeas corpus and that the Court's decision was an "arrogant" violation of separation of powers.

The only occasion when Scalia did not support the Bush administration was in *Hamdi v. Rumsfeld* (2004).[41] In that case the Court ruled that a U.S. citizen, designated as an "enemy combatant," could be indefinitely detained during the War on Terror. In dissent Scalia argued that *Hamdi* had to be released unless criminal charges were brought against him or Congress suspended the writ of habeas corpus. However, Scalia's dissent was arguably not a departure from Hamiltonian political principles. Scalia quoted Hamilton on several occasions, including for the proposition that habeas corpus was an essential check against "the practice of arbitrary imprisonments … in all ages, [one of] the favorite and most formidable instruments of tyranny."[42]

Public Administration

The late political scientist Leonard D. White, an expert in the field of public administration, regarded Alexander Hamilton as "the greatest administrative genius of his generation in America, and one of the great administrators of all time."[43] Hamilton defined good government as "its aptitude and tendency to produce a good administration."[44] While all of the departments participated in the administration of government, Hamilton believed that "in its most precise signification, it is limited to executive details and falls peculiarly within the province of the executive department."[45] Hamilton advanced a unique theory of public administration that contained three distinct but related elements.[46] First, he stressed that each member of the executive branch should be under the direct control of the president. All executive officials, wrote Hamilton, "ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought … to be subject to his superintendence."[47] The second element of Hamilton's administrative theory emphasized that administration often involves making sensitive policy judgments, not merely (as Progressive theorists would later argue) scientific or technical decisions. Accordingly, Hamilton argued that department heads, acting under the supervision of the president, should be able to exercise a reasonable amount of discretion. Finally, Hamilton's administrative theory underscored the connection between administration and policy formulation. Hamilton wanted to forge the United States into a prosperous and well-respected nation. As the nation's first treasury secretary, he proposed that the debt accumulated by the Continental Congress be paid in full, that the federal government assume all state debts, and that the Bank of the United States be chartered. In his view the president, in consultation with department heads, should be willing to initiate policies with Congress and be actively engaged in the legislative process.

These three elements of Hamilton's administrative theory—unity, discretion, and policy formulation—were all defended by Justice Scalia. Scalia's support for Hamilton's unitary executive was apparent in various ways. For example, Scalia was a vociferous critic of *Humphrey's Executor v. United States* (1935),[48] where the Supreme Court limited the president's ability to remove independent regulatory commission heads. "It has … always been difficult," Scalia wrote in a court of appeals opinion, "to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government … ."[49]

Justice Scalia also supported the second element of Hamilton's administrative theory: the conception of administrators as political appointees who are

supposed to exercise discretion. In the late nineteenth century, a theory of public administration developed that challenged the classical approach associated with Hamilton. Led by Woodrow Wilson, Progressive theorists sought a more "enlightened" system of administration. Believing that public administration had become too corrupt, and that a more technical and scientific expertise was needed to solve the problems of modern government, the Progressives sought to remove politics from the field of administration.[50]

A former administrative law professor, Scalia expressed strong disagreement with the Wilsonian apolitical conception of public administration. In Scalia's view most regulatory issues pose questions of values, not simply facts. When he served as chair of the ABA's administrative law section, Scalia wrote an article titled "Rulemaking as Politics" where he argued that "[a]n agency may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to want."[51] As a judge Scalia attempted to allow administrative agencies to exercise discretion by defending a deferential role for courts in three major areas of administrative law: (1) during the *process* of agency rulemaking, (2) when reviewing agency constructions of law, and (3) when examining the *substance* of agency rules. For example, Scalia was one of the Court's most avid defenders of *Chevron* deference. In a 1989 article Scalia called *Chevron* "perhaps the most important [decision] in the field of administrative law since *Vermont Yankee Nuclear Power Corp v. NRDC*."[52]

