BATTERED WOMEN & JUSTICE SCALIA

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I. INTRODUCTION

This Article explores the human cost of one justice's intellectual dishonesty. The beginning of the story is chillingly familiar. Ana Cruz and Michael Foster married in 1987. Just a few months into the marriage, Foster became violent and abusive. With the help of a legal services organization, Ana obtained a civil protection order which directed her husband not to "molest, assault, or in any manner threaten or physically abuse" her or her mother.[1] Despite the order, Foster continued to harass and threaten them for over nine months. He followed Ana on the street, twice kidnapped her, and repeatedly threatened her in person and by phone. His physical abuse culminated in a brutal assault in which he lay in wait for Ana at her mother's house, attacked her, pushed her down a flight of stairs, and kicked and beat her until she was bloodied and unconscious.[2] Ana Foster's attorney moved to have Foster held in contempt for violating the protection order. Ultimately, Foster was found guilty of four counts of misdemeanor contempt. However, because of the six-month maximum for misdemeanor contempt, Foster received only 150 days on each count, even for the most serious attack on Ana.[3]

Although the police were called to the scene of several of these incidents,[4] Foster was not indicted until one and a half years later.[5] Foster moved

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1. *See* United States v. Dixon, 598 A.2d 724, 725 (D.C. 1991).

2. *See* Brief of Amicus Curiae, Women's Legal Defense Fund citing Motion to Show Cause at 3, United States v. Dixon, 598 A.2d 724 (D.C. 1991) (No. 89-449).

3. *See id.* at 6.

4. *See* Motion to Adjudicate Contempt at 1, United States v. Dixon, 598 A.2d 724 (D.C. 1991) (IF-630-87).

5. The United States Attorney's Office for the District of Columbia, which

to dismiss the charges, claiming that he had already been placed in jeopardy for this conduct in the contempt proceeding.[6] The District of Columbia Court of Appeals agreed and dismissed the charges.[7] His case was later consolidated with another contempt and double jeopardy case and granted certiorari to the Supreme Court as *United States v. Dixon*.[8]

Writing for a badly fractured Court, Justice Scalia affirmed in part and reversed in part the lower court's decision.[9] The day of the *Dixon* decision, Ana Foster's attorney proclaimed the opinion, "a significant victory for battered women,"[10] because Scalia stated that the more serious felony assault and felony threats charges could go forward, while only one count of misdemeanor simple assault was barred by the Double Jeopardy Clause. The years since the decision, however, have proven to the contrary.[11] In reality, Scalia's failure to articulate a clear and workable double jeopardy rule for contempt cases has created substantial uncertainty and confusion in the lower courts about the effect of contempt actions on subsequent domestic violence prosecutions. As a result, battered women now run the risk that the swifter but less severe penalties for contempt—often necessary to protect their safety—may later bar more serious criminal charges by the state.[12]

Scalia's opinion in *Dixon* continues to baffle commentators.[13] Scalia resolved Foster's case with arguments advanced by neither the parties nor by amici curiae, and each of the six dissenting and concurring justices, both liberal and conservative, excoriated his flawed logic. This Article reveals the reason for Scalia's belabored efforts in *Dixon*, and shows that the convergence of double jeopardy and contempt doctrines in the case created a conflict between Scalia's avowed methodology for constitutional analysis, and his distinct ideological motivation for the methodology—his hostility to judicial power.

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prosecutes all adult felonies in the Capital, had filed charges against Foster before the contempt hearing. In the D.C. Superior Court, however, a grand jury indictment is required for felony charges to proceed. That indictment was not handed down for almost nine months after the initial criminal charges were lodged. *See Dixon*, 598 A.2d at 727.

6. *See id.*

7. *See id.* at 731.

8. 509 U.S. 688 (1993).

9. See *infra* notes 246–249.

10. George Lardner, *Court Allows Successive Prosecutions*, WASH. POST, June 29, 1993, at A6 ("The decision sends a clear message to batterers that domestic violence is a crime and that the state will be able to prosecute it just like any other crime." (quoting Anna Foster's lawyer, Leslye Orloff)).

11. Even for Ana Foster, justice was never completely served. The United States Attorney's Office never pursued the counts the Supreme Court let stand.

12. *See infra* notes 517, 528–529 and accompanying text.

13. *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1832–33 (1997); Philip Green, Note, *Constitutional Law—Goodbye Grady! Blockburger Wins the Double Jeopardy Rematch.* United States v. Dixon, *113 S. Ct. 2849 (1993)*, 17 U. ARK. LITTLE ROCK L.J. 369, 384–86 (1995); Kathryn A. Pamenter, Note, United States v. Dixon: *The Supreme Court Returns to the Traditional Standard for the Double Jeopardy Clause Analysis*, 69 NOTRE DAME L. REV. 575, 596 (1994).

Part II lays out the components of Scalia's constitutional methodology: textualism, faint-hearted originalism, and the clear rules principle.[14] Separately, Part II discusses his motivating ideology—the belief that only a methodology that restricts the intrusion of judicial bias can properly confine the Court to its limited constitutional role. Part III discusses the complex evolution of the same offense issue in double jeopardy doctrine and examines Scalia's pre-*Dixon* double jeopardy opinions. Part IV analyzes Scalia's *Dixon* opinion. This Part shows that, had Scalia faithfully applied his methodology, he would have affirmed the common law rules for contempt and double jeopardy, thereby allowing successive prosecutions for contempt and criminal sanctions in domestic violence cases. Instead, Scalia manipulated his already patchwork double jeopardy doctrine to create an entirely new test for double jeopardy cases involving contempt. Not only does this test depend on subtle, often unintelligible distinctions, but his supporting analysis repeatedly violates his constitutional methodology and contradicts his own arguments in earlier double jeopardy cases.

Part V argues that, although *Dixon* came to the Court as a double jeopardy case, the driving issue for Scalia was judicial contempt power. Scalia's opinions demonstrate a marked hostility toward contempt power, which flows from his distrust of the judicial branch and his focus on the separation of powers principle as a fundamental guarantee of liberty. In *Dixon*, Scalia's hostility to contempt power essentially infected his double jeopardy analysis and led him to discard his methodology in order to reach a result consistent with his ideological views. Part V also reveals Scalia's most egregious error in *Dixon*. Scalia relied on common law practices and, in particular, on an Eighteenth Century English case, *Rex. v. Lord Ossulston,* to support his contention that modern contempt practices so differ from their historical antecedents that the common law rules for double jeopardy and contempt are now irrelevant. In fact, Scalia misread *Lord Ossulston.* Moreover, additional historical materials demonstrate that a true originalist analysis actually refutes Scalia's assertions about contempt doctrine.

Part VI returns to the impact of Scalia's *Dixon* opinion on domestic violence enforcement. Part VI documents the lower courts' struggle and ultimate failure to implement the *Dixon* test. Because of the confusion created by *Dixon*, battered women and their allies in law enforcement and the legal community have been unable to take advantage of one of the best tools for combating domestic violence—civil protection orders enforced by swift criminal contempt sanctions. Thus, apart from the theoretical debate over constitutional interpretation, public policy reasons compel us to take Justice Scalia to task for failing to adhere to his methodology in this case.

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14. Scalia also calls this component "a law of rules." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

II. JUSTICE SCALIA'S CONSTITUTIONAL METHODOLOGY

A. The Motivation for the Methodology

More than any other modern Supreme Court Justice, Scalia has laid out an explicit methodology for interpreting the Constitution. However, no language in Article III, or anywhere else in the Constitution, mandates any system of interpretation, including Scalia's. The true source of Scalia's conception of the Court's role must therefore lie outside the Constitution.

As Scalia has made clear in his many scathing dissents, he believes the greatest danger to the Constitution is the Court's willingness to use open-ended interpretation to implement the Justices' own values.[15] In Scalia's view, the Constitution delegates the law-making function to the elected branches, leaving the Court to secure only explicitly enumerated rights and to enforce the provisions of the text and the separation of powers principle.[16] This approach is not unique. Rather, it can be fairly identified as one ideological approach to the role of judicial review in a constitutional democracy. Sometimes referred to as the countermajoritarian difficulty, this philosophy requires tight restrictions on the role of an unelected judiciary, lest it usurp the power of the legislature to make new laws and, ultimately, the power of the people to amend the Constitution.[17]

Accordingly, insofar as possible, Scalia seeks to articulate a methodology in which substantive constitutional doctrines are merely the byproduct of the proper application of neutral methods to specific issues. "Scalia's ambition in this regard is to convert a judge, in Thomas Jefferson's words, into 'a mere machine' that accurately transcribes and applies the popular will."[18] Toward that goal, Scalia offers a vision of the Constitution as a "dead" document, with its meaning fixed at

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15. *See* County of Sacramento v. Lewis, 523 U.S. 833, 860 (1998) (Scalia, J., concurring) ("But for judges to overrule that democratically adopted policy judgment on the grounds that it shocks their conscience is not judicial review but judicial governance."). *See also* United States v. Virginia, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); Robert Post, *Justice For Scalia*, N.Y. REV. OF BOOKS, June 11, 1998, at 57 ("Mistrust of courts, however, is a theme that also emerges in Scalia's theory of constitutional interpretation.").

16. *See* Clinton v. City of New York, 118 S. Ct. 2091, 2110 (1998) (Scalia, J., concurring in part and dissenting in part) ("Today the Court acknowledges the 'overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere....'" (quoting Raines v. Byrd, 521 U.S. 811, 820 (1997))).

17. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (2d ed. 1968); JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE 201–02 (1997); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 789 (1997); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1818–19 (1997).

18. Post, *supra* note 15, at 61 (quoting Gordon S. Wood, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49, 50 (Amy Guttman ed., 1997)).

the time of ratification.[19] He believes the Supreme Court should implement this fixed meaning and no more.[20] For Scalia, this requires that the Court use only the plain meaning of the Constitution's text, either as its words were defined at the time, or limited by the historical practices of that period.[21] To the extent that further interpretation of the Constitution is necessary, this exegesis should be in the form of clear rules that constrain a judge's discretion in future cases. In Scalia's terms, this methodology consists of three-tier hierarchy: "textualism," "originalism," and a preference for "general rules."[22] While Scalia does not claim that this methodology is flawless,[23] he does assert its superiority over the view that the Constitution is a living, evolving document. The organic approach, Scalia maintains, is ultimately nothing more than a cloak that hides the imposition of personal judicial preferences.[24] Therefore, in Scalia's words, his system should prevail because you "can't beat somebody with nobody."[25] While the components of Scalia's methodology are not *sui generis*, to truly understand whether he faithfully implemented them in *Dixon*, it is necessary to describe how Scalia claims the components of the methodology operate, both independently and as part of a system.

B. The Components of the Methodology

1. Scalia's Semantic Textualism

Consistent with his underlying motivation, Scalia sees textualism as both a constitutionally mandated end in itself, and a means to restrict the judiciary to its proper role. "Judges should be restricted to the text in front of them.... According to my judicial philosophy, I feel bound not by what I think...but by what the text and tradition actually say."[26] At the core of Scalia's textualism is his belief that the Constitution is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[27] Scalia therefore flatly rejects

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19. Maureen Squires, *Scalia Urges Inflexible Constitution, Supreme Court Justice Scoffs at the Notion of a Changing Constitution*, PEORIA J. STAR, Oct. 25, 1996, at C11.

20. *See* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 39–41 (Amy Guttman ed., 1997).

21. *See id.* at 37–38.

22. Scalia, *supra* note 14, at 1176.

23. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

24. *See id.* at 864.

25. Scalia, *supra* note 23, at 855.

26. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 30 n.18 (1994) (citing Dan Izenberg, *Clinging to the Constitution*, JERUSALEM POST, Feb. 19, 1990 (quoting Scalia)). To Scalia, a judge's role is not to "'determine what seems like good policy at the present time, but to ascertain the meaning of the text.'" George Kannar, Comment, *The Constitutionalism Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303 (1990) (quoting Address by Justice Antonin Scalia, Remarks at the 24th Australian Legal Convention 12, Sept. 21, 1987).

27. Scalia, *supra* note 23, at 854.

all claims of modern hermeneutic theory about the indeterminacy of language.[28] He believes the words that make up the Constitution are definable; that they have "meaning enough" for purposes of judicial decision-making.[29]

Scalia's proclamation of his fidelity to constitutional text and his general belief that the law supplies the necessary tools of interpretation is only a starting point. The devil is in the details, namely, how to ascertain the meaning of the Constitution's often broad aspirational clauses and how to apply a two-hundred-year old text to modern scenarios beyond the conception of the document's drafters. Thus, Scalia's textualism requires an interpretive technique. It is the technique he has chosen, and the degree of confidence he has in its results, that distinguishes Scalia's textualism.

For Scalia, the ordinary social and dictionary meaning of individual words is the most important, and often the decisive, ingredient of his analysis of a constitutional provision.[30] Moreover, Scalia requires that the interpretation of text be done "in as semantically precise a way as possible,"[31] with close attention to formal rules of grammar.[32]

Scalia's opinions generally reflect his theoretical bias to narrowly define words, and correspondingly, to marginalize broader meanings that could be attributed to the immediate text or to the document as a whole.[33] This is most obvious in statutory interpretation because such cases often require interpretation of specific words or phrases.[34] In these cases, Scalia often places exclusive reliance on the dictionary definition of the operative word or phrase.[35] The broadly

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28. Scalia mischaracterizes and then dismisses indeterminacy theory in his *Originalism* article. *See* Scalia, *supra* note 23, at 856 ("Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning.").

29. Scalia, *supra* note 23, at 856. Scalia has asserted that "while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible." Scalia, *supra* note 20, at 24.

30. *See* Kannar, *supra* note 26, at 1307–08.

31. *Id.* at 1308.

32. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (stating that the "and" in the Eighth Amendment requires that punishments be both cruel and unusual to violate the text). *See also* Scalia, *supra* note 20, at 25 (*"[O]f course its formalistic!* The rule of law is *about* form.") (emphasis in original).

33. *Compare* Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988) (Scalia's majority opinion focusing solely on the "irreducible literal meaning" of the Confrontation Clause and admitting no exceptions), *with id.* at 1025–26 (Blackmun, J., dissenting) (looking first to the framers' "primary object" for the clause).

34. *See* William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1142 (1992) (suggesting very different methods of statutory interpretation for each justice). *See also* West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting) (the literalist's approach to statutes calls for using "thick grammarian's spectacles" and "ignor[ing] the available evidence of congressional purpose.").

35. *See* Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting)

written and judicially glossed language of the Constitution provides fewer opportunities for this mode of interpretation. Nevertheless, even here, the impact of Scalia's semantic textualism is detectable in cases that involve specific clauses or phrases. As in statutory interpretation cases, Scalia's first option in these cases is to turn to dictionary definitions of the pertinent words at the time the text was adopted.[36] For constitutional analysis, this means late Eighteenth and early Nineteenth Century dictionaries.[37] Sometimes, he buttresses his dictionary definition with historical usage, etymology, and literature.[38] However, in other cases, the plain meaning is so clear to Scalia that he simply declares the definition he finds obvious without a dictionary citation.[39]

Nevertheless, constitutional text that can be conclusively defined by an ancient *Webster's* volume is infrequent. Most constitutional litigation concerns the more abstract phrases of the Constitution, such as the Due Process Clause, which are less amenable to semantic dissection or have layers of meaning added by prior decisions.[40] In these cases, Scalia's semantic textualism functions predominantly as a nay-sayer, or as he puts it, "a brake" on the expansion of constitutional rights.[41] By narrowly focusing on the precise semantic meaning of each word or phrase, he routinely finds no justification for unenumerated rights that the modern Court has upheld.[42]

(citing WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 2114 (1950) on the meaning of "representatives" to exclude elected judges from Voting Rights Act).

36. *See* California v. Hodari D., 499 U.S. 621, 624 (1991) Modern case law held that a "seizure" under the Fourth Amendment occurs when a reasonable person would not feel free to leave. Scalia narrowed the definition to mean "physically grasped" for situations in which a suspect refuses to submit relying on an 1828 version of *Webster's Dictionary*. Scalia wrote, "[f]rom the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" *Id. See also* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2182 (1998) (Scalia, J., concurring in the judgment) (using a 1796 dictionary to define "abridging" to determine if the statute violated the First Amendment's freedom of speech guarantee).

37. *See id.*

38. *See Coy*, 487 U.S. at 1015–17 (stating that Confrontation Clause requires "face-to-face" meeting citing confrontation's Latin derivation, Shakespeare's Richard II, Act. I. sc.1, and President Eisenhower's description of his hometown code of Abilene, Kansas).

39. *See* Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting in turn, California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring) and arguing that the meaning of "confrontation" in the Sixth Amendment must include a "face-to-face" meeting)). *See also* Minnesota v. Carter, 119 S. Ct. 469, 474–75 (1998) (Scalia, J., concurring) (use of the word "their" in the Fourth Amendment limits protection to the owner of the property).

40. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (setting forth multi-layer procedural due process test in case of denial of welfare benefits); Matthews v. Eldridge, 424 U.S. 319, 321 (1976) (discussing test for procedural due process rights afforded after withdrawal of social security disability benefits).

41. *See* Kannar, *supra* note 26, at 1306 (*citing* Address by Justice Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987)).

42. These cases are the most representative of Scalia's textualism in constitutional law. *See. e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 480–84 (1990); Ohio v.

Scalia's opinions rarely rest solely on textualist analysis. Instead, either to support a plain meaning argument, or for the cases that are not amenable to textualist analysis, Scalia turns to the second prong of his methodology: his version of originalism, which he alternately calls original meaning or faint-hearted originalism.

2. Historical Practices and Scalia's Not So "Faint-Hearted" Originalism

The core tenet of originalism, broadly defined, requires judges "to ascertain and give effect to the original intentions of the framers and ratifiers."[43] Beginning with his confirmation hearing, Scalia took pains to distinguish this generic version of originalism, which he calls "original intent," from his approach, which he describes as "original meaning."[44]

Scalia asserts that for his "original meaning" approach, the beginning and end is the text of the Constitution. Therefore, while he recognizes the importance of understanding the Constitution in terms of "what it meant to the society that adopted it," it is the final text that counts, not the actual intentions of the drafters or ratifiers of the document.[45] While the proponents of "original intent" and Scalia share similar motives, Scalia's focus on the Framers' end product rather than their pre- or post-drafting debates has significant implications for how he implements his originalism. Unlike many versions of originalism,[46] Scalia does not use the statements and writings of individual drafters as authoritative sources for the meaning of the text. Rather, Scalia only consults these sources "because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood."[47]

Because the extra-textual statements of the drafters are not authoritative, Scalia is left with the problem of how to find a specific historical meaning for the text, especially when the words are too broad to be amenable to a semantic textualism reading.[48] In his oft cited article, *Originalism, the Lesser Evil*, Scalia offers only vague, inspirational advice that a judge immerse himself "in the political and intellectual atmosphere of the time."[49] Scalia's judicial opinions,

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Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990).

43. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 3 (1991).

44. *Hearings on the Nomination of Judge Antonin Scalia Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 108 (1986) ("[I]f somebody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make a difference.").

45. *Id.*

46. Classic "original intent" theory places heavy reliance on the statements and writings of the individual framers; in essence, the legislative history of the constitution. *See* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-In-Law*, 71 CHI.-KENT L. REV. 909, 913 (1996).

47. Scalia, *supra* note 20, at 38.

48. In particular, cases involving the due process clause of the Fourteenth Amendment present this problem. *See supra* note 40.

49. Scalia, *supra* note 23, at 856–57.

however, recognize that his theory needs a firmer footing to avoid subjectivism.[50] In practice, therefore, Scalia has grounded his originalism in longstanding historical practices to define, and often to limit, the scope of the Constitution's language.

His "historical practices" originalism operates as follows: when confronted with a claim of constitutional right not resolved by a plain reading of the text, Scalia asks whether the activity existed in the common law and in the drafting/ratification period. Activities not in existence or without a very close historical analog are not protected by constitutional text.[51] Similarly, if the activity was known and illegal, it can be restricted without offending the Constitution.[52] On the other hand, if the period permitted a specific practice, its protected status cannot be eliminated. Thus, Scalia's originalism sometimes defends a historic practice now under attack.[53] However, like his semantic textualism, Scalia's "historical practices" approach more often results in no protection for a modern practice, either because a practice was condemned under the religious or moral precepts of that earlier time,[54] or because the modern situation was unknown to the Framers.[55]

Although Scalia's use of historical practices is not unique to this or previous Courts,[56] two things distinguish his originalism. First is his virtual insistence that in the absence of historical support for a practice, the Court should not recognize behavior as protected by the Constitution.[57] Second is his method of selecting the appropriate historical practice. In theory, Scalia has said that originalism could include exploration of the "political and intellectual atmosphere of the time."[58] In his opinions, however, Scalia states that the Court should seek

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50. *See* Hodgson v. Minnesota, 497 U.S. 417, 479–80 (1990) (Scalia, J., dissenting).

51. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1991).

52. *See* Planned Parenthood v. Casey, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in part and dissenting in part); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and dissenting in part).

53. For example, Scalia dissented from the successful First Amendment challenge to religious invocations at public school ceremonies in *Lee v. Weisman*, claiming that such invocations had a long historical pedigree. Scalia said that "the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves...." 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting); Clinton v. New York, 118 S. Ct. 2091, 2116–17 (1998) (Scalia, J., concurring in part, dissenting in part) (history and tradition support line item veto legislation); Rutan v. Republican Party of Illinois, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (defending the political patronage system).

54. *See Casey*, 505 U.S. at 984.

55. *See 44 Liquormart,* 517 U.S. at 517 (Scalia, J., concurring in part and concurring in judgment) (bemoaning fact that parties did not discuss state legislative practices regulating commercial speech at time it was adopted).

56. *See* Scalia, *supra* note 23, at 851 (citing Myers v. United States, 272 U.S. 52 (1926) (exploring historical roots of the President's removal power)).

57. *See* Lee v. Weisman, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting).

58. Scalia, *supra* note 23, at 856–57.

out the most specific historical practice of which the Framers were aware that is analogous to the practice at issue.[59]

Scalia's focus on the most specific historical analogue fulfills his motivating principle that his originalism be fixed in reasonably verifiable extra-textual sources. Moreover, the more specific the historical analogue, the closer the current interpretation of the text to the original compact (and correspondingly, the less likely that the opinion will incorporate the subjective views of the Justices). This results in judicial opinions laden with nuts-and-bolts historiography.[60] While Scalia recognizes that judges do not always have the time or training for this kind of research,[61] he once again falls back on the argument that at least this methodology tells him what to look for.[62]

Aside from the difficulty of historical research, Scalia's dedication to Eighteenth Century mores presents a further dilemma for his originalism. As Scalia willingly admits, some features of early American society are simply unpalatable to modern sensibilities.[63] He attempts to accommodate this limitation with the final component of his originalism—his so-called "faint-hearted" principle.[64] This principle permits him to depart from a historical rule, but only when it is absolutely clear that an "evolution in social attitudes has occurred."[65] While Scalia has never definitively spelled out the parameters of his faint-hearted

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59. In *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989), Scalia denied a due process challenge by a biological father who sought parental rights for a child conceived during his relationship with a married woman. He found substantial common law roots for the statute, based on an aversion to illegitimacy and the protection of the "peace and tranquility of States and families...." *Id.* Furthermore, finding no historical support for "adulterous natural fathers" in the common law, Scalia refused to find that this biological father had any due process rights. *Id.* at 125–27. In an extended footnote, Scalia argued that the Court should refer to "the most specific level at which a relevant tradition protecting or denying protection to, the asserted right can be identified." *Id.* at 127 n.6. *But see* Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1086, 1108 n.172 (1990).

60. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 452–55 (1996) (Scalia, J., dissenting) (history of review of judgments by appellate courts); Lee v. Weisman, 505 U.S. 577, 633–34 (1992) (Scalia, J., dissenting) (public ceremonies featuring prayers); California v. Hodari D., 499 U.S. 621, 624 (1991).

61. As practical matter, Scalia acknowledges the difficulties of applying it correctly—the need for an "enormous mass" of materials of often questionable reliability and the discipline to put on the "beliefs, attitudes and philosophies, prejudices and loyalties" of an "earlier age." Scalia, *supra* note 23, at 856–57. These tasks, Scalia recognizes are "sometimes better suited to the historian than the lawyer." *See id.*

62. *See* Scalia, *supra* note 20, at 45. All too often, Scalia's historical assertions remain unchallenged by other Justices who prefer to contest him on a higher methodological plane. *Compare Gerald D.*, 491 U.S. at 124–26 *with id.* (Brennan, J., dissenting).

63. *See* Scalia, *supra* note 23, at 864.

64. Scalia, *supra* note 23, at 861, 864 ("[I]n its undiluted form, at least,...is medicine that seems too strong to swallow," and therefore, "in a crunch I may prove [to be] a faint-hearted originalist."). Scalia is also willing to "adulterate" originalism with the doctrine of stare decisis. *See id.* at 864.

65. *Id.* at 864.

exception, he has said that such a societal shift must appear in "extant" sources.[66] The sole example he has offered of an extant source is widespread and one-sided state legislation permitting or condemning the practice.[67]

The requirement for widespread extant verification of social evolution, however, reveals the limited reach of Scalia's faint-heartedness. In his *Originalism* article, Scalia used public flogging as an example of a historical practice permissible at ratification, but one he would be unlikely to sustain if reenacted by a legislature today.[68] Without specific proof, Scalia asserted that there is sufficient evidence of an evolution of societal attitudes towards flogging. In the next breath, however, Scalia stated that he also could not "imagine such a case's arising either."[69] In other words, to demonstrate that societal attitudes have truly evolved, Scalia wants democracy's hard proof in "extant legislation." Neither opinion polls nor, even worse, the Court's finger in the wind will suffice. But, if societal mores have changed so significantly that a practice now is either basically forbidden by statutes or no longer imposed by state action, it is doubtful that the issue would reach the Court. Thus, Scalia's threshold for departing from originalism is so high that while theoretically possible, its conditions could rarely, if ever, be met. Not surprisingly, Scalia has yet to concede that the conditions for faint-hearted originalism have been met while he has been a sitting Justice.[70]

Even with faithfulness to text and history, Scalia recognizes that the open-ended nature of much of the Constitution's language requires the Court to create constitutional doctrine in a manner similar to the development of the common law. It is in these waters that the final leg of Scalia's methodology comes into play—the clear rules principle.

3. The Clear Rules Principle

The conventional wisdom has always been that the common law, case-by-case approach is "the course of judicial restraint, 'making' as little law as possible in order to decide the case at hand."[71] Scalia disagrees. He asserts that

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66. *See* Thompson v. Oklahoma, 487 U.S. 815, 864 (1988) (Scalia, J., dissenting).

67. *See id.* at 865 (focusing on objective signs such as legislation to assess the evolution of society's views towards punishing minors as adults). Scalia argues that to permit judges to make nuanced decisions about the level of societal change necessary to shrug off the constraints of history invites personal values back into the process. Thus, he prefers to err on the side of restraint—in his words, to be a "librarian who talks too softly." Scalia, *supra* note 23. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37, 47 (1996) (declining to adopt a "new common-law" rule which would allow intoxication to be considered in determining specific intent, because such a rule is inconsistent with historical practices.).

68. *See* Scalia, *supra* note 23 at 861–62 (stating that flogging is unlikely to withstand an Eighth Amendment cruel and unusual analysis).

69. *Id.* at 864.

70. For example, in *Pacific Mutual Life Ins. Co. v. Haslip*, Scalia concurred only in the judgment stating that "punitive damages assessed under common-law procedures are far from a fossil or even an endangered species." 499 U.S. 1, 39 (1991) (Scalia, J., concurring in judgment).

71. Scalia, *supra* note 14, at 1179.

both the common law approach and its modern equivalent, the balancing test, actually leave judges free to decide the next case according to their own preferences.[72] Moreover, because balancing tests use multiple factors, it is even more difficult to prove inconsistent reasoning from case to case, allowing the re-intrusion of judicial bias.[73] On the other hand, Scalia asserts that clear rules of general application constrain not just the lower courts, but the Supreme Court as well.[74] "Only by announcing rules do we hedge ourselves in."[75] Scalia recognizes, however, the prevalence of balancing tests in precedent and that some constitutional language inevitably requires their usage.[76] Therefore, all he urges is that "those modes of analysis be avoided where possible; that the Rule of law, the law of rules, be extended as far as the nature of the question allows...."[77]

Although framed only as a preference, Scalia's insistence on clear rules rather than balancing tests in constitutional cases should not be underestimated. According to Kathleen Sullivan, it is the rules versus standards divide that is most responsible for the frequent rifts between Scalia and other Justices on the current Court.[78] Scalia's opinions chide these Justices for a host of clear rule violations, including creating new, unclear rules,[79] applying flexible balancing tests that fail to

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72. *See id.* at 1179. *See also* Eric J. Segall, *Justice Scalia, Critical Legal Studies and the Rule of Law,* 62 GEO. WASH. L. REV. 991, 1002 (1994) ("Although many scholars believe that the legal realists forever cast doubt on rule-oriented jurisprudence, Justice Scalia's message is that the realists were wrong and that rules and language can and should constrain judicial choice.").

73. *See* Scalia, *supra* note 14, at 1180.

74. *See id.* at 1183; *See also* Jones v. Thomas, 491 U.S. 376, 388 (1989) (Scalia, J., dissenting) (criticizing majority for departing from clear rule for multiple punishment cases); Employment Division v. Smith, 494 U.S. 872 (1990) (attempting to discern a clear rule in the Court's free exercise cases).

75. Scalia, *supra* note 14, at 1179–80 (arguing that general rules control even if "the next case should have such different facts that my political or policy preferences regarding the outcome are quite opposite....").

76. Scalia uses the Fourth Amendment's "reasonableness" requirement as an example of constitutional language that calls for elaboration by the Court. *See* California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in judgment).

77. Scalia, *supra* note 14, at 1187. Scalia advances additional reasons for his clear rules preference including the value of uniformity and predictability. *See id.* He also argues that clear rules embolden judges to be courageous in the face of an unpopular decision such as to protect a criminal defendant's rights. *See id.* at 1180. Lastly, Scalia suggests that the case-by-case approach is even more ill suited to our system, because the Supreme Court reviews only a small percentage of cases. *See id.* at 1178.

78. Sullivan cites *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), as emblematic of this schism. Kathleen Sullivan, *The Justices of Rules and Standards,* 106 HARV. L. REV. 22, 54 (1992). In *Lucas,* Justice Blackmun in dissent rejected "'set formula[e]' or 'rigid' categorical rule[s]" because they do not promote "fairness and justice" and "are 'arbitrary.'" *Id.* (quoting *Lucas,* 505 U.S. 1003, 1064, 1070 (1992) (Blackmun, J., dissenting)).

79. *See* United States v. Fordice, 505 U.S. 717, 750 (1992) (Scalia, J., concurring in part and dissenting in part) (Court's rule that "'substantially restrict[ing] a person's choice of which institution to enter' is not clear.").

provide guidance or restrain judicial discretion,[80] and undermining previously clear rules by creating new exceptions, all to justify their preferred outcome.[81]

In addition to the conflict between flexible standards and clear rules, another important mode of legal argument conflicts with Scalia's clear rules principle—metaphoric reasoning.[82] A metaphor is essentially a vehicle to assert a condensed analogy. But a metaphor may also contain a "concealed argument" because it "asserts a resemblance but does not usually explain it," leaving the similarities to be drawn "to the reader's imagination."[83] Thus, metaphors allow judges to create new law without explicit acknowledgment or setting precise boundaries.[84] This imprecision leaves metaphors open to disparate, yet supportable, interpretations. Thus understood, metaphoric reasoning is clearly contrary to Scalia's clear rules principle, and indeed, to his motivating principle to limit judicial discretion.[85] Therefore, it is not surprising that Scalia has also used clear rule arguments to criticize the Court for resorting to metaphoric reasoning in a number of cases.[86]

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80. *See* Granfinanciera v. Nordberg, 492 U.S. 33, 70 (1989) (Scalia, J. concurring in part and concurring in the judgment) (arguing that "public rights" doctrine exception to the Seventh Amendment jury requirement should require that government be a party and central features of the Constitution must be "anchored in rules, not set adrift in some multi-factor balancing test"); Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) (Scalia dissenting) (arguing for all or nothing rules on standard of limitations question because any other rule permits judicial law making).

81. *See* Waters v. Churchill, 511 U.S. 661, 686–87 (1994) (Scalia, J., concurring).

82. Metaphors are "fundamental tools of thought and reasoning," therefore, they can be used as creative tools that extend and reshape legal language. Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 233–35 (1994). Recent scholarship has explored the use of metaphor in judicial opinions as a "specialized means of reasoning by analogy." Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 406 (1986). *See also* James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 U.C.L.A. L. REV. 833, 856 n.75 (1982); Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball and "The Sex Stuff,"* 28 CONN. L. REV. 813, 815 (1996).

83. Boudin, *supra* note 82, at 406. *See also* Hibbits, *supra* note 82, at 234 ("In extreme circumstances, a good metaphor may be so compelling that it altogether subverts its referent's original meaning. No longer recognized as a metaphor, it redefines truth on its own limited terms."); Steven Winter, *The Metaphor of Standing and the Problem of Self Governance*, 40 STAN. L. REV. 1371, 1387 (1988). *See generally* METAPHOR AND THOUGHT (A. Ortony ed., 1979). Thus, metaphor has "a natural appeal to lawyers versed in common law reasoning." Boudin, *supra* note 82, at 406.

84. *See* Boudin, *supra* note 82 (arguing that metaphors have been integral to growth and development of antitrust doctrine).

85. Metaphoric reasoning fails to constrain discretion because the next judge may understand the metaphor differently. Moreover, by purporting to stand for rules, judicial metaphors hide judicial discretion under the cover of evocative language. In addition, metaphors are antagonistic to textualism both by nature and by design. The metaphor resists and in fact, is a substitute for plain meaning.

86. *See* American Dredging Co. v. Miller, 510 U.S. 443, 467 (1994); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990). However, as shown later,

4. The Interplay of the Methods: Hierarchy and Compatibility

Scalia's contention that he has established a cohesive methodology rather than three independent tools of constitutional analysis is dependent upon several additional assertions. First, to be capable of consistent application, the components of a methodology must be arranged in a definite hierarchy. Otherwise, the choice of components can be influenced by the desired result. Scalia's stated hierarchy of constitutional analysis is the plain meaning of the text, followed by historical practices, if necessary, and then clear rules.[87] Scalia also asserts that each component relates back to the text of the Constitution as its ultimate source of authority. For example, in the context of the clear rules principle, Scalia has said that the Court cannot create rules "out of whole cloth," but must find some basis for them "in the text that...the Constitution has provided."[88]

Moreover, Scalia contends that his components are compatible and, indeed, mutually reinforcing. For example, he asserts that each component operates to constrain judicial discretion.[89] Thus, whatever part or parts of the methodology come into play in a given case, the resulting analysis still advances the motivating principle of the methodology. Each component also employs similar analytic tools. For example, textualism and the clear rules principle share a central faith in clarity of language to express and control meaning in judicial interpretation.[90] Therefore, Scalia claims that, in most cases, analysis under any component leads to the same outcome.[91] Thus, even when the text provides a clear answer, he will often cite historical practices to buttress his textual interpretation.[92]

Scalia uses metaphoric reasoning when it serves his needs. *See infra* notes 309–316 and accompanying text.

87. *See* Scalia, *supra* note 14, at 1184–85.

88. *Id.* at 1183.

89. For textualism and clear rules, close attention to a semantic exegesis, either of the Constitution or prior precedent, is the primary means of judicial self-restraint. *See id.* at 1184. For originalism, Scalia believes the "raw material for the general rule is readily apparent" in historical practices. *Id.* at 1184.

90. "Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text." *Id.* at 1183–84.

91. *See id.* at 1183.

92. *See* Minnesota v. Carter, 119 S. Ct. 469, 475–76 (1998) (Scalia, J., concurring) (citing historical sources to support his reading of the Fourth Amendment). Similarly, in a case based primarily on historical practices, Scalia also framed the historical practice in the form of a clear rule. *See* Maryland v. Craig, 497 U.S. 836, 861–64 (1990) (Scalia, J. dissenting); Morrison v. Olsen, 487 U.S. 654, 697 (1988) (Scalia, J. dissenting). Occasionally Scalia admits a conflict between his methods or cases but provides a rationale consistent with the methodology to justify the result. *Compare* Anderson v. Creighton, 483 U.S. 635, 644–46 (1987) (expanding qualified prosecutorial immunity beyond common law), *with* Burns v. Reed, 500 U.S. 478, 496–501 & n.1 (1991) (Scalia, J., concurring in part and dissenting in part) (following common law rules for immunity). Scalia "reconciled the two approaches on the ground that abandoning the common law in *Anderson* created a

Scalia also relies on the professed compatibility of the components to adjust to the circumstances of different cases. Thus, where constitutional language is too open-ended to be amenable to a plain meaning approach, Scalia either falls back on historical practices to limit the scope of the text or he grafts (or crafts) a general rule out of historical practices or precedent.[93] Therefore, while each component of the methodology is important in its own right, the principles of hierarchy and compatibility lie at the heart of his claim that he has achieved a consistent constitutional methodology with resilience against judicial discretion.

5. The Methodology and the Ideology

When examined in depth, it is clear that despite Scalia's desire to turn judges into Jeffersonian "automatons,"[94] his methodology still requires difficult judgments and tasks. In particular, originalism requires not just difficult historical research, but also nuanced decisions about the import of often incomplete and conflicting records.[95] Moreover, Scalia is often faced with precedent that conflicts with his methodology. While Scalia contends that "stare decisis is not part of my originalist philosophy: it is a pragmatic exception to it,"[96] he still has no clear rule that settles whether, in a particular case, he should submit to the existing doctrine for stability and predictability or overturn precedent in favor of an outcome consistent with his methodology.[97] Thus, like any system of interpretation, Scalia's

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more limited scope for judicial discretion than would rejecting the common law in *Burns*." Popkin, *supra* note 34, at 1187 n.37.

93. *See* 44 Liquormart, Inc. v Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment) (interpreting the broad guarantees of the freedom of expression by examining state legislative practices prevalent at the adoption of the First Amendment in order to define free speech).

94. Thomas Jefferson, too, sought to convert judges into "mere machines." *See* Post, *supra* note 15, at 61 (quoting Gordon S. Wood, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49, 50 (Amy Guttman ed., 1997)).

95. Scalia agrees that judges can honestly reach different outcomes, for example, based on different interpretations of the historical record. *See* Scalia, *supra* note 20, at 45.

96. Antonin Scalia, *Response in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Guttman ed., 1997).

97. Scalia acknowledges that stare decisis brings "certainty and stability into the law and protect[s] expectations of individuals and institutions that have acted in reliance on existing rules." Walton v. Arizona, 497 U.S. 639, 673 (1990). Therefore, Scalia sometimes votes to uphold precedents that conflict with his reading of text and tradition. *See* Granfinanciera v. Nordberg, 492 U.S. 33, 66 (1989) (public rights exception is inconsistent with absolute language of Article III but Scalia is willing to accept the doctrine based on its pedigree in *Murray's Lessee* and its sensible rationale). *See id.* (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855)). Scalia acknowledges that "*stare decisis* affords some opportunity for arbitrariness—though I attempt to constrain my own use of the doctrine by consistent rules." Scalia, *supra* note 96, at 140. A review of his various statements on this subject reveals what is, at best, a flexible standard and, at worst, a series of contradictory and malleable axioms. For example, in *Planned Parenthood v. Casey*, Scalia states he will abide by precedent when either: (1) the case was correctly decided, or (2) the case has "succeeded in producing a settled body of law." Planned Parenthood v. Casey, 505 U.S. 833, 983 (1992) (Scalia, J., concurring in part and dissenting in part) (stating that he is not bound by *Roe v. Wade* because that case was "plainly

constitutional methodology leaves ample room for manipulation. And because the material is complex, subterfuge is not easy to detect without retracing each analytic or historical step.

In addition, although the methodology is motivated by Scalia's antipathy to judicial discretion, his motivating ideology and the components of his methodology are distinct. Thus, while each of the components arguably tends to be biased against an expansive reading of the Constitution, the methodology itself does not guarantee that in every case, a reasonable interpretation of the text or historical practices will necessarily yield a decision that is hostile to more open-ended judicial powers of interpretation. In fact, given the broad law-making authority of the common law courts, Scalia's historical practices approach might yield quite the opposite result on a number of judicial power issues, and thus come into conflict with his ideology. In fact, this is the very conflict Scalia faced in *Dixon*. Before turning to that case, however, the next Part explores Scalia's opinions to establish a baseline for his pre-*Dixon* double jeopardy doctrine before that 1993 decision.

III. JUSTICE SCALIA AND DOUBLE JEOPARDY

A. An Overview of the Same Offense Doctrine

The Fifth Amendment states, in pertinent part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." In recent decades, courts and commentators have struggled mightily to define when two crimes are the "same offence" for purposes of the Double Jeopardy Clause.[98] This issue caused a doctrinal meltdown between 1989 and 1993, when the Supreme Court first narrowly endorsed an expansive new test in *Grady v. Corbin*,[99] only to reverse itself just three years later in the fractured *United States v. Dixon*[100] opinion. In light of this unusual about-face, some doctrinal and historical background is necessary to place Scalia's participation in the 'same offense' controversy in context.

1. The Doctrinal Debate: The "Elements Test" Versus Conduct Tests

The Court has long viewed the Double Jeopardy Clause as protection against two evils: successive prosecutions and multiple punishment.[101] Successive

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wrong."). Determining what is a "settled body of law," however, is a malleable standard, not a formally realizable rule. *Id.*

98. Chief Justice Rehnquist noted in *Whalen v. United States* that the "phrase is deceptively simple in appearance but virtually kaleidoscopic in application." Whalen v. United States, 445 U.S. 684, 700 (1980). *See also* Albernaz v. United States, 450 U.S. 333, 343 (1981) ("The decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."); George C. Thomas III, *The Prohibition of Successive Prosecutions For The Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 330 (1986) (cataloguing various attempts to define "same offence").

99. 495 U.S. 508 (1990), *overruled by* U.S. v. Dixon, 495 U.S. 508 (1993).