Consistent with a Hamiltonian conception of public administration, Scalia also defended the legislative powers of the president. In *The Federalist* Hamilton described the president's veto power as a "shield" that not only protects the legislative prerogatives of the president but "furnishes an additional security against the enaction of improper laws."[53] Back in the 1970s assistant attorney general Scalia strenuously argued that the legislative veto violated the Presentment Clause and general principles of separation of powers. As he saw it, the legislative veto violated the Presentment Clause because all bills or resolutions must be presented to the president "to ensure presidential participation in *all* lawmaking, under whatever form it might disguise itself."[54] At the same time, Scalia took a different position when it came to the line-item veto. In 1996 Congress passed the Line Item Veto Act, which authorized the president to "cancel" tax and spending provisions within five calendar days after the enactment of a law. In *Clinton v. City of New York* (1998),[55] the Court ruled that the cancellation authority provided under the act did not conform to the requirements of the Presentment Clause. Scalia dissented. Despite the title of the act, Scalia argued that the president's cancellation authority did not amount to a line-item veto because the language of the affected statutes did not actually change.

How does one reconcile these markedly different interpretations of the Presentment Clause? While Scalia's different interpretations of the legislative and line-item vetoes are irreconcilable as a matter of constitutional law, they can be understood if one takes into account his Hamiltonian political philosophy. For the Hamiltonian Scalia legislative vetoes violated the Presentment Clause because they attempted to negate previously conferred authority on the executive branch by circumventing the president's role in the lawmaking process; meanwhile, the Line Item Veto Act simply represented an effort by Congress to confer discretionary tax and spending authority on the president that did not conflict with Article I's requirements for making laws nor a broad interpretation of the nondelegation doctrine.

Independent Judiciary

Alexander Hamilton regarded the judiciary as vitally important to the U.S. constitutional system. Properly constituted, the judicial branch would provide a moderating influence on republican government by "mitigating the severity and confining the operation of … [unjust and impartial] laws."[56] For this reason Hamilton was a strong champion of the standard of good behavior for federal judges, referring to it as "one of the most valuable of the modern improvements in the practice of government."[57] Similarly, Justice Scalia was a forceful defender of the standard of good behavior for federal judges. During his confirmation hearings Scalia expressed strong opposition to any reform proposals that would replace the current "cumbersome" process of impeaching federal judges. He also disagreed with mandatory retirements and elections for federal judges. "[A]ll of those things were considered and rejected" by the framers, Scalia testified, "in favor of an extraordinarily strong—extraordinarily, more so than most of the states now—an extraordinarily strong and independent Federal judiciary. I think it was a conscious decision by the framers, and I happen to think that it was a good one."[58] Despite his concerns about a Living Constitution, Scalia never wavered from his support of the standard of good behavior for federal judges. In a 2010 interview with Calvin Massey, Scalia

was asked if he supported terms limits on federal judges. Scalia could not fathom why the people would want to impose term limits on federal judges, calling it "a solution in search of a problem." In constitutional cases Scalia claimed that the standard of good behavior was essential. "The current society expresses its wishes through the legislature," observed Scalia. "But if you do believe that a Constitution places some limits on the current society in light of society over time, it seems to me you would prefer a Court that represents the society over time."[59]

Federalism

James Madison is often credited with being the originator of the political process approach to federalism disputes, but that distinction ought to go to Alexander Hamilton. Like Madison, Hamilton placed little weight on the Tenth Amendment as an affirmative limit on national power.[60] Moreover, Hamilton did not make formalistic distinctions between national and state powers, as both Madison and Thomas Jefferson did. Hamilton, for example, never maintained, as Madison did in *Federalist* 45, that "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[61] As Hamilton said in his opinion on the national bank, "[t]he means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must, of necessity, be great latitude of discretion in the selection & application of those means."[62] For Hamilton, the question of the distribution of powers between the national and state governments was not a legal question, but a practical consideration.[63]

During his confirmation hearings, Scalia defended a political process approach to federalism. When asked to provide his "general philosophy" of the role of the judiciary relative to federalism, Scalia stated: "The fact is, it seems to me, that the primary defender of the constitutional balance … is the Congress. It is a principle of the Constitution that there are certain responsibilities that belong to the State and some that belong to the Federal Government, but it is essentially the function of Congress–the Congress, which takes the same oath to uphold and defend the Constitution that I do as a judge, to have that constitutional prescription in mind when it enacts the laws."[64] Moreover, Scalia's early opinions as a Supreme Court justice reflected a political process approach to federal-state relations.