100. 509 U.S. 688 (1993).

101. *See* North Carolina v. Pearce, 395 U.S. 711, 717 (1969), *overruled in part by*

prosecution involves a second prosecution by the same sovereign for what the defendant contends is the "same offence" after either a conviction or an acquittal.[102] Multiple punishment involves one trial but with multiple charges.[103] Here the claim is that two or more of the charges, although named differently, are really the "same offence." Because the Court has viewed the prohibition on successive prosecutions as the core guarantee embodied in the Fifth Amendment,[104] it has been this definition of "same offence" in successive prosecution cases that has engendered the most controversy. Under a narrow definition of sameness, successive prosecution of the same underlying conduct is often possible by charging the defendant under two slightly different statutes.[105] A broader definition, on the other hand, is more likely to force the government to bring all charges stemming from a criminal event in one indictment, thus sparing a defendant the risks and burdens of repeated trials.[106]

Proponents of a narrow interpretation endorse the common law elements test. The elements test looks only at the statutory elements of each offense. If *each offense* contains *an element* that the other does not, then double jeopardy is not offended.[107] For example, rape and statutory rape are not the "same offence" under this test. Although each involves sexual intercourse, rape contains the separate element of force, and statutory rape the element that the female was underage.[108] A greater offense and a lesser-included offense are considered the "same" under the elements test because the lesser offense has no elements not contained in the greater offense. For example, robbery is a lesser-included offense of armed robbery because all the elements of robbery are contained in armed robbery. Therefore, successive prosecution of greater and lesser-included offenses is also prohibited under the elements test.[109]

Ashe v. Swenson, 397 U.S. 436 (1970); GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW at 15–16 (1998) (setting forth a theory that double jeopardy protects equally against both). A separate issue has been whether the same or different tests should apply to each prong. *See* Vandana Venkatesh, *Double Jeopardy and the Excessive Fines Clause*, 48 TAX LAW. 911, 920 (1995) (noting "considerable blurring between the multiple punishment and successive prosecution prongs of double jeopardy analysis."). Scalia no longer believes the multiple punishment prong is required by the text and he would abolish it. *See infra* note 218.

102. *See* George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1360, 1360–1401 (1984).

103. *See id.*

104. *See* Abney v. United States, 431 U.S. 651, 660–62 (1977). Under the multiple punishment prong, a court's duty is simply to ensure that the defendant's punishment is not more than the legislature intended. *See* Missouri v. Hunter, 459 U.S. 359, 368 (1983). *But see* THOMAS, *supra* note 101, at 98 (arguing there is no historical, textual, or theoretical support for distinguishing between two prongs; both protect against two punishments for same blameworthy act).

105. *See* Thomas, *supra* note 102 at 1391–94.

106. *See* Green v. United States, 355 U.S. 184, 187 (1957).

107. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932); Morey v. Commonwealth, 108 Mass. 433, 435 (Mass. 1871).

108. *See* D.C. Pattern Jury Instructions §§ 4.60, 4.63.

109. Nor does it matter which offense is prosecuted first. *See* Brown v. Ohio, 432 U.S. 161, 169 (1977).

The elements test is a predictable, bright line rule. It accords traditional deference to the legislative and executive branches to define and enforce the criminal law. The critical defect of the elements test is that it essentially cedes to the legislature the question of when successive prosecutions are permitted. If the legislature defines two offenses so that each contains a single distinct element, then, no matter how trivial these different elements may be, the Double Jeopardy Clause is not offended. No matter how congruent the underlying conduct is, or how unfair successive trials may be under the circumstances, the sole inquiry is whether each offense contains an element the other does not.[110]

Opponents of the elements test have advanced a variety of standards that would find more offenses "the same," and thus bar more successive prosecutions. The key feature of these tests, called "same conduct" or "same transaction" tests, is that all mandate some inquiry beyond the statutory elements into the facts of the event charged.[111] If the requisite overlap of conduct or transaction exists between the government's evidence on each charge, the offenses are the "same." Versions differ over the core unit by which to determine the requisite "sameness."[112] Putting aside questions of constitutional legitimacy for the moment, from a policy perspective, it has been argued that conduct-based tests overly constrict prosecutorial discretion.[113] In addition, conduct tests require a fact-intensive review, making them more difficult to implement than the elements test.[114]

Alas, the controversy over the "same offence" clause has not been merely a two-way battle between the common law elements tests and some modern conduct-based replacement. Although changes in the substantive criminal law and

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110. *See* Garrett v. United States, 471 U.S. 773, 778 (1985) ("The rule stated in *Blockburger* was applied in as a rule of statutory construction to help determine legislative intent."). *See also* Ohio v. Johnson, 467 U.S. 493, 499 (1984) (stating that "the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent"); Albernaz v. United States, 450 U.S. 333, 337 (1980).

111. *See, e.g.*, Casterelli v. Commonwealth, 373 N.E.2d 1183, 1188–89 (Mass. 1987); Amar, *supra* note 13, at 1842–45 ("continuing jeopardy"); Frank E. Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 812 (1937) (single intent theory); Otto Kirschheimer, *The Act, The Offense, and Double Jeopardy*, 58 YALE L.J. 513, 542–44 (1949) (modified transaction test); Steven Jay Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem*, 25 WAYNE L. REV. 825, 837 (1979) (same evidence test); Thomas, *supra* note 98, at 347 ("necessary elements" test).

112. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 448–60 (1970) (Brennan, J., concurring); George C. Thomas, *A Modest Proposal To Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195, 195 (1991).

113. To completely insure against a double jeopardy bar under a conduct rule, the government would have to charge all offenses arising out of a transaction in a single prosecution. *See, e.g.*, *Ashe*, 397 U.S. at 468–70 (Burger, C.J., dissenting); United States v. Felix, 503 U.S. 37, 107 (1992); Phillip S. Khinda, *Undesired Results Under Halper and Grady: Double Jeopardy Bars on Criminal RICO Against Civilly-Sanctioned Defendants*, 25 COLUM. J.L. & SOC. PROBS. 117, 145–46 (1991); Kircheimer, *supra* note 111, at 534 ("result[s] in disadvantage for the state"). This is particularly problematic under modern statutes designed to attack complex criminal organizations that often employ predicate offenses within their definition.

114. *See infra* Parts III.C.3, V.C.2.

prosecutorial practices revealed the flaws of the common law elements test, the Supreme Court was loath to openly or fully abandon it.[115] Instead, the Court responded by manipulating or avoiding the elements test to create limited exceptions.[116] These exceptions looked to conduct, but only in certain contexts, and to a lesser extent than required by a true conduct test.[117]

2. The Historical Development of the Elements Test

At common law, an intentional homicide was indicted as a single count of murder. If found guilty, the defendant was sentenced to death: Steal a horse; face indictment for horse thievery; and receive punishment by hanging.[118] Darkly put, the early criminal law's emphasis on capital punishment left little room for successive prosecutions of the same offense, at least after conviction. As a result, double jeopardy issues rarely arose in the early common law period, and the few existing cases are unclear about the doctrinal basis for the result.[119] Even if a defendant was acquitted, under the early and simpler criminal offenses of the common law, there generally was only one applicable offense. For that reason, the early double jeopardy cases involved an acquitted defendant who was reprosecuted for *exactly* the same offense.[120] The common law's response to successive prosecution for the exact same offense was the double jeopardy pleas: autrefois acquit, autrefois convict, and auterfois attaint.[121] Typical of the

115. *See infra* Part III.C.

116. *See infra* Part III.C.

117. *See infra* Part III.C.

118. *See* George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1248 (1995).

119. English legal writers make almost no mention of double jeopardy until Hale in the 17th Century, and even his discussion of the autrefois plea does not really encompass the modern concept. *See* Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. LEGAL HIST. 3, 11–16 (1984). In 1642, Lord Coke's Second Institutes gave the first formulation of what would become modern double jeopardy. *See id.* at 17. However, historians now suggest that Coke's approach was more opinion of how the law ought to be rather than a restatement of English law as it existed. *See id.* at 18–20. *See also* Marion S. Kirk, *Jeopardy During the Period of the Year Books*, 82 U. PA. L. REV. 602, 616–17 (1934); Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 800 (1988).

120. This was sometimes possible under a system that allowed both private prosecution (appeal) and indictment by the king, and trials in different courts with overlapping jurisdiction (ecclesiastic courts and the king's courts). *See* THOMAS, *supra* note 101, at 28, 74–75, 77.

121. Autrefois means formerly or at another time. *See* Black's Law Dictionary 134 (6th ed. 1990). Autrefois acquit is a bar to prosecution for an offense for which the defendant was previously acquitted of. *See id.* Autrefois convict bars prosecution if the defendant had been convicted of the same crime. *See id.* Autrefois attaint means that the defendant had been attained for one felony, and therefore cannot be criminally prosecuted for another. *See id.* In addition, these principles extended to forbid a new prosecution for the same offense after conviction in a foreign jurisdiction. *See* 4 William Blackstone, Commentaries *329–31, 335. *See also* Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting) (discussing the historic import of these writs).

convoluted rules of the common law, these pleas provided some, but not complete, protection from successive prosecutions.[122]

The elements test was not born until the Eighteenth Century, when the first successive prosecution cases involving different offenses were recorded. Interestingly, these cases were not the result of prosecutorial vindictiveness, but of prosecutorial error. Under the formalistic writ system, crimes had to be pleaded very specifically (e.g., burglary with intent to steal rather than just generic burglary).[123] If the evidence at trial proved a slightly different offense (even by one element), then the defendant had to be acquitted. With the newly conceived elements test, however, there was no bar to a new indictment charging the correct crime.[124] For example, in the frequently cited case, *The King v. Vandercomb & Abbot*, the defendants were incorrectly charged with "burglary and stealing goods" and obtained a mid-trial acquittal.[125] The court upheld a second indictment under the elements test for "burglary with intent to steal" because the new offense required proof of larceny while the prior charge was based upon proof of intent to commit a felony.[126] With this historical background, the development of the elements test can be seen as a reasonable effort by the common law courts to foreclose a technical windfall for criminals, rather than as insensitivity to the inchoate, but deeply rooted double jeopardy principle.[127]

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122. *See* THOMAS, *supra* note 101, at 31.

123. This formalism also extended to victims named in the indictment, which explains why a second indictment charging the same offense but a different victim was also permissible. *See* 2 W. Hawkins, PLEAS OF THE CROWN, ch. 2 § 35 (4th ed. 1762). English criminal procedure also severely restricted the prosecutor's ability to bring more than one charge in a single trial. *See* Ashe v. Swenson, 397 U.S. 436, 453 (1970) (Brennan, J., concurring); MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 163–64 (1969).

124. As a treatise of the period stated, "The plea [of auterfoit acquit] will be vicious if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact." 1 T. STARKIE, CRIMINAL PLEADING 322–23 (2d ed. 1822). *See also* 2. W. HAWKINS, PLEAS OF THE CROWN, ch. 35 § 5 (4th ed. 1762) (stating that the same conduct may be prosecuted twice if it constitutes different offenses).

125. 168 Eng. Rep. 455, 457 (K.B. 1796). The prosecution was technically flawed because on the date of the offense noted in the indictment, the defendants had been caught in the house before they were able to remove any goods, although they had previously broken into this vacant house and stole items. *See id.* at 459–60.

126. *Id. See also* Turner's Case, 84 Eng. Rep. 1068 (K.B. 1708) (acquittal for burglary of home did not bar indictment for theft of property of servant of that home); Vaux's Case, 76 Eng. Rep. 992 (Q.B. 1591) ("if a man be convicted...by verdict...upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy...."); 2 M. HALE, PLEAS OF THE CROWN, ch. 31, p. 245–46 (1736 ed.); 2 W HAWKINS, PLEAS OF THE CROWN, ch. 36, § 7, p. 526 (4th ed. 1762); 2 C. PETERSDORFF, ABRIDGMENT 738 (1825); 1 T. STARKIE, CRIMINAL PLEADING, ch xix, p. 322 (2d ed. 1822).

127. Most of the ancient codes that predate the common law had a double jeopardy principle of some sort. *See The Law of Ur-Namma, in* LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR, § 13 (Martha T. Roth ed., 1997); CODE OF HAMMURABI, §§ 1–4; 1 DEMOSTHENES 589 (J. Vince trans., 4th ed. 1970); *Digest of Justinian*, Bk. 48, tit. 2, n.7, *in* 17 THE CIVIL LAW (S.P. Scott trans., 1932).

Despite some claims to the contrary,[128] some form of the common law elements test was therefore likely to have been the double jeopardy test with which the drafters of the Bill of Rights were familiar. Moreover, while historians have not discovered the drafters' intent in choosing the "same offence" language for the final version of the Fifth Amendment,[129] the state courts and the Supreme Court[130] readily adopted the common law elements test as the proper standard when the first American cases arose. For example, in *Morey v. Commonwealth*,[131] the Massachusetts high court upheld successive prosecutions for the separate crimes of "lewd and lascivious cohabitation" and "adultery."[132] In its opinion, the court stated that the double jeopardy clause is not offended if "each statute requires proof of an additional fact which the other does not."[133] The *Morey* formulation was adopted by the Supreme Court in *United States v. Gavieres*,[134] which permitted successive prosecutions for "behaving in an indecent manner in a public place" and "insulting a public officer in his presence."[135]

The emergence of the "same offence" question as a difficult constitutional issue can be traced to the emergence of modern criminal codes and the unrestrained use of these codes by prosecutors.[136] As society grew more complex during the Nineteenth and Twentieth Centuries, legislatures responded

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128. One leading historian of double jeopardy finds some early American support for a conduct based test. *See* JAY A. SIGLER, DOUBLE JEOPARDY 14, 67 (1969). However, the majority of the early cases Professor Sigler cites do not seem to stand for this proposition. *See* Holiday v. Johnson, 313 U.S. 342 (1940); Ball v. United States, 163 U.S. 662 (1896). *But see* Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930).

129. The Fifth Amendment went through several versions in committee. While earlier drafts may have been rejected as unclear or misleading, the specific reason(s) for final changes went unrecorded. *See* Sigler, *supra* note 128, at 28–33. The "same offence" was a term from the common law, which suggests that the drafters intended to adopt common law practices. On the other hand, the final language of the Amendment was different from all forms of double jeopardy then existing. In the final analysis, Professor Sigler is probably correct in saying that "[t]he drafters of the double jeopardy clause were so steeped in common law that they tended to perpetuate its inadequacies rather than declare a precise protection for a criminal defendant." *Id.* at 32-33.

130. These cases most often arose on appeals from the territories because the Double Jeopardy Clause did not apply to the states until 1969. *See* Benton v. Maryland, 395 U.S. 784, 786 (1969). State criminal proceedings needed only to comply with state double jeopardy principles or Fourteenth Amendment due process.

131. 108 Mass. 433 (1871).

132. *Id.*

133. *Id.* at 434.

134. 220 U.S. 338 (1911).

135. *Id.* at 344 (discussing offenses defined under the United States criminal code then governing the Philippines territory). Harkening back to the debate on originalism, however, this extant history still tells us nothing about whether the drafters intended the Double Jeopardy Clause to be a static enshrinement of the common law test or an aspirational principle that would adapt with the times.

136. *See* Charles C. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 245 S. TEX. L. REV. 735, 750 (1983) (arguing that double jeopardy doctrine evolved to respond to "the dangers and realities of the existing legal system").

with comprehensive criminal codes.[137] The multiplication of criminal offenses with overlapping coverage resulted in more opportunities for successive prosecutions of the same criminal event with slightly differing offenses. The development of full-time, politically motivated prosecutors' offices at both the state and federal levels also created a large pool of government litigators who had incentives to pursue defendants when they were not satisfied with the outcome of a first proceeding.[138] As fighting crime became seen as good politics, aggressive prosecution, including successive prosecutions, of the reviled crime of the moment became appealing.[139] Separately, fragmentation of state prosecutorial authority among counties and townships also gave rise to multiple prosecutions as different prosecutorial offices, although legally the same sovereign, each pursued their own agendas.[140]

These developments spurred some courts and commentators to recognize that the common law elements test might no longer provide sufficient protection from successive prosecutions.[141] The Supreme Court's response has proceeded on two independent tracks. At first, the Court employed a back-door approach: it created partial exceptions to the elements test but did not acknowledge that it was undermining the common law rule.[142] After the Double Jeopardy Clause was extended to the states in 1969 in *Benton v. Maryland*,[143] the Supreme Court was forced to confront the same offense issue more frequently. This led a minority, spearheaded by Justice Brennan, to openly express dissatisfaction with the elements test and call for its abandonment in favor of a same transaction test.[144]

3. The Back Door: The "Species" of Lesser-included Offense and Collateral Estoppel Exceptions

In theory, the common law elements test and the conduct-based tests are exclusive propositions: either the statutory elements are the end of the question or some additional, case-specific inquiry is required. However, beginning in the Nineteenth Century, the Court blurred this distinction in some lesser-included offense cases. Thus, although the common law elements test did not distinguish

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137. Today, the federal criminal code has "over 300,000 federal crimes." John C. Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

138. *See* Robert Matz, Note, *If At First You Don't Convict, Try Again*, 24 FORDHAM URB. L.J. 353, 371–76 (1997).

139. Therefore, it is not surprising that the offenses charged in successive prosecution cases over the years reveal a great deal about the politics of crime. *see In re* Nielsen, 131 U.S. 176 (1889) (prosecuting bigamy in the 1880s to suppress Mormonism); Garrett v. United States, 471 U.S. 773 (1985) (prosecuting drugs in the 1980s); United States v. Dixon, 509 U.S. 688 (1993) (prosecuting domestic violence in the 1990s).

140. Sometimes, this was a case of one prosecutorial entity not knowing what another was doing. *See* Illinois v. Vitale, 447 U.S. 410, 412–13 (1980).

141. *See* Horack, *supra* note 111, at 812; Kirschheimer, *supra* note 111, at 542–44.

142. *See infra* notes 145–174 and accompanying text.

143. 395 U.S. 784, 786 (1969).

144. *See infra* notes 182–189 and accompanying text.

between offenses that were simply the "same" and offenses that were the "same" because one was a lesser-included of the other, the Supreme Court began to develop a slightly different test for the lesser-included subset of same offense cases.

a. In re *Nielsen*

The earliest Supreme Court case of this ilk was *In re Nielsen*.[145] As in the *Morey* case, *Nielsen* involved successive prosecutions for illicit cohabitation and adultery. Unlike *Morey*, the Supreme Court found a double jeopardy violation, despite the fact each statute clearly contained an element that the other did not.[146] Many have therefore claimed that *Nielsen* employed a conduct test. As best explained by Akhil Amar and Jonathan Marcus, *Nielsen* was not a same conduct case.[147] Rather, what the *Nielsen* Court did was "shoehorn" one offense into becoming a lesser-included of the other with some inventive statutory interpretation.[148] Still, *Nielsen* is important for three reasons. First, it laid the foundation for the Court's use of lesser-included offense analysis to avoid a literal application of the elements test. Second, *Nielsen* changed the elements test's analysis of greater and lesser-included offenses by importing legislative intent analysis, albeit creative, into the test. Prior to *Nielsen*, the elements test meant

145. 131 U.S. 176 (1889).

146. Cohabitation required proof that a man was living with more than one woman and the adultery statute required proof that the man or woman was married. *See id.* at 185–86.

147. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney King*, 95 COLUM. L. REV. 1, 41–43 (1995). Conduct test proponents rely on *Nielsen*'s use of the word "incidents" for their claim that the case supports their approach. *See* United States v. Dixon, 509 U.S. 688, 753 (1993) (Souter, J., concurring in the judgment in part and dissenting in part). Justice Scalia and others, however, are probably correct that in light of the Court's reliance on *Morey*, *Nielsen* must have used "incidents" synonymously with "elements." *See id.* at 705.

148. *See* Amar & Marcus, *supra* note 147, at 42. The Court claimed, without any citation, that "[i]t is well known" that the cohabitation statute "was aimed against polygamy, or the having of two or more wives and it is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives." *Nielsen*, 131 U.S. at 189. Based upon this inferred statutory intent, the Court took it upon itself to rewrite the elements of the cohabitation statute in such a way as to make adultery a lesser-included offense of cohabitation. Thus interpreted, the elements of cohabitation were: (1) a man living with more than one woman, (2) as husband and wives, and (3) *sexual intercourse between this man and the women.* The elements of adultery were; (1) sexual intercourse between a man and woman, and (2) one of whom was married to someone else. Since, it was impossible to be legally married to more than one woman at a time, a cohabiting defendant was always a married man (to one of the putative wives) while having sexual intercourse with at least one woman not his wife. Thus, all the elements of adultery, marriage of a party and sex, were necessarily included in the cohabitation offense. Amar's understanding of *Nielsen* as a bastardized application of the elements test is supported by the opinion's favorable citation to *Morey* for the applicable rule, even though the Court spent most of the opinion woefully struggling to distinguish *Morey* on the facts. *See id.* at 187–89.

comparison of the statutory elements—period.[149] Legislative history, real or contrived, was irrelevant.[150] Third, *Nielsen* was the first double jeopardy case to ignore the common law requirement that a lesser-included offense carry a less severe punishment than the greater offense.[151]

b. *Harris v. Oklahoma*

More recently, the Court employed the lesser-included offense category to create a true exception to the elements test in *Harris v. Oklahoma*.[152] *Harris* involved a common feature of modern criminal codes, the compound statute.[153] In a compound statute, the commission of a variety of offenses plus another event equals a separate crime. The felony-murder statute at issue in *Harris* was a classic compound crime.[154] State law defined felony-murder as a death occurring during the commission of any felony.[155] Harris was convicted of felony-murder and then prosecuted for the robbery with a firearm that begat the murder. This second prosecution was not a double jeopardy violation under the common law elements test because these two offenses *share no statutory elements*.[156]

Nevertheless, in an exceptionally brief *per curiam* opinion, the Court held that the robbery conviction was a lesser-included of felony-murder.[157] As authority, the Court quoted boilerplate language from *Nielsen* about the greater and lesser offenses being the same offense for purposes of double jeopardy.[158] In addition, the Court cited to several other greater and lesser-included offense

149. *See* Amar & Marcus, *supra* note 147, at 29.

150. *See id.*

151. Adultery, the putative lesser offense, was punishable by three years imprisonment, whereas unlawful cohabitation, the putative greater offense, had an upper limit of a $300 fine or six months in jail. *See Neilsen*, 131 U.S. at 176–77.

152. 433 U.S. 682 (1977).

153. These statutes raise a variety of double jeopardy issues. *See, e.g.*, Susan W. Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability*, 27 NEW ENG. L. REV. 915 (1993).

154. RICO and "continuing criminal enterprise" under the Controlled Substances Act are more complex versions of compound offenses. *See* 18 U.S.C. §§ 1961–1962 (1994); 21 U.S.C. §§ 848 (1994).

155. *See* Harris v. State, 555 P.2d 76, 80 (Okla. 1976) (citing OKLA. STAT. tit. 21, § 701 (1971)).

156. "The essential elements of robbery with a firearm are: a wrongful taking of personal property in the possession of another from his person or presence against his will, by means of force or fear, and with the use of firearms." *Id.* (citing OKLA. STAT. tit. 21, § 801 (1971)). "[T]he elements [of felony-murder] are: homicide accompanied by a premeditated design to effect the death of the person killed, or homicide perpetrated by a person engaged in the commission of any felony." *Id.* (citing OKLA. STAT. tit. 21, § 801 (1971)).

157. Brennan concurred on the grounds that a same transaction test should apply to all successive prosecution cases. *See* Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (Brennan, J., concurring).

158. The Court wrote, "'[a] person [who] has been tried and convicted for a crime which has various incidents included in it,...cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.'" *See id.* at 683 (alteration in original) (quoting *In re* Neilsen, 131 U.S. 176, 188 (1889)).

cases.[159] However, the Court engaged in no further analysis of the elements of the felony-murder statute.

Beneath the surface a bit more was going on. As in *Nielsen,* the Court actually had to massage the statutory elements to achieve the result it wanted. The Court substituted the predicate felony proved in the felony-murder trial, "robbery with a firearm," for the statutory element, "any felony" in the felony-murder statute.[160] This done, "robbery with a firearm" became a lesser-included of felony-murder in this case.[161] This step, however, violated the elements test's sole focus on statutory elements because either the indictment or the trial record had to be consulted. Thus, *Harris* was an unacknowledged move in the direction of a case-specific, conduct-based test, at least in the context of compound statutes.

The Court's substitution of the predicate felony charged for the general felony element in the statute was not illogical. After all, the felony-murder statute expressly referred to all felonies. Thus, the *Harris* Court could have argued that an exception to the traditional elements test was warranted to effectuate the apparent intent of the Oklahoma legislature. But *Harris* made no legislative intent argument.[162] Instead, *Harris'* obscure holding can be boiled down to this: if the Court finds that two offenses resemble a traditional greater and lesser-included, it can so hold, without resort to legislative intent and despite a different result under the elements test.[163]

Harris' failure to either openly proclaim a new successive prosecution test for compound offenses or to resort to legislative intent to justify that test illuminates the Court's central dilemma in modern successive prosecution cases. If the successive prosecution prong is to have independent force to safeguard the core protections enshrined in the Double Jeopardy Clause,[164] the Court must reserve the power to reject a legislative determination that two offenses are distinct. Neither the elements test, which is a proxy for legislative intent, nor an explicit appeal to legislative intent so empowers the Court. Thus, the *Harris* Court could not argue that legislative intent controlled without weakening an argument that it could override that intent in a different case. On the other hand, the majority of the Court was apparently unwilling to abandon precedent and openly engage in judicial lawmaking. Therefore, while at common law the elements test had defined the extent of judicial power in successive prosecution cases, buried in *Harris* was

159. *See id.* at 682–83.
160. *Id.* at 682.
161. *Id.*
162. *See id.*
163. *See id.*
164. The Court has held that the Double Jeopardy Clause protects the defendant's interest in finality, deters the government from wearing down defendants with its superior resources, honing its case in successive proceedings, or seeking additional penalties (due to either acquittal or judicial leniency), and to safeguard defendants' personal interests in being free from continual anxiety, embarrassment, and fear from repeated efforts to convict. *See* Green v. United States, 355 U.S. 184, 187–88 (1957). *See also* Jones v. Thomas, 491 U.S. 376, 394–95 (1989) (Scalia, J., dissenting) (holding that finality is the key interest in the clause). *But see* THOMAS, *supra* note 101, at 58–60 (disagreeing that harasssment is a value protected by the Double Jeopardy Clause).

a subtle expansion of that power.[165] The Court's treatment of *Harris* in later cases also demonstrates the Court's unwillingness to admit that *Harris* broke new ground. For example, in *Illinois v. Vitale*,[166] the Court encapsulated the essence of *Harris*' holding in a subtle legal metaphor, one so commonplace that its import can easily be overlooked. Specifically, the *Vitale* Court stated that the robbery in *Harris* was treated "as a *species* of lesser-included offense."[167]

Metaphoric reasoning in judicial opinions, however, is often used to mask a weak argument or an attempt to modify a doctrinal rule.[168] Both are at work in the "species of lesser-included offense" metaphor. The word "species" has several definitions. Sometimes it is used merely as a synonym for "kind" or "sort."[169] As a term in biology, however, "species" describes organisms that are sufficiently genetically similar such that they are considered "related."[170] It is this latter, scientific definition that is ripe for metaphoric usage. For example, although they belong to the same species, Poodles and Great Danes are strikingly dissimilar in appearance. By focusing on their common scientific "dog-hood" (i.e., species), a biologist can easily refocus an observer back to underlying sameness of the two breeds. It is the familiarity and accessibility of this scientific principle of underlying sameness despite surface differences that makes the "species" metaphor appealing to legal writers.[171]

However, the "species" metaphor, as with all legal metaphors, has the potential to mislead by short-circuiting the analysis. To logically show a relationship of sameness despite apparent differences requires two steps. First is an assertion that the two things are of the same type or kind. Second is an explanation that shows why the two things are essentially the same despite their differences (e.g., negligence and libel are the same kind of legal action because they are both torts). However, when there are logical or qualitative differences between the two things that a court wants to classify together for purposes of a legal rule, the "why" step may not be persuasive. In these instances, the evocative connotations of the "species" metaphor can be used as substitute for the second explanatory step.

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165. The significance of the Court's failure to articulate its reasoning in *Harris* is supported by the stark contrast between *Harris* and Whalen v. United States, 445 U.S. 684 (1980), a multiple prosecution case that came just three years later. *Whalen* involved an almost identical compound felony-murder statute, but in that case, all the Justices agreed that that legislative intent was the sole issue in question.

166. 447 U.S. 410 (1980).

167. *Id.* at 420 (emphasis added). The lesser-included "species" metaphor first appears in *Vitale*, but Justice White may have borrowed the term from the multiple punishment case, *Whalen*, which referred to species of felony murder statutes without referring to the lesser-included concept. *See Whalen*, 445 U.S. at 684.

168. *See* Hibbits, *supra* note 82, at 233.

169. THE MERRIAM WEBSTER DICTIONARY 660 (1974).

170. *Id.*

171. *See* Hibbits, *supra* note 82, at 238, 300 (exploring the appeal of visual and aural metaphors); Yelnosky, *supra* note 82, at 823 (defending baseball metaphors in judicial opinions because of the shared cultural understanding of the game).

This is exactly what the *Vitale* Court did when it noted that *Harris* treated "a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense."[172] The Court asserted a sameness between traditional lesser-included offenses and the Oklahoma felony-murder statute and its predicate felonies but never explained how or why it could do so. The *Vitale* Court did not argue legislative intent or that equating felony-murder and its predicate felonies with traditional greater and lesser-included offenses was necessary to be fair in some abstract sense. Instead, the Court used the "species" metaphor to convey an evocative image of sameness despite superficial differences without further explanation.

Still, why is the species metaphor in *Harris* significant? Even if the Court did metaphorize its *Harris* holding, the result in *Harris* seems eminently fair, and it was not obviously inconsistent with the statutory language or intent.[173] The substitution of the "species" metaphor in place of a clear statement of a new rule for lesser-included offenses in double jeopardy doctrine had two important effects. First, the *Vitale* "species" metaphor disguised the fact that *Harris* broadened the common law rule for which offenses could be considered lesser-included offenses under the elements test; lesser-included offenses no longer had to be included in the statutory language of the greater offense. Second, the *Vitale* metaphor left unclear just how far the Court's authority to redefine the elements of offenses could be extended under this exception.[174]

c. *Ashe v. Swenson*

The other pre-*Dixon* exception to the elements test involved the constitutionalization of criminal collateral estoppel. In *Ashe v. Swenson*,[175] the defendant was acquitted of one count of robbery at a six-man poker game. The state reindicted and convicted the defendant for robbing a different player at the same game.[176] Although this type of successive prosecution was permitted at

172. *See Vitale*, 447 U.S. at 420.

173. Felony-murder at common law would not have permitted this successive prosecution. Thus, it seems reasonable to alter the elements test to ensure the same outcome. Moreover, the result seems consistent with, or at least not contrary to, any unexpressed legislative intent. Felony murder in Oklahoma carried either the death penalty or a life sentence; thus, any punishment for robbery was necessarily included in that sentence. *See* OKLA. STAT. tit. 21, § 701.7 (1971).

174. Thus, while *Vitale* hinted that under *Harris,* the Court might have the power to decide what constitutes a lesser-included offense without regard to legislative intent, the use of the "species" metaphor allowed the Court to sidestep an explicit discussion of this issue. Scalia seized upon this subtle distinction in the *Dixon* opinion. *See infra* notes 309–316 and accompanying text.

175. 397 U.S. 436 (1970). While collateral estoppel had been applied in federal criminal cases before, *Ashe* held that the principle was part of the Fifth Amendment. *See id.* at 441–42. While the Due Process Clause of the Fourteenth Amendment might have been the more natural resting place, that option was precluded by a contrary holding in *Hoag v. New Jersey*, 356 U.S. 464, 467 (1958).

176. In the first trial, the jury found the defendant "not guilty due to insufficient evidence." *Ashe*, 397 U.S. at 439. With some refinements, the state obtained a conviction in the second trial. *See id.* at 440.

common law,[177] the Supreme Court overturned the conviction.[178] The Court framed the issue as a collateral estoppel issue, a heretofore non-constitutional doctrine.[179] In this way, the Court was able to finesse the fact that it established a new line of double jeopardy analysis independent of the elements test. The Court also ignored its fundamental departure from the elements test's basic premise that only the elements of offenses, not the facts of the case, should be examined. As explained by the Court in *Ashe*, a collateral estoppel inquiry requires an examination of the complete record, testimony and evidence included, to determine what issues of ultimate fact, if any, were determined by the prior proceeding.[180] Thus, as in *Harris*, the Court moved toward a case-specific, conduct test without confronting that the traditional constitutional test was being undermined.[181]

4. Justice Brennan's Crusade for a Same-Transaction Test

In his concurrence in *Ashe*, Justice Brennan went further and argued that the Double Jeopardy Clause should now be read to require the government to bring all charges relating to a single transaction in one trial.[182] That view never managed to garner a majority, although Brennan continued to argue for the transaction test well into the Burger Court era.[183] Instead, the Court only hinted in dicta that a broader test for successive prosecutions might be constitutionally required without actually so holding.[184]

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177. *See infra* Part IV.C.3.

178. The Court held that because the initial acquittal meant that the jury found that Ashe was not one of the robbers, collateral estoppel precluded the government from relitigating the issue of identity in a second trial. *See Ashe*, 397 U.S. at 445–46. The Court stated that the Fifth Amendment's guarantee "surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Id.* at 446.

179. Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CINN. L. REV. 1, 4 (1989).

180. *See Ashe*, 397 U.S. at 444.

181. In a footnote in *Ashe*, however, the Court was at least clear about its motive. It frankly stated that the need to constitutionalize collateral estoppel was the direct result of the evolution of complex criminal codes, thus confronting the true policy issue at stake. *See Ashe*, 397 U.S. at 445 n.10. While still good law, the criminal collateral estoppel has not been extended much beyond the facts of *Ashe*. *See* Anne Bowen Poulin, *Double Jeopardy:* Grady *and* Dowling *Stir the Muddy Water*, 43 RUTGERS L.J. 889, 915 (1991).

182. *See Ashe*, 397 U.S. at 449–52 (Brennan, J., concurring) (concluding that the current opportunities for multiple prosecutions were "frightening" and the potential for abuse "simply intolerable"). Brennan reasoned that given the traditional deference accorded prosecutors to initiate a criminal case, there was no other basis on which to restrict a successive prosecution that passed muster under the elements test. *See id.* at 452.

183. *See* Hoag v. New Jersey, 356 U.S. 464, 467–68 (1958); Brown v. Ohio, 432 U.S. 161, 170 (1977) (Brennan J., concurring).

184. *See* Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977) (noting that the elements test was "not the only standard for determining whether successive prosecutions impermissibly involve the same offense"). Dicta in *Vitale* went further. In discussing various scenarios possible on remand, the Court noted that even if the elements test did not bar a successive prosecution, the defendant might have a substantial double jeopardy claim if the state had to rely on the traffic offense or the conduct underlying the traffic offense to

For Justice Brennan, the dicta of the post-*Ashe* cases fell far short of his goal, and with each new conservative appointee, his chances for revolutionizing the same offense doctrine seemed more unreachable. Then, with his time on the Court growing short, Brennan doubly surprised Court watchers in 1989. In *Grady v. Corbin*, Brennan abandoned his pure same transaction proposal.[185] Instead, he argued for a test which he claimed was a middle ground between the elements test and the same transaction test.[186] Further, he was able to cobble together a bare majority for this result.[187]

Under Brennan's *Grady* test the Double Jeopardy clause was violated if "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[188] Despite Brennan's claim that this was not a same transaction test, *Grady* for the first time openly mandated an examination of the underlying conduct for all successive prosecution cases. Thus, *Grady* formally broke the same elements test's hold on the same offense doctrine. However, the distinction between the "conduct that constitutes" an element of an offense and the underlying transaction proved elusive to many commentators and to the courts that tried to implement the *Grady* test in the three years that followed.[189] Thus, the ink was barely dry on *Grady* when state prosecutors and the Justice Department called for it to be overruled[190] and the Court obliged in *Dixon*.[191] Whether the *Grady* test

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to prove the manslaughter charge. This reference to conduct was taken by commentators to imply a test broader than the elements test. *See, e.g.*, Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 11 (1993); Scott J. Sheldon, *"Same Offense" or "Same Conduct"?: Double Jeopardy's New Course in* Grady v. Corbin, 1 SETON HALL CONST. L.J. 7, 34 (1990).

185. 495 U.S. 508, 521–22 (1990).

186. *See id.* at 521–22.

187. *See id.* at 510.

188. *Id.* In *Grady,* Brennan attempted to create a test that looked past the statutory elements of the offense to underlying conduct, but limited the examination of the underlying transaction to determine what actual evidence would be used to prove the overlapping elements of each crime. The question he tried to formulate was not whether the underlying transactions were substantially the same, but whether the evidence used to prove the elements of those offenses was the same. *See id.* at 521.

189. *See* Sharpton v. Turner, 964 F.2d 1284, 1287 (2d Cir.1992) (noting that Grady test "has proven difficult to apply"); Ladner v. Smith, 941 F.2d 356, 362–64 (5th Cir.1992) (similar); *see also* Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecution in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 123 (1992); George C. Thomas, III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U.L.Q. 195, 201–02 (1991). To the extent that the ultimate outcome of the *Grady* test might depend on the evidence as it came out at the second trial, prosecutors still faced the risk of losing a conviction to the double jeopardy bar, even after trial and conviction. *See id.* at 542 (Scalia, J., dissenting).

190. *See* Ellis v. Oklahoma, 498 U.S. 977 (1990); Tidwell v. United States, 498 U.S. 801 (1990). The year before *Dixon,* the Court affirmatively chose to sidestep the issue in *United States v. Felix*, 503 U.S. 378 (1992). In *Felix*, the Court held that the existing rule that conspiracy and the underlying substantive offense were not the same for purposes of double jeopardy had not been overruled by Grady, while acknowledging that a strict reading of Grady might lead to the opposite conclusion. *See id.* at 389–91.

191. *See infra* Part III.

could have been implemented short of a same transaction test was never determined, as *Dixon* overruled *Grady* on this issue and held that the elements test should be used to determine the "same offence" question for *all* double jeopardy cases, or so it seemed.[192]

B. Scalia's Same Offense Doctrine Before Dixon

The remainder of this Part examines Scalia's pre-*Dixon* same offense opinions for three purposes: (1) to establish a baseline for his pre-*Dixon* position on the same offense issue and show how he diverged from the Court's approach to double jeopardy; (2) to discern how Scalia applied his methodology in double jeopardy cases before *Dixon*; and (3) to analyze these cases for methodological consistency. The importance of these aspects of Scalia's pre-*Dixon* cases becomes clear in the analysis of *Dixon* in Part IV which shows that preexisting inconsistencies in his opinions created room for his novel analysis of successive prosecutions involving contempt.

Scalia's two significant opinions in double jeopardy cases before *Dixon* were his dissents in *Grady v. Corbin* and *Jones v. Thomas*.[193] In these two cases, Scalia firmly staked out his position on the key issues in the same offense doctrine. In *Grady*, Scalia argued that the elements test is the only historically legitimate standard for measuring when two offenses are the same for purposes of the Fifth Amendment.[194] In some detail, Scalia laid out the originalist case for the elements test.[195] Scalia recounted the test's historical roots in the common law, and then traced its passage to colonial America and its acceptance in the early days of the republic.[196] He also quoted the early British treatises, which were known to the

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192. *See* United States v. Dixon, 509 U.S. 688 (1993).

193. 491 U.S. 376 (1989). *Jones* was actually a multiple punishment case but some of the positions Scalia staked out are relevant to both the multiple punishment and successive prosecution prongs of the double jeopardy protection.

194. *See* Grady v. Corbin, 495 U.S. 508, 526–28 (1990).

195. Scalia first gamely tried to prove that the text of the Fifth Amendment requires the elements test. He argued that the "in jeopardy" language of the amendment required a pretrial determination of the same offense. Because Brennan's test depended on the government's proof at the second trial, Scalia argued the text could not support it. Scalia also cited to dictionaries from the late Eighteenth and early Nineteenth Century which defined "offence" as "'transgression,' that is, 'the Violation or Breaking of a Law.'" For Scalia, this showed that the elements test's focus on the statutory elements came closer to that era's understanding of offense. *See Grady*, 495 U.S. at 529 (Scalia, J., dissenting) (citing DICTIONARIUM BRITANNICUM (Bailey ed., 1730)); J. KERSEY, A NEW ENGLISH DICTIONARY (1702); 2 T. SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780); J. WALKER, A CRITICAL PRONOUNCING DICTIONARY (1791); 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Typically overconfident, Scalia asserted these arguments alone proved that the text supported the elements test over Brennan's test. *See Grady*, 495 U.S. at 530. Of course, a plain reading of "same offence," supports only that "same" means exactly the same. *See infra* notes 213–218 and accompanying text. Regardless of Scalia's textualist puffing, the bulk of his dissent and its methodological heart was based upon historical practices.

196. *See Grady*, 495 U.S. at 532–36 (citing Turner's Case, 86 Eng. Rep. 1068 (K.B. 1708); State v. Standifer, 5 Port. 523 (Ala. 1837); Commonwealth v. Roby, 12 Pick.

Framers and the First Congress, for their support of the elements test.[197] On these grounds, Scalia argued that the elements test reflected "a venerable understanding" of double jeopardy and was the controlling law "as understood in 1791" when the Fifth Amendment was adopted.[198]

Also in *Grady*, however, Scalia briefly noted without disapproval the two existing exceptions to the elements test established by *Harris* and *Ashe*.[199] His discussion of the collateral estoppel exception was brief and without substantive content.[200] His treatment of *Harris*, however, is a superb example of Scalia's effort to read precedent to find the clearest rule a case will yield. Even though *Harris* itself was terse and *Vitale*'s discussion of *Harris* metaphoric, Scalia had no difficulty discerning a clear rule in *Harris*. He wrote in *Grady* that the *Harris* exception only applied when "a statutory offense *expressly incorporates another statutory offense* without specifying the latter's elements."[201] This interpretation basically reduces *Harris* to a question of statutory interpretation. Scalia thereby foreclosed what *Harris* seemed to imply: that the lesser-included subrule of the elements test might apply where two statutes did not explicitly refer to one another but the Court perceived a relationship that makes one crime a "species" of lesser-included offense of another. In other words, Scalia's *Grady* dissent demetaphorized the *Harris* exception. Part IV will show that he backslid on this commitment in *Dixon*.