However, Scalia's views of federalism did change over time. In his opinion for the Court in *Printz v. United States* (1997),[65] Scalia took the unusual step of explaining why he thought Madison's views prevailed over Hamilton's on the subject of federal-state relations.[66] On the basis of Scalia's newly discovered Madisonian perspective, he joined his conservative colleagues in the so-called "federalism revolution" of the 1990s. During that period the Court placed some limits on Congress's authority to regulate interstate commerce and its ability to allow individuals to bring lawsuits against their own state governments under the Eleventh Amendment.

Justice Scalia's pivot toward Madison on the subject of federalism was not wholly complete, however. During his time on the Court, Scalia was a strenuous defender of federal preemption, particularly when a federal statute could be read to nullify expansive state theories of liability under the common law.[67] Moreover, Scalia never deviated from his view that the Tenth Amendment did not constitute a substantive limit on federal power. In a 2008 speech at the University of Central Missouri, Scalia was asked what he thought about the Tenth Amendment. "I don't think of it very much," Scalia comically remarked. "As I think our opinion holds, so what else is new? It's just a repetition of the understood fact that the Federal Constitution is a Constitution of enumerated powers; that the only powers the federal government has are those given to it by the Constitution and that all the other ones remain with the states."[68] On several notable occasions Scalia also sided with the national government in a federalism dispute. For example, in *Gonzales v. Raich* (2005),[69] Scalia joined the Court's decision upholding the federal government's authority to regulate homegrown marijuana for medicinal purposes. Scalia wrote a separate concurrence in which he defended a broad interpretation of Congress's commerce power and placed some reliance on *Wickard v. Filburn* (1942),[70] which provided one of the most far-reaching interpretations of Congress's commerce authority in Supreme Court history! Scalia's opinion in *Raich* received substantial criticism from libertarian conservatives.[71] In fact, on the basis of his willingness to adhere to certain Court precedents, law professor Randy Barnett claimed that "Justice Scalia is simply not an originalist."[72]

Conclusion

This article provided substantial evidence that Justice Scalia's jurisprudence was influenced by Hamiltonian

political principles. Like Hamilton, Scalia displayed a fundamental distrust of popular democracy, except when it came to the Living Constitution. He also supported Hamilton's elite theory of who governs. Scalia's views on legal standing, the regulation of money in politics, libel, and the Seventeenth Amendment all aligned with a Hamiltonian conception of who governs. Scalia also supported all five of Hamilton's constitutional principles: a formalistic view of separation of powers; an energetic executive; a theory of public administration based on unity, discretion, and policy-making; an independent judiciary; and a political process approach to federalism. Not only did Hamilton and Scalia defend similar constitutional principles but they also exhibited common personality traits, including brilliant intellectual abilities, dramatic literary styles, a high sense of character, and uncompromising temperaments.

Admittedly, there are some Scalia decisions that conflict with a Hamiltonian conception of the U.S. Constitution. In 1995 Scalia joined Justice Thomas's dissent in *U.S. Term Limits v. Thornton*,[73] which contended that the states had the right to place term limits on members of Congress. Thomas, a more principled defender of states' rights than Scalia, placed reliance on the Tenth Amendment, Thomas Jefferson's interpretation of the Qualifications Clauses, and he dismissed Joseph Story's contrary view because his positions on federal-state relations were "more nationalist than the Constitution warrants."[74] As I have argued elsewhere, Scalia's vote in *Term Limits* cannot be reconciled with a Hamiltonian understanding of the Constitution, but it can be explained on various policy grounds.[75]