In both *Grady* and *Jones v. Thomas*, Scalia emphasized the importance of his clear rules principle in double jeopardy cases. In *Grady*, Scalia's arguments can be broken down into two parts. First, he made a straightforward clear rules critique of the *Grady* test. Scalia complained "it is not at all apparent how a court is to go about deciding whether evidence that has been introduced...at the second trial 'proves conduct' that constitutes an offense...."[202] Second, he claimed that inserting the ahistorical *Grady* rule into double jeopardy doctrine would distort the criminal trial process in ways that would subject the legal system to "ridicule."[203]

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496 (Mass. 1832); State v. Sonnerkalb, 2 Nott & McC. 280 (S.C. 1820)).

197. *See Grady*, 495 U.S. at 530–32.

198. *See id.* at 530, 535.

199. *See id.* at 528–29.

200. *See id.*

201. *Id.* at 528 (emphasis added).

202. *Id.* at 521. Scalia gave this example of the uncertainty in the *Grady* test:

> Is the judge in the second trial supposed to pretend that he is the judge in the first one, and to let the second trial proceed *only if* the evidence would not be enough to go to the jury on the earlier charge? Or (as the language of the Court's test more readily suggests) is the judge in the second trial supposed to decide on his own whether the evidence before him really 'proves' the earlier charge (perhaps beyond a reasonable doubt)?

Id. (emphasis added).

203. Scalia's argument here is a good example of how he tries to show that the components of his methodology are mutually reinforcing. Historical rules are also clearer rules because they mesh better with the existing legal framework which is still largely a historical product.

Here, Scalia provided a parade of horribles. He claimed that both prosecutors and defense attorneys would be forced to alter their traditional roles to adapt to the prescriptions of *Grady*.[204] As his most outrageous example, Scalia hypothesized a second trial involving the same transaction but different offenses. He claimed that even if the prosecutor properly limited the evidence to avoid violating the *Grady* rule, a defense attorney would "presumably seek to provoke the prosecutor into (or assist him in) proving the defendant guilty of the earlier crime," in order to trigger double jeopardy.[205] To Scalia, "[t]his delicious role reversal, discovered to have been mandated by the Double Jeopardy Clause lo these 200 years, makes for high comedy but inferior justice."[206]

In *Jones v. Thomas*, Scalia argued that under a line of multiple punishment precedents going back to 1874, a defendant convicted of felony-murder had to go free on a technicality after serving a short sentence for attempted robbery.[207] Scalia made short work of the majority's efforts to distinguish the earlier cases and he excoriated his colleagues for creating a specious, outcome-driven exception.[208] While the double jeopardy rule at stake in *Jones* did not concern the definition of "same offense" in successive prosecution cases, Scalia used this dissent to make a broader point about the importance of the clear rules principle for all double jeopardy cases. Scalia stated,

> The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but the embodiment of technical, prophylactic rules that require the Government to turn square corners.... There are many ways in which these technical rules might be designed.... With technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all.[209]

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204. *See Grady*, 495 U.S. at 540–41.

205. *Id.* at 542.

206. *Id.* at 542. He also argued that the new rule would straightjacket prosecutors even where successive prosecutions might be permissible under *Grady*. In a first trial, prosecutors would introduce only as much evidence as was necessary to prove the charge but attempt to avoid crossing whatever line or quantum might trigger double jeopardy if a second prosecution was initiated. *See id.* at 542. Scalia's ultimate contention was that despite *Grady*'s efforts to find a middle ground, prudent prosecutors would be forced by uncertainty and the distortions to the criminal justice process to join all offenses arising from a transaction in a single proceeding—in other words, the same transaction test that Brennan has sought all along. *See id.* at 540.

207. *See* Jones v. Thomas, 491 U.S. 376, 379 (1989). The defendant was sentenced to consecutive terms for attempted robbery and felony-murder, with the shorter robbery sentence to be served first. Although as greater and lesser-included offenses, the sentences should have been merged, by the time the error was corrected, the defendant had completed the first sentence for attempted robbery. *See id.*

208. *See id.* at 395 (1989) (Scalia, J., dissenting).

209. *Id.* at 396. This excerpt also shows how Scalia used *Jones* as a platform to spread the gospel of his clear rule principle and, more generally, as support for his claim that he elevates methodology over result. If politically conservative Scalia advocated the early release of a murderer—surely he must have a consistent and value-neutral

These cases show that before *Dixon*, Scalia relied on the historical practices and clear rules components of his methodology to carry his analysis in double jeopardy cases. Before turning to *Dixon,* however, I examine whether Scalia's use of these two components was both internally consistent and in accord with the methodological principle of hierarchy.

*C. A Critique of Scalia's Pre-*Dixon *Same Offense Doctrine*

Taken individually, Scalia's pre-*Dixon* same offense opinions could serve as poster children for his methodology. He makes a great show of employing historical practices and the clear rules principle while disparaging the Court for failing to adhere to his principles for constitutional fidelity. Moreover, his chosen test for the same offense question appears to meet his methodological requirements. Some form of the elements test was the applicable rule when the Fifth Amendment was drafted and it is a clear rule that leaves little room for judicial discretion.[210] Subjecting Scalia's pre-*Dixon* same offense doctrine to critique under the framework from Part II, however, reveals some major methodological inconsistencies that detract from its facial legitimacy.[211]

1. The Hierarchy Problem: Originalism Versus Plain Meaning

The fundamental problem with Scalia's pre-*Dixon* same offense doctrine is that he does not start with a plain reading of the text of the Fifth Amendment. Instead, Scalia's opinion rests on his historical practices justification for the elements test.[212] However, according to Akhil Amar, the Double Jeopardy Clause could mean exactly what it says—"same means same."[213] For Amar, the elements test is a legal and logical mess; it "insist[s] that day is night and that different offenses are really the same."[214] Furthermore, as developed by Amar, a plain reading of "same offense" would be neither impracticable nor unfair, so long as many of its current doctrinal rules were rehoused under the Due Process Clause where they more properly belong.[215]

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methodology after all. *See supra* Part III.A.2.

210. *See supra* notes 107, 128–135 and accompanying text.

211. Scalia's adherence to historical practice here can also be criticized because the elements test arguably fails to protect the interests the Court has stated underlie the Double Jeopardy Clause. *See* Green v. United States, 355 U.S. 184, 187–88 (1957) (deterring the government from wearing down defendants with its superior resources, honing its case in successive proceedings, and sparing defendants the continual anxiety, embarrassment, and fear from repeated efforts to convict). Several post-*Dixon* cases illustrate these issues. *See* United States v. Liller, 999 F.2d 61 (2d Cir. 1993); United States v. White, 1 F.3d 13 (D.C. 1993); State v. Gocken, 896 P.2d 1267 (Wash. 1995) (en banc); Baggett v. State, 860 S.W.2d 207 (Tex. Ct. App. 1993).

212. In *Grady*, Scalia advanced some claims that the elements test was closer to the text than Brennan's test but he ignored the more textually based "same means same" interpretation. *See supra* note 151.

213. Amar, *supra* note 13, at 1813; Amar & Marcus, *supra* note 147, at 10, 36.

214. *See* Amar & Marcus, *supra* note 147, at 36.

215. Amar, *supra* note 13, at 1812. Amar also argues that a same means same approach "enjoys clear textual, *historical,* and logical advantages over the *Blockburger*

If a plain reading of same offense has such appeal to a sophisticated textualist like Amar,[216] it is all the more surprising that "Justice Scalia, who usually claims he believes in plain meaning and common sense,"[217] has never raised this possibility. Nor did Scalia use stare decisis as an excuse for disregarding the apparent plain meaning of the text. He never argued in *Grady* that although "same" should mean "same," he was compelled by precedent to follow the elements test. Thus, on this most fundamental issue, Scalia's same offense doctrine fails the critical hierarchy test for methodological integrity because he simply skips his first step—textualism.[218]

2. The Precedent Problem: The Exceptions Versus the Elements Test

Scalia's arguments for the elements test in his *Grady* dissent are classic Scalian originalism. To avoid judicial lawmaking, he argued that the Court should adopt the "same offense" test that existed at common law.[219] Thus, even where the actual intent of the drafters is unknown, the Court can take refuge in the extant practices of this earlier time.

Scalia's originalism only prevents judicial discretion, however, if the rule found in the history books is the sole rule governing that constitutional question. In the beginning of his *Grady* dissent, Scalia acknowledged that the Court has departed from the elements test's "exclusive focus on the statutory elements of crimes in only two situations," those of *Harris* and *Ashe*.[220] Without any real explanation, Scalia accepted these two exceptions as legitimate but then condemned the majority for its departure from the elements test.[221]

The collateral estoppel exception in particular violates Scalia's originalism and the clear rules principle. Successive prosecutions based on different victims of one criminal event were permissible at common law. By accepting *Ashe,* Scalia therefore condoned a same offense doctrine that contains

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test." *Id.* at 1818 (emphasis added). Here, Amar is mistaken. Although at early common law, same offense meant exactly the same offense, the historical record suggests that, by ratification, the elements test was the applicable historical practice. *See supra* Part III.A.2.

216. I say sophisticated because unlike Scalia, Amar rejects hyper literalism when context and history do not support it. For example, Amar reads the phrase "life or limb" as a "vivid and poetic metaphor for all criminal punishments." Amar, *supra* note 13, at 1809.

217. Amar, *supra* note 13, at 1832.

218. This point becomes even clearer when Scalia's post-*Dixon* flip-flop on the multiple punishment prong is considered. For seven years, Scalia accepted that the Double Jeopardy Clause forbade multiple punishments for the same offense. In fact, as noted earlier, he used his dissent in *Jones v. Thomas* to stress the importance of his clear rules principle for ensuring judicial consistency in these cases. *See* Jones v. Thomas, 491 U.S. 376, 388 (1989) (Scalia, J., dissenting). Then, in *Kurth Ranch*, Scalia switched methodological gears and decided that the multiple punishment prong had no basis in the text, and therefore, should not exist at all. *See* Deptartment of Revenue v. Kurth Ranch, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting).

219. *See* Grady v. Corbin, 495 U.S. 508, 543 (1990) (Scalia, J., dissenting).

220. *Id.* at 523 (referring to Harris v. Oklahoma, 355 U.S. 184 (1977) and Ashe v. Swenson, 397 U.S. 436 (1970)).

221. *See id.*

rules that contradict common law practices.[222] Moreover, like the *Grady* test he criticized, *Ashe* requires an intensive review of the record of the prior trial.[223] While *Harris* is also inconsistent with the common law elements test, my main point is that by agreeing to any exceptions to common law practices, Scalia steps off the hallowed ground of original meaning and back into the real world of judicial discretion.

While Scalia's defense of these exceptions could have been "stare decisis made me do it," he never advanced this argument in *Grady*. Nor did he have a principled reason why the *Ashe* and *Harris* exceptions are acceptable modifications to the historical elements test but the *Grady* rule was not.[224] The only real difference between them and *Grady* is one of magnitude, not substance. The *Grady* test affected all successive prosecutions whereas the two existing exceptions cover just a small subset of cases. However, with his originalist lens focused in *Grady* on attacking Brennan's test, Scalia ignored the methodological conflict created by his acceptance of these other exceptions to the common law elements test.[225]

3. The Originalism Problem

The final methodological flaw in Scalia's pre-*Dixon* opinions was his failure to consider whether his faint-hearted originalism principle should apply. Theoretically, Scalia is willing to depart from a historical practice when there has been a fundamental change in society's understanding of that practice and that the change is reflected in widespread extant sources.[226] Here, a strong argument can be made that a true faint-hearted originalist would abandon the elements test in light of modern developments in the criminal law.

At the time of the Framers, a criminal offense and a criminal transaction were essentially synonymous because each criminal act generally gave rise to only one charge and pleading rules permitted only one crime per indictment.[227] In this

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222. *See supra* notes 123–124 and accompanying text.

223. Given the speculative nature of determining what issues the first jury decided, collateral estoppel also leaves ample room for judicial discretion in its application.

224. Scalia might have argued that *Ashe* and *Harris* were more longstanding precedent (18 and 12 years respectively) and therefore had to be accepted. However, Scalia's "rules" on stare decisis are so flexible that it is impossible to predict whether these cases would pass muster. *See* David M. Zlotnick, *Justice Scalia & His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology,* 51 EMORY L.J. (forthcoming 1999). In any event, one could as easily argue that *Ashe* and *Harris* began a transformation of same offense law that culminated in *Grady*.

225. Scalia's defense of the elements test is also subject to a historian's critique. The two leading historical studies on double jeopardy are Sigler's DOUBLE JEOPARDY and Friedland's DOUBLE JEOPARDY. *See* SIGLER, *supra* note 128; FRIEDLAND, *supra* note 123 (1969). Although these books are cited in virtually every academic article, Scalia mentions neither. Nor is it surprising since these inquiries provide a more ambiguous picture, which make Scalia's originalist case for the elements test look very much like a "lawyer's history."

226. *See supra* notes 63–70 and accompanying text.

227. THOMAS, supra note 101, at 76–78, 111.

context, the elements test evolved to prevent defendants from using the rules of pleading to avoid punishment, not to encapsulate the extent of the common law's respect for the double jeopardy principle.[228]

Now, changes in substantive and procedural criminal law have undercut the ability of this common law rule to fulfill the interests of the Double Jeopardy Clause.[229] Most fundamentally, the term offense is no longer understood to be coextensive with criminal transaction. Rather, it is well recognized that one criminal transaction can give rise to multiple criminal offenses.[230] Moreover, as required by Scalia's faint-hearted principle, this change is reflected in extant sources. Modern criminal codes are replete with offenses that have overlapping elements, allowing multiple offenses to be charged for all but the most simple criminal transactions.[231] In addition, the pleading practices that gave rise to the elements test as a method to prevent a windfall to defendants no longer exist.[232] The liberalization of the rules of criminal procedure now permits the charging of multiple offenses in one indictment,[233] thus, prosecutors rarely need to worry about charging the "wrong" offense for a transaction and suffering a mid-trial dismissal. Consistent with the principle of faint-hearted originalism, one could argue that since the legal and policy issues that gave rise to the elements test no longer exist, the historical elements test need not be the defining guidepost for defining "same offense" in the Fifth Amendment. Therefore, judicial invention of an alternative test in accord with modern notions of the double jeopardy concept is permissible. In fact, prior to *Grady,* both the organized bar and most commentators had called for the elements test to be replaced with a test that better protected defendants from successive prosecutions for the same transaction.[234] Despite this plausible faint-hearted approach, Scalia failed to even raise the possibility in *Grady.*[235]

Thus, before *Dixon,* Scalia had articulated a consistent methodological justification for his same offense doctrine. However, at the same time, these cases uncritically accepted precedents that conflicted with his primary justifications for

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228. *See supra* notes 123–127 and accompanying text.

229. *See* Thomas, *supra* note 102, at 1392–93.

230. *See* THOMAS, *supra* note 101, at 29, 77–78, 111.

231. Modern criminal codes subsumed highly specific common law crimes into broadly defined offenses. *Compare, e.g.,* various common law theft and burglary offenses, *with* Model Penal Code's simpler definitions of these crimes.

232. *See* FED. R. CRIM. P. 8(a).

233. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50, 85–105 (1968).

234. *See* MODEL PENAL CODE §§ 1.07(2), 1.09(1)(b) (Proposed Official Draft 1962). Even the English courts have chosen to abandon a strict elements test. *See* Connelly v. Director of Public Prosecutions, 1964 App. Cas. 1254, 1354 ("The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.").

235. Scalia could have argued that the most direct evidence that society's view of the Double Jeopardy Clause has not evolved are state statutes and court decisions that continue to endorse the elements test. Thus, although legal commentators and other "law-trained" elites believe a change is required, this view has not sufficiently permeated downward to permit the Court to act. However, his utter silence on this issue pointedly reveals the inconsistency of his faint-hearted originalism in practice.

the elements test and contained reasoning that contradicted his methodological principles of hierarchy and faint-hearted originalism. With this background, I now turn to two main questions. First, in *Dixon,* was Scalia faithful to the core methodological principles, originalism, and the clear rules principle, that underlay his earlier same double jeopardy opinions? Second, what role did the pre-existing, although previously benign, inconsistencies in Scalia's double jeopardy doctrine play in his *Dixon* opinion?

IV. JUSTICE SCALIA AND *DIXON*: THE METHODOLOGY BETRAYED

A. An Introduction to United States v. Dixon

United States v. Dixon involved two consolidated cases. In the lead case, Alvin Dixon was released on bond on a second degree murder charge.[236] His release papers notified him that if he committed "'any criminal offense,'" he was subject to prosecution for contempt.[237] Dixon was then arrested on a new felony cocaine charge. The judge in the murder case issued a show cause order.[238] After a hearing, Dixon was found guilty of criminal contempt and sentenced to 180 days confinement.[239] Dixon moved to dismiss the drug indictment on double jeopardy grounds.[240]

The companion case, *United States v. Foster*, was the domestic violence case. The defendant's estranged wife, Ana Foster, obtained a civil protection order in the District of Columbia Family Court that required Foster, to "'not molest, assault, or in any manner threaten or physically abuse'" Ana or her mother.[241] After a series of escalating incidents culminating in a violent beating that rendered Ana unconscious, her legal aid attorney filed motions alleging sixteen separate violations of the protection order.[242] After a three day bench trial, the court found Foster guilty of criminal contempt for four incidents, three of which involved attacks on Ana, but entered judgments of acquittal on the other counts.[243] One and a half years after Foster began violating the order, the United States Attorney's Office for the District of Columbia[244] obtained an indictment for five of the

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236. *See* United States v. Dixon, 509 U.S. 688, 691 (1993).

237. *Id.* (quoting D.C. CODE ANN. § 23-1329(a) (1989)). He was also subject to revocation of release. *See id.*

238. *See id.* at 691–92. The court's order was *sua sponte*, although the U.S. Attorney's Office did file a motion requesting modification of the conditions of Dixon's release. *See* United States v. Dixon, 598 A.2d 724, 728 (D.C. 1991).

239. *See Dixon*, 509 U.S. at 692.

240. *See id.*

241. *Id.* (citation omitted).

242. *See id.* These counts also alleged violations of the order protecting Ana's mother. *See id.*

243. *See id.* at 692–93. Foster was also found in criminal contempt for one count involving Ana Foster's mother. *See id.* at 693.

244. *See id.* at 693. The United States Attorney's Office for the District of Columbia has dual jurisdiction, handling federal matters in U.S. District Court while also prosecuting all felonies and misdemeanors punishable by one year incarceration or more under the D.C. CODE. *See* D.C. CODE ANN. §§ 23-101 (a)–(c) (1996).

incidents involving Ana that had been the subject of the contempt trial. The indictment charged one count of simple assault, one count of assault with intent to kill, and three counts of threats with intent to injure or kidnap.[245] Foster moved for dismissal of the indictment. Based upon *Grady*, the District of Columbia Court of Appeals held *en banc* that the Double Jeopardy Clause barred all charges against both Dixon and Foster.[246]

Scalia's opinion for the Court garnered a majority on two issues. Four justices joined Scalia to overrule *Grady* and return to the elements test as the primary test for successive prosecution of substantive criminal offenses.[247] Seven justices agreed with Scalia that the Double Jeopardy Clause applies to criminal contempts for out-of-court violations (nonsummary contempt).[248] However, only one justice joined Scalia's opinion on how to apply the double jeopardy protection to contempt.[249] Moreover, Scalia's divergent analyses of the individual contempts in the case spawned four separate opinions, each of which found fault with different parts of his idiosyncratic approach.[250]

B. What Scalia Should Have Done in Dixon

Before critiquing Scalia's analysis of contempt and double jeopardy in *Dixon*, it is useful to explore how a faithful application of Scalia's methodology would have resolved the issue. This sections shows that there were two

245. *See Dixon*, 509 U.S. at 693.

246. *See* U.S. v. Dixon, 598 A.2d 724, 725 (D.C. 1991).

247. *See Dixon*, 509 U.S. at 704. Chief Justice Rehnquist, along with Justices Kennedy, O'Connor, and Thomas. As in *Grady*, the Court did not overturn the pre-existing collateral estoppel and compound statute exceptions. In this part of his opinion, Scalia held that *Grady's* conduct-based test was "wholly inconsistent with earlier Supreme Court precedent and with the clear common law understanding of double jeopardy." *Id.* Justices Souter, Stevens and White, disagreed and argued that *Nielsen*, *Brown*, *Harris*, and *Vitale* supported a broader test. *See id.* at 749–59 (Souter, J., concurring in part and dissenting in part).