Scalia's dissent in *Zivotofsky v. Kerry* (2015)[76] is also difficult to harmonize with a Hamiltonian conception of the Constitution. That case involved a clash between the president and Congress over whether "Israel" could be listed on a passport as the country of birth for a U.S. citizen born in Jerusalem. In an opinion by Justice Kennedy the Court ruled that the president had exclusive authority to recognize foreign nations under the Constitution and that Congress could not require the president to contradict the United States' neutrality policy regarding what nation, if any, has sovereign authority over Jerusalem. For support of the Court's decision Kennedy cited Hamilton's views from his "Pacificus" essays, his theory of "unity" from *Federalist* 70, and the sole organ theory.[77] In dissent Scalia did not reach the constitutional issue, but he expressed skepticism that the president's recognition power was exclusive.[78] Not only did Scalia's view of the president's recognition authority arguably represent a departure from Hamiltonian political principles, but it contradicted congressional testimony he gave back in 1975 when he stated unequivocally that "the recognition of foreign governments" is "exclusively Presidential in nature and not subject to limitation by Congress, even by statute."[79]

Finally, Scalia's opinion for the Court in *District of Columbia v. Heller* (2008)[80] likely represents a departure from Hamiltonian principles. In arriving at the conclusion that the Second Amendment guarantees an individual right to own guns for self-defense, Scalia relied mostly on a textual argument. He maintained that while the primary purpose of the Second Amendment was to support state militias as a check on federal power (i.e., the creation of a large standing army), the language of the Second Amendment had a broader meaning. To my knowledge Hamilton never expressed specific views on the Second Amendment, but his understanding of the relationship between standing armies and state militias,[81] as well as his general lack of support for a bill of rights,[82] strongly indicate that he would *not* have regarded the Second Amendment as protecting an individual right to bear arms disconnected from service in state militias. Notwithstanding these important departures from Hamiltonian political principles, Scalia's overall jurisprudence was profoundly influenced by Hamilton and was reflected in many substantive areas. In fact, during a visit to the University of Central Missouri, where I teach, Scalia admitted both privately and publicly that Hamilton's political philosophy, particularly in the areas of separation of powers and federalism, influenced his own interpretation of the Constitution.[83]

Notes

1. *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment).
2. Antonin Scalia, Speech at the Attorney General's Conference on Economic Liberties, June 14, 1986, in *Original Meaning Jurisprudence: A Sourcebook*, Appendix C (Office of Legal Policy, U.S. Department of Justice, 1987), 1–6.
3. This is not meant to suggest that Justice Scalia did not apply an original meaning approach at all. His original meaning approach was most apparent in interpreting various provisions of the Bill of Rights. See, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the Second Amendment guaranteed an individual right to keep and bear arms for self-defense); *Crawford v. Washington*, 541 U.S. 36

(2004) (interpreting the Confrontation Clause to require face-to-face confrontation).
4. James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* [hereinafter FP], ed. Isaac Kramnick (New York: Penguin Books, 1987), No. 15, 150.
5. Constitutional Convention Speech on a Plan of Government (Robert Yates's Version), June 18, 1787, *The Papers of Alexander Hamilton* [hereinafter PAH], 27 Vols., eds. Harold C. Syrett et al. (New York: Columbia University Press, 1961–1987), Vol. IV. 200.
6. FP (No. 72), 414.
7. Constitutional Convention Speech, 200.
8. Antonin Scalia, "The Two Faces of Federalism," *Harvard Journal of Law and Public Policy* 6 (1982): 19–22.
9. Ibid., 22.
10. PAH, Vol. VIII, 111.
11. Antonin Scalia, "Use of Legislative History: Judicial Abdication to Fictitious Legislative Intent," Unpublished speech delivered to various law schools in 1985–1986. On file with author.
12. Speech at the Attorney General's Conference on Economic Liberties, 3.
13. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 219–220 (1995) (citing Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, NJ: Princeton University Press, 1914), 37.
14. Remarks by Justice Antonin Scalia to Dr. Henry J. Abraham's "Seminar in American Constitutional Law and Theory" course from the University of Virginia, U.S. Supreme Court Building, Washington, DC, December 2, 1996.
15. Antonin Scalia, Address delivered at Thomas Aquinas College, Santa Paula, CA, January 24, 1997. On file with author.
16. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).
17. See, for example, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (Scalia, J., dissenting); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
18. See, for example, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (Scalia, J., concurring in part and dissenting in part).
19. Constitutional Convention Speech, PAH, Vol. IV, 200.
20. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (Scalia, J., dissenting).
21. See, for example, Antonin Scalia, "Methodology of Originalism," 12th Annual Henry J. Abraham Distinguished Lecture, University of Virginia School of Law, April 16, 2010.
22. Ian Millhiser, "Scalia Jumps on the Anti-Seventeenth Amendment Bandwagon," http://thinkprogress.org/2010/11/15/scalia-seventeenth/.
23. Antonin Scalia, "Reflections on the Constitution," Address at the Kennedy Political Union at American University, November 17, 1988. C-SPAN Broadcast.
24. "1976 Bicentennial Institute: Oversight and Review of Agency Decisionmaking," *Administrative Law Review* 28, no. 4 (1976): 569–742, 693.
25. Jennifer Senior, "In Conversation: Antonin Scalia," *New York Magazine*, October 6, 2013.
26. James B. Staab, *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court* (Lanham, MD: Rowman & Littlefield, 2006), 35–45.
27. *Synar v. United States*, 626 F. Supp. 1374 (D. D.C. 1986).
28. Ibid., at 1400.
29. 488 U.S. 361 (1989).
30. 488 U.S., at 420–421.
31. 487 U.S. 654 (1988).
32. Ibid., 699, 703, 732–733 (Scalia, J., dissenting).
33. FP, 402.
34. "Pacificus No. 1," PAH, vol. XV, 39.
35. Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849–65.
36. The sole organ theory is often credited to an 1800 speech by John Marshall, but Hamilton concluded his "Pacificus" essays, authored seven years earlier, by observing that the president is the "constitutional organ of intercourse between the United States & foreign Nations: Whenever he speaks to them, it is in that capacity; it is in the name and on behalf of the United States." PAH, Vol. XV, 135.
37. *Ramirez de Arellano v. Weinberger*, 745 F. 2d 1500 (D.C. Cir. 1984) (Scalia, J., dissenting); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).
38. *Ramirez de Arellano*, 745 F. 2d at 1562.
39. *Rasul v. Bush*, 542 U.S. 466 (2004) (Scalia, J., dissenting); *Boumediene v. Bush*, 553 U.S. 723 (2008) (Scalia, J., dissenting).
40. 553 U.S. 723 (2008).
41. 542 U.S. 507 (2004).
42. Ibid., 558 (quoting *Federalist* 84).
43. Leonard D. White, *The Federalists: A Study in Administrative History* (New York: MacMillan Co., 1961), 125–126.
44. FP (No. 68), 395.
45. FP (No. 72), 412.
46. For an excellent synopsis of Hamilton's administrative theory, see James W. Ceaser, et al. *American Government: Origins, Institutions, and Public Policy*, 5th ed. (Dubuque, IA: Kendall/Hunt, 1998), 510–511.
47. FP (No. 72), 413.
48. 295 U.S. 602.
49. *Synar v. United States*, 626 F. Supp. at 1398.
50. Woodrow Wilson, "The Study of Administration," *Political Science Quarterly* 11, no. 2 (1887): 198–222.
51. Antonin Scalia, "Rulemaking as Politics," *Administrative Law Review* 34 (1982): v–xi.
52. Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," *Duke Law Journal* (1989): 511–521.
53. FP (No. 73), 418.
54. Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," *Regulation* 3, No. 6 (1979): 19–26.
55. 524 U.S. 417.
56. FP (No. 78), 441.
57. Ibid., 437.
58. *Nomination of Judge Antonin Scalia*, Hearings before the Committee on the Judiciary, U.S. Senate. 99th Cong. 2d. Sess. August 5–6, 1986, 99–100.
59. "Legally Speaking: A Conversation with Antonin Scalia," Hastings College of Law, September 26, 2010.

https://www.youtube.com/watch?v=KvttIukZEtM. See also "To Preserve Elite Federal Courts," *L.A. Times Daily Journal*, February 20, 1987, 4, col. 3.