248. *Id.* at 694. Joining Part II of Scalia's opinion were Chief Justice Rehnquist and Justices Kennedy, O'Connor, Souter, Stevens, Thomas, and White. *See id.*

249. *Id.* at 697. Justice Kennedy joined all parts of Scalia's opinion. *See id.* Justices Stevens, Souter, and White would have preserved the *Grady* rule and, as applied to these cases, all successive charges would have been barred. *See id.* at 743 (Souter, J., concurring in the judgement in part and dissenting in part); *id.* at 720 (White, J., concurring in the judgement in part and dissenting in part). Chief Justice Rehnquist, joined by Justices Thomas and O'Connor, conceded that double jeopardy could theoretically apply to contempt. *Id.* at 718 (Rehnquist, C.J., concurring in part and dissenting in part). However, under their straightforward application of the elements test, none of the successive charges in either case would have been barred. Justice Blackmun argued that, because contempt power was and is essential to vindicating the authority of the court (and private litigants), only the common law and early American rule that contempt is exempt from double jeopardy ensured that judicial prerogatives would be completely protected. *See id.* at 742–43 (Blackmun. J., concurring in part and dissenting in part).

250. *See Dixon*, 509 U.S. at 713 (1993) (Rehnquist, C.J., concurring in part and dissenting in part); *Id.* at 720 (White, J., concurring in part and dissenting in part); *See id.* at 741 (Blackmun, J., concurring in part and dissenting in part); *Id.* at 743 (Souter, J., concurring in part and dissenting in part).

alternatives that were clearly consistent with Scalia's methodological precepts and his pre-*Dixon* same offense opinions: (a) the common law rule that contempt was exempt from double jeopardy analysis, and (b) a straightforward application of the elements test.

1. Originalism and the Common Law "Contempt-is-Exempt" Rule

Scalia's originalist methodology requires that in the absence of a plain directive from constitutional text, he look for the most specific common law or ratification era rule that is analogous to the issue in the case.[251] The most specific formulation of the issue in *Dixon* was: Does the successive prosecution of contempt and a substantive criminal offense violate the double jeopardy protection? For that issue, history provides a clear and definite answer.

At common law, a contempt conviction was never a bar to a criminal prosecution for the same act.[252] Contempt was exempt from double jeopardy analysis because the common law viewed contempt and criminal offenses as *diverso intuiti*: the former necessary to protect the court's authority and the latter to protect the king's peace.[253] This common law rule was carried to the Colonies and continued to be the American rule at the drafting of the Fifth Amendment and well after.[254] For example, in an 1834 opinion concerning the successive prosecution of General Sam Houston for assault and contempt of Congress, then-Attorney General B.F. Butler stated, "The Fifth Amendment...does not apply to cases of this sort.... Technically, therefore, General Houston has not been twice tried for the same offence."[255]

The issue reached the Supreme Court for the first time in 1895 and the Court confirmed that the common law contempt-is-exempt rule passed constitutional muster in *In re Debs*.[256] The Court stated "that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation."[257] This principle was

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251. *See supra* notes 51–62 and accompanying text.

252. For example, in *Dominus Rex. v. Lord Ossulston*, the defendants conspired to get a young woman away from her guardian appointed by the Chancery Court to another location where she voluntarily married. *See* Dominus Rex. v. Lord Ossulston, 93 Eng. Rep. 1063 (K.B. 1738). Although the defendants had been held in contempt by the Chancery Court, they were held to answer a later criminal information. *See id.*

253. *In re* Chapman, 166 U.S. 661, 672 (1897). *See also* Black's Law Dictionary 564 (4th ed. 1968) (defining *diverso intuiti* as "[w]ith a different view, purpose, or design; in a different view or point of view; by a different course or process"); JOHN C. FOX; THE HISTORY OF CONTEMPT OF COURT 1, 54 (1972). *Cf. Ex Parte* Robinson, 86 U.S. 505, 509 (1873).

254. *See In re* Morris, 194 Cal. 63, 68 (1924); Pompano Horse Club v. State, 111 So. 801, 808 (Fla. 1927); State *ex rel.* Duensing v. Roby, 41 N.E. 145, 151–52 (Ind. 1895); State v. Yancy, 4 N.C. (Car. L. Rep.) 133, 134 (1813); *Ex parte* Allison, 90 S.W. 870, 871 (Tex. 1906). *See also* F. WHARTON, CRIMINAL PLEADING AND PRACTICE, § 444 at 309 (9th ed. 1889); 21 AM. JUR. 2d *Criminal Law* § 250 (1981).

255. 2 Op. Att'y Gen. 655, 656 (1834).

256. 158 U.S. 564 (1895).

257. *Id.* at 599–600.

reaffirmed through the early Twentieth Century.[258] Although the issue then dropped off the federal radar screen for many years, state courts continued to hold that contempt was exempt from double jeopardy, even as these same courts modified the elements test to moderate the harsh results created by the evolution of overlapping criminal codes.[259]

The common law contempt-is-exempt rule therefore meets Scalia's originalist criteria: it has a common law pedigree and was well accepted at the time of ratification and beyond.[260] The rule also satisfies Scalia's clear rules requirement; a rule that double jeopardy never bars successive contempt and substantive criminal charges is the clearest of rules.[261]

The contempt-is-exempt rule is also consistent with another core Scalia concern—the separation of powers principle.[262] The Constitution assigns the prosecutorial function to the executive branch. Therefore, with very few exceptions, courts do not interfere with basic prosecutorial decisions such as whether to prosecute and what charges to seek.[263] Separately, however, judges have the power to initiate contempt proceedings to punish violations of their orders.[264] Thus, holding that the Double Jeopardy Clause applies to contempt actions creates a separation of powers conflict because a court-initiated contempt proceeding can later preclude criminal charges by the executive branch arising out of the same events.[265] Nor is there any constitutional mechanism whereby a prosecutor can prevent a contempt prosecution initiated by a court from going

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258. *See* Jurney v. MacCracken, 294 U.S. 125, 151 (1935); Bessette v. W.B. Conkey Co., 194 U.S. 324, 330 (1904); *In re* Chapman, 166 U.S. 661, 672 (1897); Orban v. United States, 18 F.2d 374, 375 (6th Cir. 1927); Hansen v. United States, 1 F.2d 316, 316–17 (7th Cir. 1924); Lewinsohn v. United States, 278 F. 421, 428 (7th Cir. 1921). Two later district court cases held otherwise. *See* United States v. Haggerty, 528 F. Supp. 1286, 1306 (D. Colo. 1981); United States v. United States Gypsum Co., 404 F. Supp. 619, 625 (D.D.C. 1975).

259. *See* State v. Sammons, 656 S.W.2d 862, 868–69 (Tenn. Crim. App. 1982) (stating that prosecution for violation of custody order was not barred in a kidnapping case). In fact, even after *Dixon*, some state courts have maintained that double jeopardy does not bar contempt actions brought to vindicate the interests of the court and third party beneficiaries of court orders. *See* State v. Rhodes, 938 S.W.2d 192, 194 (Tex. Ct. App. 1997), *rev'd*, *Ex parte* Rhodes, 974 S.W.2d 735 (Tex. Crim. App. 1998) (reaffirming that post-*Dixon*, contempt sought by private party does not implicate double jeopardy on charges brought by state).

260. *See supra* notes 45–55 and accompanying text.

261. *See supra* notes 74–81 and accompanying text.

262. See *infra* notes 384–388 and accompanying text, for a discussion of how Scalia is deeply wedded to an absolutist interpretation of the separation of powers principle.

263. Judicial review is limited to constitutional violations and the defendant's burden of proof is quite high. *See* Armstrong v. United States, 517 U.S. 456 (1996); Heckler v. Chaney, 470 U.S. 821 (1985); Wayte v. United States, 470 U.S. 598 (1985); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

264. *See infra* Part VI.A.

265. This is exactly what happened in *Dixon* and *Foster*. Alvin Dixon's felony drug charge and Michael Foster's simple assault count were precluded by their misdemeanor contempt convictions. *See* United States v. Dixon, 509 U.S. 688, 700 (1993).

forward. The contempt-is-exempt rule was the only option available to Scalia in *Dixon* that would have completely avoided this separation of powers problem.[266]

In addition to consistency with Scalia's methodology, core jurisprudential concerns, and prior double jeopardy opinions, resolving *Dixon* through the contempt-is-exempt rule would have permitted the Court to decide the case on the narrowest grounds presented, a principle of judicial restraint to which Scalia generally subscribes.[267] The Court could have left *Grady* in place, respecting stare decisis and allowing the lower federal and state courts more time to determine whether the *Grady* test was workable.[268]

Finally, the contempt-is-exempt rule has a strong policy argument in its favor. Although Scalia's methodology does not consider policy arguments authoritative in constitutional cases, his opinions sometimes include such arguments as secondary support.[269] Here, the rule's underlying rationale—the ability of a court to vindicate a breach of its authority—is at least as important today as it was in the common law period.[270] Therefore, while criminal contemnors now have trial rights substantially similar to criminal defendants,[271] there are important policy considerations that support continuation of the exemption for contempt from the Double Jeopardy Clause.

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266. The *Grady* test, by barring more successive prosecutions, makes the separation of powers conflict more likely. Under Rehnquist's generic elements test, some newer kinds of criminal charges can be barred by a prior contempt proceeding when they include the violation of a court order as an element. *See, e.g.*, FLA. STAT. 741.31 (1994) (violation of a domestic restraining order is a misdemeanor). Nevertheless, while raised by the government in its brief, Scalia failed to discuss this issue when he rejected the contempt is exempt rule. *See* Brief for Petitioner at 19–20, United States v. Dixon, 509 U.S. 688 (1993) (1992 WL 511934) [hereinafter *Brief for Petitioner*].

267. *See* Almendarez-Torres v. United States, 523 U.S. 224 (1998).

268. Creating a historical exception for contempt also would have been consistent with other post-*Grady* decisions such as *Felix*, which created a historical exception for conspiracy and double jeopardy without overruling *Grady*. *See* United States v. Felix, 503 U.S. 378, 389 (1992). The government seemed understandably acquiescent to this strategy in its brief in *Dixon* where it argued for reversal of *Grady* only as its last resort. The government's first arguments were for a historical/precedent exception from *Grady* for contempt or that *Grady* should read narrowly. *See Brief for Petitioner*, *supra* note 266, at 12–13.

269. *See* California v. Hodari D., 499 U.S. 621, 627 (1991) (writing that in addition to a textual argument, "[w]e do not think it desirable, even as a policy matter, to stretch the Fourth Amendment...as respondent urges"); Board of Comm'rs of Wabaunsee County v. Umbehr, 116 S. Ct. 2361, 2367–69 (1996) (Scalia, J., dissenting) (adding policy and docket management arguments to defend political patronage); Rutan v. Republican Party of Ill., 497 U.S. 62, 105 (1990) (Scalia, J., dissenting) (discussing policy implication of dismantling the patronage system); McKoy v. North Carolina, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) (arguing that decision weakens intended function of the jury in sentencing).

270. Today, injunctive relief, backed by contempt power, plays a significant role in a variety of settings ranging from domestic violence to judicial supervision of public institutions such as schools and prisons. *See infra* note 387.

271. *See* Bloom v. Illinois, 391 U.S. 194, 198 (1968).

2. A Straightforward Application of the Elements Test

Although the contempt-is-exempt rule was clearly the option in *Dixon* most consistent with his historical practices methodology, Scalia also could have reconciled a straightforward application of the elements test with his originalist principles. As Chief Justice Rehnquist advocated in his *Dixon* opinion, a straightforward application of the elements test to contempt would have been simple.[272] "Contempt of court comprises of two elements: (i) a court order made known to the defendant, followed by (ii) willful violation of that order."[273] Neither of these elements "is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no elements of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court."[274] Under this approach, none of the offenses in either *Dixon* or *Foster* would be barred.[275]

Thus, a straightforward elements test approach to the elements of contempt has the advantage of being a clear rule and would result in the same test for contempt and substantive crimes. This approach also would have been consistent with Scalia's *Grady* and *Jones* dissents which strenuously argued against the creation of new double jeopardy tests.[276] Resort to the elements test would also be consistent with Scalia's reason for rejecting the more specific historical test for contempt. Scalia declined to follow the contempt-is-exempt rule because he believed that the Court now viewed contempt "as 'a crime in the ordinary sense.'"[277] Accepting this argument for the moment, the natural place for Scalia to turn was to the historical same offense test for ordinary crimes—the common law elements test—for if contempt is now just like an ordinary crime, the historical double jeopardy test for ordinary crimes should apply to contempt as well.[278] Thus, the traditional elements test should have been Scalia's originalist alternative in *Dixon*.[279]

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272. *See* United States v. Dixon, 509 U.S. 688, 713–716 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).

273. *Id.* at 716.

274. *Id.*

275. Since neither contempt element overlaps with any element of any substantive offense, the Double Jeopardy clause is not offended.

276. *See* Grady v. Corbin, 495 U.S. 508, 528–29 (1990) (Scalia, J., dissenting); Jones v. Thomas, 491 U.S. 376, 388 (1989) (Scalia, J., dissenting).

277. *See Dixon*, 509 U.S. at 696 (quoting Bloom v. Illinois, 391 U.S. 194 (1968)).

278. The common law elements test for criminal offenses is also closely analogous to, and a slightly more general formulation of, the contempt and double jeopardy issue presented by the case. *See* Tribe & Dorf, *supra* note 59, at 1108.

279. Scalia could have justified the choice of a straightforward elements test in *Dixon* as judiciously expedient. If he had chosen this route, Scalia likely would have written for a full majority, leaving no room for doubt in the lower courts about the Court's holding. Chief Justice Rehnquist's separate opinion, with O'Connor and Thomas concurring, advocated the generic elements test. *See Dixon*, 509 U.S. at 715–16 (Rehnquist, C.J., concurring in part and dissenting in part). If Scalia had agreed, and assuming Justice Kennedy had signed on, this approach would have garnered five votes.

C. How Scalia Violated His Methodology in Dixon

Although Scalia had two viable options in *Dixon* consistent with his methodology and all of his core concerns, he chose neither. Instead of either common law rule, Scalia's *Dixon* opinion created a new analytical framework for double jeopardy cases involving contempt. To determine the elements of contempt, he substituted the specific language in each contemnor's injunction for the generic elements of contempt.[280] Scalia tried to justify this novel approach based on the "conditional" nature of contempt and by analogy to the *Harris* exception.[281] When Scalia applied his new successive prosecution test for contempt cases to the contempts in the *Dixon* and *Foster* cases, his analysis resulted in an outright victory for Dixon and a split decision on the offenses in Foster's indictment; the simple assault count was dismissed but the assault with intent to kill and threat counts could proceed.[282] The rest of this Part examines each step in Scalia's analysis in more detail and shows how he violated his methodology and contradicted his prior double jeopardy opinions.

1. The Redefinition of the Elements of Contempt

The first step in Scalia's doctrinal shenanigans in *Dixon* was his novel approach to defining the elements of contempt in double jeopardy cases. Rather than use the generic elements of contempt, which is all that the common law elements test required, Scalia contended that the specific term of the court order had to be incorporated as an element of each contempt charge.[283]

Under Scalia's incorporation approach, the elements of Alvin Dixon's contempt offense became: (1) knowledge of a court order not to violate any criminal laws (including the drug laws); and (2) a willful violation of that order by committing a felony drug offense.[284] Thus redefined, Dixon's drug offense became a lesser-included offense of contempt because all the elements of the drug offense were contained in the second element of contempt.[285] Foster's restraining order contained multiple directives, including a prohibition on assaults and threats.[286] Similarly, Scalia held that the elements of each of Foster's contempt charges had to be separately defined, depending on which prohibition in the court order each contempt charge incorporated.[287] For example, the elements of the contempt based upon the assault prohibition in the protection order became: (1) knowledge of the

280. *See id.* at 696, 700.
281. *See id.* at 698.
282. *See id.* at 700–01, 711–12.
283. *See id.* at 698.
284. *See id.*
285. As noted above, under Scalia's analysis, the second element of Dixon's contempt was defined as a willful violation of the court order by committing a felony drug offense. By substituting the felony drug offense for the traditional second element of contempt—a generic violation of the court order—all the elements of the felony drug offense became incorporated into this element of contempt. *See id*
286. *See id.* at 692.
287. *See id.* at 697–98, 700.

court order not to assault Ana Foster or her mother; and (2) willful violation of the court order by assaulting Ana Foster or her mother.

Under this approach, there can be a different "crime" of contempt for every contemnor and for distinct violations of an order containing multiple prohibitions. Moreover, the variety of potential elements is limited not by any statutory language, but only by the imagination of a court in drafting the order that becomes the basis for the contempt.

Scalia justified his modification of the traditional elements test upon a distinction between contempt and substantive criminal offenses. Examining one of the contempt statutes, he stated that "[o]bviously, Dixon could not commit an 'offence' under this provision until an order setting out conditions was issued. The statute by itself imposes no legal obligation on anyone."[288] To Scalia, the conditional nature of contempt offenses "resemble[d] the situation that produced our judgment of double jeopardy in *Harris v. Oklahoma*."[289] Because contemnors could not commit an offense until an order setting out conditions was issued, "[s]o too here, the 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition."[290] Quoting *Vitale*, Scalia therefore concluded that substantive criminal offenses could become "a species of lesser-included offense" of contempt.[291]

2. A Critique of Scalia's Dixon *Test*

My critique of Scalia's *Dixon* test is threefold. First, although Scalia's analysis has a superficial appeal, upon a closer view, his reworking of the elements of contempt contains contradictory assertions about contempt. Second, Scalia's modification of the elements test in *Dixon* violates his clear rules principle for constitutional cases. Third, Scalia's use of the *Harris* exception undermines his earlier understanding of that case in *Grady*.

a. The Contradictory Assertions

Scalia's incorporation approach to the elements of contempt rests upon several inconsistent and contradictory assertions about criminal contempt that are worth noting. In summarily rejecting the contempt-is-exempt rule, Scalia asserted that it was "obvious" that the Double Jeopardy Clause applies to criminal contempt because contempt is "a crime in the ordinary sense."[292] When it was time, however, to apply the traditional elements test, Scalia refused on the grounds that the "conditional" nature of contempt offenses rendered them unlike regular

288. *Id.* at 697.
289. *Id.* at 698 (citation omitted).
290. *Id.* at 697–98.
291. *Id.* (citation omitted).
292. *Id.* at 696 (quoting Bloom v. Illinois, 391 U.S. 194, 201 (1968)). Justice White, although ultimately concurring that contempt was governed by double jeopardy, felt that Justice Scalia's analysis here was "conclusory" and did not deal "adequately with either the Government's arguments or the practical consequences" of the decision. *Id.* at 721 (White, J., concurring in the judgment in part and dissenting in part).

criminal offenses.[293] Basically, Scalia tried to have his cake and eat it too. Either contempt is an ordinary crime and the traditional elements test should apply or contempt is different. If contempt is different, under Scalia's originalist methodology, the common law's special exemption for contempt should control. Only by arguing both points simultaneously could Scalia carve out an artificial place in the double jeopardy doctrine for his approach to elements of contempt.[294]

In addition, it is not clear why the "conditional" nature of contempt should matter to double jeopardy analysis. At the time of the contemptuous act, the order is in existence and the potential contemnor knows that a willful violation will result in contempt. To the potential contemnor, the generic elements of contempt serve the same function as the generic elements of ordinary crimes.[295] These internal contradictions suggest that Scalia's *Dixon* analysis had more in common with the malleable logic of the common law than with the rigid rules of his constitutional methodology.[296] A methodological analysis of Scalia's test confirms this suspicion.

b. The Clear Rules Principle

In many of his "clear rules" dissents, Scalia complains that the Court has seized upon a factual distinction which previously, had no significance to an existing rule.[297] Scalia then argues that modification of a clear rule based upon a heretofore irrelevant factor constitutes result-driven, judicial activism that undermines the rule of law.[298] Yet, in *Dixon*, Scalia engaged in the same

293. *Id.* at 697–98.

294. This contradiction is highlighted by Scalia's approach to the elements of Foster's substantive offenses. Here, Scalia acknowledged that the District of Columbia Court of Appeal's definitions should control because, as the equivalent of a state high court, its determinations were entitled to deference, even in constitutional cases. *See id.* at 702 n.6. *See also* Board of Comm'rs of Wabaunsee County v. Umbehr, 116 S. Ct. 2361, 2368 (1996) (Scalia, J., dissenting) ("State law frequently plays a dispositive role in the issue of whether a constitutional provision is applicable."). Yet, just paragraphs later, Scalia ignored the fact that this same court had used the generic elements of contempt in its double jeopardy analysis in opinion below. Thus, once again, Scalia treated contempt differently despite his foundational argument that contempt is now "a crime in ordinary sense." *Dixon*, 509 U.S. at 696 (quoting Bloom v. Illinois, 392 U.S. 194, 201 (1968)). *See* D.C. CODE ANN. § 16-1005 (f) (1997); *In re* Thompson, 454 A.2d 1324, 1326 (D.C. 1982).

295. An example involving a different kind of court order demonstrates this point. A husband who takes the family auto out for a spin does not commit a crime. After a court order in a divorce action is served that awards ownership of the vehicle to his wife, this same act might now constitute theft or criminal unauthorized use. *See* D.C. CODE ANN. § 22-3815 (1996) (unauthorized use of motor vehicles); D.C. CODE ANN. § 22-3811 (1996) (theft). If this kind of individualized court order which changes a legal act to an illegal act is not relevant to the definition of the elements of theft, why should individualized court orders matter in the contempt context?

296. *See* Scalia, *supra* note 20, at 7–8.

297. *See supra* notes 79–81 and accompanying text.

298. *See supra* notes 79–81 and accompanying text.

exception-creation game when he rewrote the elements of contempt in lieu of either the contempt-is-exempt rule or the common law elements test.[299]

The existing clear rule Scalia claimed to apply was the traditional elements test.[300] In *Dixon,* however, Scalia modified the elements test to accommodate what he saw as a meaningful difference in context—its application to contempt. To justify this departure, Scalia relied on a distinction between contempt and substantive crimes—the "conditional" nature of contempt—that heretofore had not been recognized as having consequences in double jeopardy analysis.[301] From a Scalian methodological perspective, the "conditional" nature of contempt is nothing more than a judicially created distinction employed to alter the result of an existing rule. Moreover, this distinction is not based on constitutional text or historical practices; therefore, it should be illegitimate under his clear rules principle.[302]

c. The Remetaphorization of the *Harris* Exception

As discussed in Part III, although the *Harris* opinion is a cipher, Scalia was able, consistent with his approach to precedent, to extract a clear rule from *Harris* in his *Grady* dissent.[303] There, he limited *Harris* to situations "where a *statutory offense* expressly incorporates another statutory offense without specifying the latter's elements,"[304] turning the *Harris* exception into nothing more than a judicial tool to effectuate legislative intent. Under this understanding of *Harris,* the felony-murder statute in *Harris* is critically different than the contempt statutes in *Dixon.*

Foster was prosecuted under a section of the D.C. code which made contempt available as a sanction for violation of a protection order.[305] Neither that section nor any other provision of the D.C. civil protection order regime incorporated any criminal offense into the definition of contempt.[306] Moreover,

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299. While Scalia used the established *Harris* exception as an analogy to support his argument, he conceded that the issue in *Dixon* only "resemble[d]" the situation in *Harris* and did not assert that *Harris* was directly controlling precedent. *See Dixon,* 509 U.S. at 698.

300. *See id.* at 696.

301. *See id.* at 697.

302. A comparison of Scalia's reasoning in *Dixon* with his dissent in *Jones v. Thomas* further illuminates Scalia's departure from his clear rules principle. *See* Jones v. Thomas, 491 U.S. 376 (1989). *Jones* called upon the Court to apply a clear rule in multiple punishment doctrine that dated back to 1874. In paradigmatic clear rules mode, Scalia's dissent chided the majority for subverting that clear rule to suit its conception of a fair result. Scalia argued that because the type of punishment had never before been considered a factor in this multiple punishment rule, the Court's use of this distinction in *Jones* was a subterfuge. *See id.* at 395–96 (Scalia, J., dissenting).

303. *See* Grady v. Corbin, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting).

304. *See id.* (emphasis added).

305. *See* D.C. CODE ANN. § 16-1005(f) (1997).

306. D.C. CODE §16-1005 authorizes the issuance of a protection order if a family member has committed or is threatening to commit an intra-family offense. *See id.* The statute permits the court wide latitude on the content of the order, ranging from required

applying double jeopardy principles to this contempt provision violated the express intent of Congress. The introductory section to the protection order statute provided, "[T]he institution of criminal charges by the United States Attorney shall be *in addition to*, and shall not affect[,] the rights of the complainant to seek any other relief under this subchapter."[307] Because Congress expressly favored successive prosecutions for contempt and criminal offenses under this statute, it could not have intended that contempt ever be considered either a greater or a lesser-included of any criminal offense. Thus, Scalia's use of *Harris* to justify his redefinition of the elements of contempt contradicted Scalia's *Grady* explanation of both the central rule of and the rationale for *Harris*.[308]

More than just ignoring his previous understanding of *Harris*, Scalia relied on *Vitale's* "species" metaphor to make his analogy work, thus resorting to reasoning that is antithetical to his clear rules imperative.[309] Scalia's remetaphorization of *Harris* can be demonstrated by isolating the language Scalia chose to use, and to avoid, in his discussion of *Harris*. First, Scalia never quoted his *Grady* dissent's clear rule for *Harris*, nor did he use any language from the *Harris* opinion itself. Rather, Scalia plucked a description of *Harris* from *Vitale v. Illinois*, the source of the "species of lesser-included offense" metaphor.[310] He

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counseling, vacating a residence and awarding temporary custody. Section 16-1005(c)(1) also permits the court to order the respondent to refrain from "the conduct committed or threatened," but does not phrase this prohibition in terms of the criminal law. Subsection (c)(10) contains a catchall provision, but as drafted, neither 16-1005(c) nor (f) which authorize contempt, refer or suggest that the issuing court incorporate the criminal law. *See* D.C. CODE ANN. § 16-1005 (1997).

307. D.C. CODE ANN. § 16-1002(c) (1997).

308. Scalia acknowledged only one difference between his incorporation approach to the elements of contempt and the *Harris* situation. He conceded that the incorporation of other offenses into contempt was done by a judge on a case-by-case basis rather than by the legislature. Scalia argued that because the court's power to impose contempt was conferred by statute, the legislature was still the ultimate source of both offenses. This limited defense utterly failed to address the issues created by transposing the *Harris* exception to an analysis of contempt and double jeopardy. If Scalia was correct in *Grady* that the *Harris* rule is merely a tool to implement legislative intent, Scalia should have addressed why a *Harris*-type rule for contempt was appropriate when it clearly violated Congress' express desire to keep double jeopardy inapplicable to these contempt statutes. In addition, Scalia ignored that the source of a court's contempt power is not solely legislative. Although legislatures have the power to modify a court's contempt powers, courts still have inherent power to punish contempt irrespective of legislative authorization. By disregarding this fundamental difference between contempt and substantive criminal offenses, Scalia could also overlook the rationale for having one rule for contempt and double jeopardy—the contempt-is-exempt rule—and then some variation of the elements test for all substantive offenses, including the *Harris* subrule for compound statutes.

309. *See supra* notes 82–86 and accompanying text.

310. Scalia first quoted *Vitale* to assert that *Harris* stood not for a clear rule, but for the "proposition that...the crime generally described as felony murder is not a separate offense distinct from its various elements." United States v. Dixon, 509 U.S. 688, 698 (1993). This exact sentence, however, is the one Justice Souter cited in his dissent in *Dixon* for his argument that various precedents, including *Harris* and *Vitale*, support a conduct-based test like the *Grady* rule. *See id.* at 756 (Souter, J., concurring in the judgement in part and dissenting in part). The very fact that *Vitale*'s take on *Harris* was given opposite

argued that "[t]he *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies. Here, as in *Harris*, the underlying substantive criminal offense is a "species of lesser-included offense."[311]

For Scalia's use of the metaphor "species of lesser-included offense" to be significant, however, this language must obscure a gap in a logical argument or hide the modification of existing doctrine. In *Dixon*, Scalia used the "species" metaphor to accomplish both.

First, he asserts a sameness between the *Harris* felony-murder statute and the *Dixon* contempts when he states that the *Dixon* court order incorporated the criminal code "'in the same manner'"[312] as the enumerated felonies in *Harris*. However, he never explains why there is an underlying sameness in the face of the critical difference in legislative intent between the two statutes. Instead, Scalia invoked the *Vitale* "species" metaphor—a metaphor of sameness despite superficial differences—as a substitute for this second analytic step. The substitution of the "species" metaphor for an explicit discussion of the differences between the statutes allowed Scalia to mask the contradictions between his *Dixon* and *Grady* opinions on when two statutes could be considered greater and lesser offenses under the *Harris* exception.

Second, and more importantly, the "species" metaphor obscured Scalia's contradictory assertions in *Dixon* about the critical constitutional issue in successive prosecution doctrine: whether the judiciary or the legislature has final authority on whether two offenses could be considered the same.[313] In both *Grady* and *Dixon*, Scalia asserted that the elements test, with its deference to legislative power, is the only constitutionally legitimate test.[314] While *Grady* briefly gave the Court the authority to trump legislative intent in successive prosecution cases, Scalia claimed to overrule Brennan's brief victory on this issue in *Dixon*. However, at the same time Scalia claimed to overturn the *Grady* test, his *Dixon* test for contempt offenses holds that contempt and substantive criminal offenses can be the same under the Double Jeopardy Clause even though congressional intent is to the contrary.

Thus, despite Scalia's claim that *Dixon* utterly rejected *Grady*, Scalia's *Dixon* test for contempt is akin to the *Grady* test on this fundamental issue of judicial power. Under both Brennan's *Grady* test or Scalia's *Dixon* test, the Court, not the legislature, is the final arbiter of the double jeopardy protection.[315] Only by

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meanings by Scalia and Souter is a strong clue that a metaphor is lurking in the house.

311. *Id.* at 698 (citing Illinois v. Vitale, 447 U.S. 410, 420 (1980)).

312. *Id.*

313. THOMAS, *supra* note 101 at 8–12.

314. As noted earlier, Scalia essentially ignored that the collateral estoppel exception had neither textual or historical roots when he accepted its existence in *Grady*. *See supra* notes 220–225 and accompanying text.

315. In fact, the *Dixon* test for contempt extends judicial veto power over legislative intent far beyond any prior cases involving greater and lesser-included offenses. Prior to *Dixon*, no case had held that the lesser-included subrule of the elements test separately justified judicial supremacy over the definition of the elements of offenses.

dressing his analysis in *Vitale's* "species" metaphor could Scalia obscure this assertion of judicial authority in contempt cases while denying that the Court had this same power in regular successive prosecution cases. That Scalia was able to do this in the case that purported to overrule *Grady* reflects the remarkable power of metaphoric subterfuge.

Certainly, the groundwork for Scalia's manipulation of same offense doctrine in *Dixon* was laid in *Grady,* where he uncritically accepted both the *Harris* and collateral estoppel exceptions to the elements test.[316] Prior to *Dixon,* however, Scalia's understanding of the *Harris* exception could arguably coexist with the elements test based upon a shared legislative intent rationale.[317] Scalia's reliance on *Harris* in *Dixon,* especially where the legislature actually intended to permit successive prosecutions, cut the *Harris* exception loose from these moorings. Thus, after *Dixon,* Scalia's double jeopardy doctrine is bereft not only of textual and historical support and methodological consistency, but also of any unifying rationale.[318]

3. Scalia's Application of His Dixon *Test*

After formulating his *Dixon* test, Scalia then had to apply the test to the contempts in the case. The restraining order directed Foster not to "molest, assault, or in any manner threaten or physically abuse" his wife or her mother.[319] The two contempt charges that involved physical abuse fell under the "assault" term.[320] The contempt judge required Ana Foster to prove these two "assault" contempt charges by proving all the elements of simple assault as defined by the criminal law.[321] Although Scalia recognized that it was consistent with the civil protection order statute to define "assault" in Foster's court order to be broader than simple assault under the criminal law (e.g., tortious assaults),[322] Scalia asserted that he was foreclosed from any other interpretation by the contempt court's definition.[323] Using this narrow definition of assault, Scalia held that the crime of simple assault

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Certainly, the *Harris* holding was consistent with such a rule, but *Harris* is also explainable as a statutory intent case. In *Vitale,* the Court's "species" metaphor hinted at this power. However, the *Vitale* Court's discussion of the *Harris* exception and the "species" metaphor were dicta because the case was remanded for an interpretation of state law. Moreover, *Vitale's* suggestion that the defendant might have a substantial double jeopardy claim apart from a strict elements test analysis seemed interwoven with the broader debate over the elements test rather than a distinct discussion of the lesser-included subrule.

316. *See* Grady v. Corbin, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting).

317. *See supra* notes 194–201 and accompanying text.

318. Other than legislative intent, the only other rationale for the Double Jeopardy Clause that Scalia has endorsed is the principle of finality. *See* Jones v. Thomas, 491 U.S. 376, 393 (1989) (Scalia, J., dissenting).

319. U.S. v. Dixon, 509 U.S. 688, 692 (1993).

320. *See id.* at 700.

321. *See id.* at 701.

322. *See id.* at 700 n.3.

323. *See id.* at 700 n.3.

had been incorporated into the elements of contempt and was barred as a lesser-included offense.[324]

On the assault with intent to kill count, Scalia reasoned that the contempt court's limited definition of "assault" actually aided the government's cause in the criminal case.[325] Under Scalia's test, the elements of the contempt conviction for this more serious assault were: (1) knowledge of a court order not to commit simple assault; and (2) violation of that order by committing a simple assault.[326] So defined, assault with intent to kill had an element not contained in the contempt charge, an intent to kill, and contempt separately required knowledge of the court order. Therefore, each offense had an element not contained in the other, and the assault with intent to kill count could go forward.

Scalia's analysis of the felony threat counts was the most confusing. The statute required proof that the defendant "threate[ned]...to kidnap any person or to injure the person or another or physically damage the property of any person."[327] The court order instructed Foster not to "in any manner threaten"[328] his wife. This time, without reference to the contempt proceeding, Scalia defined the "in any manner threaten" term to proscribe conduct broader than the felony threats statute, and indeed, broader than any criminal offense in the District of Columbia Code. He reasoned that the "in any manner threaten" term could be met by noncriminal acts such as threats "to cause intentional embarrassment, to make harassing phone calls, [or] to make false reports to employers...."[329] Based on this definition, Scalia concluded that the "in any manner threaten" element of the contempt charge and the "kidnap" or "injure" element of felony threats were distinct, and therefore the contempt acquittals did not bar the criminal threats counts.[330]

4. A Critique of Scalia's Application of His Dixon *Test*

Analysis of Scalia's treatment of Foster's charges further reveals the logical and methodological weaknesses of his opinion.[331] I first examine the logical inconsistencies in this part of the opinion and then consider their methodological implications.

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324. *See id.* at 700.
325. *Id.* at 702–03.
326. *See id.* at 701.
327. *Id.* at 702.
328. *Id.* at 692.
329. *Id.* at 702 n.8.
330. Foster also moved to dismiss the threat counts based on collateral estoppel. The Court did not address this issue because the lower court had not reached it. *See id.* at 712 n.17.
331. Alvin Dixon's contempt was the easy case for Scalia. Dixon's release order explicitly stated that the commission of any new criminal offense was punishable by contempt. Under Scalia's test, this meant that every substantive crime in the criminal code could potentially become a lesser-included offense of contempt. In other words, under Scalia's incorporation test, Dixon could never be successively prosecuted for contempt and any criminal offense, hence, Scalia held that the drug felony was barred. *See id.* at 697–98.

a. The Analytic Problems

Scalia's decision to limit the "assault" element of contempt to simple assault but to define the "in any manner threaten" element to include both criminal and noncriminal threats created a variety of anomalies. First, defining related terms in the same clause in a document in disparate ways violates both common sense and the canons of interpretation upon which Scalia generally relies.[332] Yet, here Scalia gave the "assault" and "in any manner threaten" terms different scopes on an issue that was critical to Scalia's double jeopardy analysis; whether the term included civil wrongs or was limited to criminal conduct.

Second, the double jeopardy consequences that flowed from Scalia's definition of each term were entirely counter-intuitive. The narrow definition given to "assault" in the protection order created a double jeopardy bar to criminal simple assault. On the other hand, the more inclusive term in the order, "threaten in any manner," did not bar the felony threat counts. Thus, a consequence of Scalia's analysis, taken to the extreme, is that a broadly written order that incorporates criminal and noncriminal acts which increases the chance of a conviction for contempt also increases the likelihood that a defendant-contemnor can be successively prosecuted for a substantive criminal offense that was certainly prohibited by the order.

Third, Scalia's belief that the noncriminal component of "in any manner threaten" distinguished these contempts from the elements of felony threats seems incorrect under Scalia's own test and illogical under traditional lesser-included offense doctrine. Seemingly, under Scalia's definition of the "in any manner threaten" term, the incorporated elements of these contempts would be: (1) knowledge of the court order not to threaten in any manner (including all criminal and non-criminal threats); and (2) willful violation of the court order by making a criminal or noncriminal threat.[333] Therefore, all the elements of felony threats to "kidnap" or "injure" would be incorporated into the contempt because any kind of criminal threat is included in the second element. Nor should the fact that the second contempt element is broader than the criminal law make it a distinct element. Under traditional lesser-included doctrine, the only issue is whether one element of the greater offense contains all the elements of the lesser-included offense.[334] Thus, the noncriminal component of the "in any manner threaten" contempt should have been irrelevant to Scalia's analysis.

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332. *See* Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 225 (1992). *See also* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) (Justice Scalia joined majority opinion except as to footnote 6.); Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 249 (1996) (Justice Scalia joined majority opinion).

333. *See Dixon*, 509 U.S. at 702 n.8.

334. An example from the criminal law illustrates this point. Under the Model Penal Code, the mental state "purposely" includes the lesser mental state, "knowingly." *See* MODEL PENAL CODE §§107(4)(c), 2.02 (1962). If one offense contains the elements "purposely," and "element A," it is considered the greater offense of a crime which includes the elements "knowingly," and "element A." The fact that the greater offense of "purposely" can be satisfied by proof other than the mental "knowingly" does not alter the

Scalia insisted that the inconsistency between the breadth of his definitions for the "assault" and "threaten in any manner" terms was caused by the contempt court's definition rather than flaws in his analysis.[335] Scalia's interpretation of the contempt record, however, was neither consistent nor accurate. Certainly, the contempt court did define the "assault" prohibition to mean criminal simple assault.[336] However, it is not clear that Scalia was bound by the contempt court's definition of "assault"[337] or that he correctly interpreted the contempt court's definition of "in any manner threaten."[338]

b. A Methodological Critique

One need look no further than Scalia's historical arguments in *Grady* for proof that Scalia's application of his new test in *Dixon* also violated his methodology. In *Grady*, Scalia argued that historical practices did not support a test that looked beyond the elements of offenses to underlying conduct or evidence.[339] While Scalia tried to characterize his *Dixon* test as a species of the

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analysis. *See id. See also* Keeble v. United States, 412 U.S. 205, 213 (1973) ("[A]n intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.").

335. *See Dixon*, 495 U.S. at 700 n.3 & 702 n.8.

336. *See id.* at 700 n.3.

337. Scalia could have ruled that while the contempt court's definition of "assault" favored Foster at the contempt hearing, that court's analysis was wrong and he would not use that error to assist Foster again in his double jeopardy motion in the criminal case. Nor did double jeopardy require him to do so. Because Foster could never be convicted in a criminal trial for assaultive conduct that was only tortious, the contempt proceeding was the only opportunity to punish him criminally for such conduct. Thus, Scalia fairly could have redefined "assault" in the protection order for purposes of the criminal case to include non-criminal assaults, as he did for the "threaten in any manner" term. This would have reconciled both the scope of each term and ensured more consistent double jeopardy results in the case.

338. The contempt court had only cryptically referred to Mrs. Foster's need to prove a "legal threat." Parsing this language, Justice White argued in dissent that, given the contempt court's definition of "assault" to mean criminal assault, the contempt court likely meant "legal threats" to refer only to criminal threats. United States v. Dixon, 509 U.S. 688, 732 n.7 (1993) (White, J., concurring in part and dissenting in part). In contrast, Scalia's discussion on the "threaten in any manner" term was an abstract discussion of plain meaning and statutory intent. He never quoted the contempt court's "legal threat" reference, even in the footnote where he disputed Justice White's interpretation of this term. Thus, it was Scalia's inconsistent approach to defining the terms in the protection order rather than the contempt court's findings below that were responsible for the anomalies created by his analysis of the assault and felony threats counts. Neither the parties, nor amicus curie, advocated Scalia's approach in the briefs or at argument. While the defendants had argued that *Harris* was relevant, *see* Brief for Respondent at 31, United States v. Dixon, 509 U.S. 688 (1993) (1992 WL 511936) [hereinafter *Brief for Respondent*], their analysis led to all charges being barred.

339. More recently, Scalia again argued that "[l]ike many other guarantees in the Bill of Rights, the Double Jeopardy Clause makes sense only against the backdrop of traditional principles of Anglo-American criminal law." Monge v. California, 118 S. Ct.

Harris exception, the tasks required to apply Scalia's incorporation test are much more akin to a same conduct or collateral estoppel test. All that *Harris* requires is inspection of the indictment to determine which felony is being used to prove the felony-murder.[340] While more than a review of statutory language, a *Harris* inquiry still presents none of the difficulties of a true conduct-based test. The *Dixon* test, in comparison, generally requires an in-depth review of the record of the contempt case. Although the depth of review may vary from case to case, the inquiry will virtually always go beyond the statutory elements or the face of the charging document.[341] This was precisely Chief Justice Rehnquist's complaint with Scalia's analysis:

> By focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of contempt of court, Justice Scalia's double jeopardy analysis bears a striking resemblance to that found in *Grady*—not what one would expect to find in an opinion that overrules *Grady*.[342]

In addition, *Dixon* has a core analytic difficulty, the need to translate the language of civil court orders into elements of criminal offenses, that plagues Scalia's entire approach to the elements of contempt. Unlike the *Ashe v. Swenson* collateral estoppel test, which at least compares a criminal trial with a criminal offense,[343] Scalia's test requires a comparison of a contempt proceeding, based upon a civil protection order, with the elements of a criminal offense. As civil decrees, protection orders are drafted in the language of civil, not criminal law. Thus, protection orders rarely, if ever, specifically state which criminal offenses are prohibited by the order.[344] Moreover, a contempt proceeding is initiated by a show cause order, not by an indictment or information. While a show cause order must set forth the dates and factual predicates for a violation of the order, they do not specify the allegations in terms of criminal offenses, but rather use the terms of the original court order.[345] Moreover, because this "civil apples" to "criminal

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2246, 2255 (1998) (Scalia, J., dissenting).