60. PAH, Vol. V, 182 (objecting to a proposal at the New York Ratifying Convention that would have limited Congress to "express" powers under the Constitution).
61. FP (No. 45), 296.
62. PAH, Vol. VIII, 105.
63. PAH, Vol. V, 97. See also James B. Staab, "The Tenth Amendment and Justice Scalia's 'Split Personality,'" *The Journal of Law & Politics* 16, no. 2 (2000): 231–379.
64. *Nomination of Judge Antonin Scalia,* 81.
65. 521 U.S. 898 (1997).
66. Ibid., 915n9.
67. James B. Staab, "Conservative Activism on the Rehnquist Court: Federal Preemption is No Longer a Liberal Issue," *Roger Williams University Law Review* (2003): 129–186.
68. Antonin Scalia, "Constitutional Interpretation," The Julius J. Oppenheimer Lecture Series, University of Central Missouri, March 4, 2008.
69. 545 U.S. 1 (2005).
70. 317 U.S. 111.
71. See, for example, Mark Moller, "What Was Scalia Thinking?" *Reason.Com*, June 14, 2005. http://www.cato.org/publications/commentary/what-was-scalia-thinking.
72. Randy Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism," *University of Cincinnati Law Review* 75 (2006): 7–24.
73. 514 U.S. 779 (1995).
74. Ibid., 856.
75. Staab, *The Political Thought of Justice Antonin Scalia*, 271–282.
76. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).
77. Ibid., 2085–2086.
78. Ibid., 2118.
79. *Congressional Oversight of Executive Agreements–1975.* Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 94th Cong., 1st Sess., May 15, 1975, 176–177.
80. 554 U.S. 570 (2008).
81. In *Federalist* 24–28, Hamilton defended the Constitution's provision allowing Congress to maintain a standing army during peacetime. To counter Anti-Federalist concerns that a standing army would endanger the people's liberties, he mentioned both political checks (i.e., elections and the requirement of appropriations every two years), and a structural check (state militias). In fact, in *Federalist* 29, Hamilton argued that "military establishments" would be less necessary if the national government had the authority to organize and discipline state militias in times of national emergency. In contrast to Madison, Hamilton desired "a select corps" of "well-trained militia ready to take the field whenever the defense of the State shall require it." FP, 210. That Hamilton likely viewed the Second Amendment as a federalism provision is evidenced by his argument that the officers for the militias would be appointed by the state governments. Moreover, during New York's Ratifying Convention, Hamilton (like Madison) supported an exemption from service in state militias for religious purposes—although he said he did "not wish to encourage this idea." PAH, Vol. V, 181.
82. It is interesting that even though Hamilton did not support a bill of rights, he proposed thirteen amendments to the Constitution as a conciliatory measure at the New York Ratifying Convention. One provision provided: "That each state shall have power to provide for organizing, arming and disciplining its militia, when no provision for that purpose shall have been made by Congress and until such provision shall have been made; and that the militia shall never be subjected to martial law but in time of war rebellion or insurrection." PAH, Vol. V, 169. Once again, this is strong evidence that Hamilton regarded the relationship between a standing army and the state militias as a federalism issue. He was responding to Anti-Federalist concerns that the federal government could unilaterally disarm the state militias. There is no provision in Hamilton's proposed bill of rights that gives support to an individual's right to own guns for self-defense.
83. In 2006 I authored a book on Justice Scalia titled *The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court* (Rowman & Littlefield, 2006). When Justice Scalia visited the University of Central Missouri in 2008, he graciously inscribed the book as follows: "To Jim Staab–For writing a fine book that probably is, in basic thrust if not in each detail, right on." He also acknowledged an indebtedness to Hamiltonian political principles in a lecture given to my "Public Law and Judicial Process" course.

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