340. This simple, paper inquiry is another reason that the *Harris* exception can be seen as only a minor departure from the traditional elements test.

341. Alvin Dixon's case was easy for Scalia because the release order stated on its face, much like a felony-murder indictment, which criminal offenses were incorporated (the entire criminal code). *Dixon* therefore did not present the civil "apples" to criminal "oranges" problem. Scalia used this feature of *Dixon* to his rhetorical advantage in the opinion. In justifying the need for an incorporation test in contempt cases, Scalia focuses exclusively on the *Dixon* facts. *See Dixon*, 509 U.S. at 697–700. He only attempted the difficult task of translating the language of Foster's order into criminal elements after he established the incorporation test as the rule. *See id.* at 700. However, in double jeopardy claims that involve domestic violence contempts, Scalia's opinion requires, as it did for Foster's case, a review of the transcript of the contempt hearing.

342. *Id.* at 717 (Rehnquist, C.J., concurring in part and dissenting in part).

343. *See* Ashe v. Swenson, 397 U.S. 436, 444 (1970).

344. *See, e.g.*, 14A AM. JUR. PLEADING & PRAC. FORMS, INJUNCTIONS § 84 (1996).

345. *See, e.g., id.* at § 92.

oranges" comparison has no support in historical practices or double jeopardy doctrine, the test and its results are also in conflict with his methodology.[346]

Comparing *Dixon* with the "clear rules"analysis of Scalia's *Grady* opinion reveals additional methodological conflict. In his *Grady* dissent, Scalia gave a parade of horribles that would befall the criminal justice system if the ahistorical *Grady* rule was engrafted into double jeopardy doctrine.[347] Scalia's *Dixon* test, however, creates these very same kind of rule implementation problems. First, harkening back to *In re Nielsen*,[348] Scalia's *Dixon* test turned the doctrine of lesser-included offenses on its head. Under traditional doctrine, a lesser-included offense: (1) has fewer elements than the greater;[349] (2) carries a less severe penalty than the greater;[350] and (3) is necessarily included in the greater.[351] Under *Dixon*, serious felony offenses are demoted to the status of lesser-included offenses of misdemeanor contempt, violating the rule that lesser offenses have lesser penalties. For example, *Dixon*'s felony cocaine charge, which had a maximum sentence of fifteen years,[352] became a lesser-included of his six-month contempt conviction.[353] Indeed, under Scalia's analysis, even a murder committed on release would become a lesser offense of contempt. As Chief Justice Rehnquist pointed out, none of these substantive criminal offenses were lesser-

346. *See supra* Part II.B.

347. *See* Grady v. Corbin, 495 U.S. 508, 539–43 (1990) (Scalia, J., dissenting).

348. 131 U.S. 176 (1889).

349. Obviously, the two elements of generic contempt are fewer than many criminal offenses. This number of elements issue, however, is not really that significant as the proliferation of statutory offenses has created a variety of situations where related offenses with fewer elements carry a greater penalty than an offense with more elements. *See* James A. Shellenberger & James A. Strazzella, *The Lesser-included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 7 n.10 (1995).

350. *See* Solem v. Helm, 463 U.S. 277, 293 (1983) ("Few would dispute that a lesser included offense should not be punished more severely than the greater offense."); Simms v. State, 421 A.2d 957, 964 (Md. 1980) ("[W]hen the defendant is convicted only of the lesser included charge, he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had he been convicted of the greater charge."); Amar &. Marcus, *supra* note 147, at 28 ("[T]he greater offence...typically carries a penalty that incorporates punishment for the lesser included offence...."); Shellenberger & Strazzella, *supra* note 349, at 7 n.10 ("Traditionally...lesser crimes were graded lower and carried lesser penalties...."). *But see* State v. Young, 289 S.E.2d 374, 376 (N.C. 1982) ("[A] crime of "less degree"...is not...exclusively one which carries a lesser sanction....") (citations omitted).

351. *See* Keeble v. United States, 412 U.S. 205, 212 (1973).

352. *See* D.C. CODE ANN. § 33-541(a)(2)(A) (1998). The law has since been amended such that Dixon's offense currently carries a maximum sentence of 30 years imprisonment.

353. For Foster, the same was true. His contempt conviction now barred the assault count punishable by a year in jail. Moreover, under a slightly different protection order (or a different interpretation of the same order), more serious offenses such as assault with intent to kill might have been barred. For example, if Scalia had interpreted the term "assault" in the order to mean all criminal assaults but not tortious assaults, his test would have barred the assault with intent to kill count.

included offenses of contempt, "either intuitively or logically."[354] Scalia's analysis also violated the requirement that the lesser offense is *necessarily included* in the greater. As the Chief Justice also wrote, "[a] defendant who is guilty of [felony drug charges] or of assault has not necessarily satisfied any element of criminal contempt. Nor, for that matter, can it be said that a defendant who is held in criminal contempt has necessarily satisfied any statutory element of those substantive crimes."[355]

Second, relegating substantive criminal offenses to the status of lesser-included offenses of contempt creates a host of practical trial practice problems akin to those that Scalia ridiculed in *Grady*. Scalia claimed the *Grady* rule would distort the traditional roles of counsel because defense attorneys might seek to trigger double jeopardy by introducing evidence themselves that proved elements of the prior charge.[356] Prosecutors, on the other hand, might withhold evidence at the first trial to avoid proving an element necessary to a different offense.[357] Similar role-bending scenarios are created under *Dixon*.

Foster's assault with intent to kill count, which was not barred, furnishes a good example. At the trial, Foster would ordinarily be entitled to an instruction on the lesser-included offense of simple assault.[358] However, a conviction for simple assault would be barred under *Dixon* because Foster had been found guilty of contempt/assault for that incident. The trial court would then be faced with a dilemma. If the court gave the lesser-included instruction, a resulting conviction for simple assault would be barred by double jeopardy. This would encourage cagey defense counsel to encourage the jury to find Foster guilty of simple assault, or more generally, whichever charges could not stand under the *Dixon* test. In addition to distorting the advocacy role, this procedure would also subvert the jury system because the jury would be voting on charges that had no legal consequences.[359]

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354. United States v. Dixon, 509 U.S. 688, 718 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).

355. *Id.* at 718–19. The elements test was also endorsed by the Court as the proper interpretation of Federal Rule of Criminal Procedure 31(c) in *Schmuck v. United States*. *See* Schmuck v. United States, 489 U.S. 705 (1989). Scalia dissented in *Schmuck*, but on a different issue. *See id.*, at 722 (Scalia, J., dissenting).

356. *See* Grady v. Corbin, 495 U.S. 508, 542 (1990) (Scalia, J., dissenting).

357. *See id.*

358. *See* FED. R. CRIM. P. 31 (c); D.C. R. CRIM. P. 31(c).

359. If the court refused to give the lesser-included instruction, a defendant would be deprived of a recognized trial right to an instruction for all lesser-included offenses that are reasonably within the evidence presented at trial. This route might also tempt prosecutors to bring contempt charges first in weak cases because, win or lose, the state could still charge the greater offense in a criminal case while preventing a compromise verdict on a lesser-included offense. Scalia's test also encourages alleged contemnors who may face later criminal charges to argue at the contempt proceeding that the court order incorporates criminal offenses because the maximum sentence for contempt remains the same no matter how the contempt is characterized. Correspondingly, a battered woman might be inclined to water down a contempt prosecution to avoid creating a double jeopardy bar. *See infra* note 526.

Lastly, Scalia's analysis of the Foster counts in *Dixon* violates his clear rules principle because the test fails to ensure predictability and consistency in successive prosecution cases involving contempt. Under Scalia's test, the consequences of a contempt prosecution upon a criminal prosecution rest upon a series of variable steps where a slight change along the way will alter the double jeopardy result. Initially, minor differences in the drafting of a protection order will determine whether criminal offenses are incorporated, and as importantly, whether non-criminal conduct is included in the same term.[360] Then comes the contempt court's gloss on the restraining order terms at the contempt hearing. Next is the criminal court's interpretation of the contempt court's record or its independent analysis of the court order.[361] In addition, the interpretation of the court order and the contempt court record is neither straightforward nor simple. One need look no further than Justice White's disagreement with Scalia over interpretation of the threats language in Foster's order for an example.[362] Thus, from a practical perspective, the convoluted analysis required by Scalia's test creates multiple dilemmas for the courts that issue and enforce protection orders.[363]

Scalia's abandonment of his methodology in *Dixon* is brought into full focus in his debate in *Dixon* with Justice Blackmun over the contempt-is-exempt rule. Justice Blackmun argued for the contempt-is-exempt rule because "the interests served in vindicating the authority of the court are fundamentally different from those served by the prosecution of violations of the substantive criminal law."[364] Scalia was utterly dismissive of Blackmun's "interests-based" analysis saying, "the distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the offenses are the same, not the interests that the offenses violate."[365] However, Scalia's claim that the text supports his analysis was pure defensive reflex. By refusing to require a literal interpretation of the Double Jeopardy Clause—that same means only exactly the

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360. *See supra* notes 319–330 and accompanying text.

361. Foster's contempt case was transferred from the Family Division to a criminal judge for trial.

362. In contrast to Scalia's abstract interpretation, Justice White relied on the contempt court's reference to "legal threats" to conclude that the order prohibited only criminal threats. *See* United States v. Dixon, 509 U.S. 688, 702 n.7 (1993) (White, J., concurring in part and dissenting in part).

363. The state court decisions in years since *Dixon* prove that my critique is correct; similar cases are being resolved inconsistently and many opinions reflect a lack of understanding of the subtleties of Scalia's analysis. *See infra* notes 502–518 and accompanying text. Moreover, the inherent ambiguities of comparing civil protection order "apples" with criminal offense element "oranges" also allows for the introduction of judicial discretion into the process. Theoretically, judges holding different values, from increasing judicial power, to cracking down on domestic violence, to protecting the rights of defendants could each be inclined to interpret protection orders in a result guided manner.

364. *Dixon*, 509 U.S. at 743 (Blackmun, J., dissenting).

365. *Id.* at 699. Justice White also argued that Scalia's analysis was "abstracted from the purposes the constitutional provision is designed to promote." *Id.* at 735. White referred to the principles of finality, embarrassment and expense, and government "fine-tuning." *Id.* at 736.

same offense—Scalia long ago abandoned the safe haven of textualism, and as this Part demonstrated, the other components of his methodology as well.[366]

V. JUSTICE SCALIA AND CONTEMPT: IDEOLOGY VERSUS METHODOLOGY

The evidence against Scalia's reasoning in *Dixon* is damning. From across the ideological spectrum, each concurring and dissenting opinion made a convincing attack on some part of Scalia's analysis.[367] Nor did anything in Scalia's prior double jeopardy opinions foreshadow the peculiarities of his *Dixon* analysis. And, as demonstrated in Part IV, Scalia's opinion is at odds with his methodology. The question that remains is, Why did Scalia choose this route when he had alternatives that were both consistent with his methodology and acceptable to other justices?[368]

The key to unlocking Scalia's manipulation of his methodology in *Dixon* can be found in Scalia's judicial power opinions. These cases reveal that contempt power pushes two of Scalia's hottest ideological buttons—his general distrust of expansive judicial powers and his belief in a strict separation of powers principle.[369] This Part shows that these ideological imperatives are responsible for the distortions of his methodology in the *Dixon* opinion. More importantly, throughout Scalia's contempt jurisprudence, and particularly in *Dixon,* Scalia grossly misreads the history of common law contempt practices. Thus, in addition to motivating his constitutional methodology, *Dixon* shows that Scalia's hostility to judicial power exerts an independent force on his substantive approach to double jeopardy doctrine.

A. Scalia's Ideology, Inherent Judicial Powers, and the Modern Injunction

Early on, the Supreme Court endorsed the common law concept that courts were presumed to have certain inherent powers that "vested, by their very creation."[370] These early decisions also adopted the common law view that contempt is an inherent power so fundamental as to be "necessary to the exercise of all [other powers]."[371] Unbridled common law inherent powers, however, sometimes gave rise to judicial excesses.[372] In response, the modern Court "has

366. Although Scalia claims to be a believer in strict translation of text like his professor father, Scalia's *Dixon* opinion is, to paraphrase the Oldsmobile ad, "not his father's textualism."

367. *See* United States v. Dixon, 509 U.S. 688, 713 (1993) (Rehnquist, C.J., concurring in part and dissenting in part); *Id.* at 720 (White, J., concurring in part and dissenting in part); *Id.* at 741 (Blackmun, J., concurring in part and dissenting in part); *Id.* at 743 (Souter, J., concurring in part and dissenting in part).

368. *See supra* notes 251–279 and accompanying text.

369. *See infra* notes 378–388 and accompanying text.

370. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821).

371. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). *See also Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); *In re* Cooper, 32 Vt. 253, 257 (1859); ROLLIN M. PERKINS, CRIMINAL LAW 531 (2d ed. 1969).

372. *See, e.g.*, Bloom v. Illinois, 391 U.S. 194,198–99 (1968); *Ex parte* Terry,

attempted to balance the competing concerns of necessity and potential arbitrariness."[373] Sometimes, the Court has merely admonished that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[374] In other instances, the Court has imposed substantive limitations.[375] Consistent with the modern Court's treatment of inherent powers in general, more recent decisions have permitted legislative restrictions on contempt power, although cautioning that its core function, the protection of judicial authority, may not be impaired.[376] In keeping with the revolution in individual rights, the Court has extended most due process trial rights accorded to criminal defendants to contemnors.[377]

Although by dint of history, Scalia has no choice but to recognize their existence, not surprisingly, his opinions and voting record reflect a greater suspicion of inherent powers.[378] In part, his suspicion arises from a libertarian

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128 U.S. 289, 313 (1888).

373. United Mine Workers v. Bagwell, 512 U.S. 821, 831 (1994).

374. Chambers v. Nasco, 501 U.S. 32, 44 (1991). In many of these cases, the Court nevertheless affirmed the exercise of an inherent power by a lower court. *See id.* (affirming lower court's imposition of sanctions under inherent powers, holding that such power was not displaced by scheme of statutes and rules). *See also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450–51 (1911) (stating that contempt should be used "sparingly" and that the "very amplitude of the power is a warning to use it with discretion"); *Ex parte* Burr, 22 U.S. (9 Wheat). 529, 531 (1824) (holding that the federal court has power to control admission to the bar and discipline attorneys but this power "ought to exercised with great caution").

375. *See, e.g.*, Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988) (acknowledging that Federal Rule of Evidence 52 (a) limits the court's supervisory power); Societe Int'l Pour Participations Indus. et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207 (1958) (finding inherent power limited by Federal Rules of Civil Procedure).

376. *See Chambers*, 501 U.S. at 59–60 (Scalia, J., dissenting).

377. For "serious" contempts, contemnors are entitled to the classic trial rights of criminal defendants. *See, e.g., In re* Oliver, 333 U.S. 257, 278 (1948) (right to public trial); Cooke v. United States, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, right to present a defense); *Gompers*, 221 U.S. at 444 (presumption of innocence, proof beyond a reasonable doubt, guarantee against self-incrimination). The Court has not extended all the Bill of Rights guarantees such as the pretrial rights to an indictment and arraignment to contempt because it is the Due Process Clause that govern contempt issues. *See* Levine v. United States, 362 U.S. 610, 616 (1960); United States v. Martinez, 686 F.2d 334, 340 (5th Cir. 1982); United States v. Bukowski, 435 F.2d 1094, 1099–1100 (7th Cir. 1970), *cert denied*, 401 U.S. 911 (1971).

378. *See* Carlisle v. United States, 517 U.S. 416 (1996). Speaking for the majority, Scalia rejected a district court's attempt to enter an untimely judgment of acquittal, stating, "Whatever the scope of this 'inherent power'...it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Id.* at 426. Justice Stevens, argued that Scalia's opinion turned judges into no more than judicial referees. He asserted that courts have the inherent power to correct wrongs "done by virtue of its process." *Id.* at 437 (Stevens, J., dissenting) (quoting Arkadelphia Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134, 146 (1919)). *See also* Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 380 (1994) (rejecting claim of ancillary jurisdiction under inherent power to reopen dismissed lawsuit due to breach of agreement where settlement was not part of court's dismissal order).

streak that abhors permitting any government entity free rein to define its own powers.[379] More specifically, Scalia's constitutional ideology requires particular restraints on the judicial branch. In Scalia's view, an open-ended inherent powers doctrine too easily justifies judicial incursions into the domains of the elected branches.[380]

Nowhere does the danger of judicial overreaching loom larger for Scalia than in the use of modern injunctions. Along with his conservative colleagues, Scalia views sweeping injunctions, particularly in the context of court supervision of public institutions, as dangerous judicial activism.[381] Injunctions, of course, are enforced by civil and criminal contempt sanctions. Thus, part of Scalia's impetus to restrict inherent powers, including contempt, arises from his desire to curb the modern injunction—for if the enforcement mechanism is curtailed, the injunction becomes toothless.[382] In fact, Scalia has gone so far as to suggest that if the scope of modern injunctions continues to grow, they might no longer warrant enforcement by contempt.[383]

Of even more concern to Scalia is that expansion of judicial power often occurs at the expense of another branch's authority, raising separation of powers concerns.[384] As Scalia himself has remarked, he is unaware of any modern figure who cares as much about the separation of powers principle as he does.[385] Scalia

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379. Scalia's cynicism runs deep here. He argues that for the Justices, like all government officials, the natural temptation is "towards systematically eliminating checks upon its own power." Planned Parenthood v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in part and dissenting in part).

380. *See* RICHARD A. BRISBIN, JUSTICE ANTONIN SCALIA & THE CONSERVATIVE REVIVAL 60, 92 (1997).

381. *See* United Mine Workers v. Bagwell, 512 U.S. 821, 842 (1994) (Scalia, J., concurring) (noting with disapproval that contemporary courts "routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions"); Lewis v. Casey, 518 U.S. 343, 362 (1996) (stating that "the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive.... [I]t is the *ne plus ultra* of what our opinions have lamented as a court's 'in the name of the Constitution, becom[ing]...enmeshed in the minutiae of prison operations.'") (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 815 (1994) (Scalia, J., concurring in part, dissenting in part) (describing "misguided trial-court injunction" permitted by the Court as a "powerful loaded weapon lying about").

382. *See Bagwell*, 512 U.S. at 844 (Scalia, J., concurring).

383. *See id.*

384. The separation of powers principle embodies several principles. It concerns the encroachment of one branch upon another but also deals with the dispersion of one branches' power to non-governmental entities. *See generally* Steel Co. v. Citizens For A Better Env't., 523 U.S. 83 (1998) (Stevens, J., concurring) (discussing separation of powers and *qui tam* actions); Joan Meier, *The "Right" to a Disinterested Prosecution of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 101–03 (1992) (reviewing the history of private prosecution).

385. Two scholars believe that, aside from his rejection of affirmative action, Scalia's dedication to the doctrine of separation of powers may be his strongest doctrinal commitment. *See* DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF ANTONIN SCALIA 84, 85 (1996).

views the separation of powers as a structural guarantee of liberty and endorses Madison's statement in the *Federalist Papers* that the doctrine is more "sacred than any other in the Constitution."[386] Therefore, Scalia believes in a rigid and near absolute separation of powers principle.[387] Any deviation from this strict approach is risky because it begins the process of allowing one branch to accumulate the power of the others. Thus, recent cases in which the Supreme Court has adopted a more pragmatic approach, permitting the creation of hybrid institutions such as the Independent Counsel and the United States Sentencing Commission, have sparked some of Scalia's most scathing dissents, which darkly warn that the Court "will live to regret" its recent flexibility toward the doctrine.[388]

With such a rigid concept of the separation of powers principle, the very nature of the contempt power is problematic for Scalia. Thus, before and after *Dixon,* Scalia has argued that "the notion of judges'[sic] in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth...the prospect of 'the most tyrannical licentiousness,'"[389] and therefore, contempt is "out of accord with our usual notions of fairness and the separation of powers."[390] Moreover, he has decried that broad contempt powers are "no less fundamental a threat to liberty than is deprivation of a jury trial."[391]

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386. THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the definition of tyranny."). Scalia has also said that the "Bill of Rights is no more than ink on paper unless...it is addressed to a government which so constituted that no part of it can obtain excessive power." SHULTZ & SMITH, *supra* note 385, at 89.

387. In his opinion, the first three Articles vest exclusive control of legislative, executive, and judicial power in their respective branches. For example, if a specific power is deemed "executive" in nature, the Constitution establishes a presumption, rebuttable only by the most conclusive textual or originalist evidence to the contrary, that only the President can exercise that power. *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Scalia argues that his strict separation of powers approach is supported by Constitutional text, reading the phrase "executive power shall be vested in the President," to mean "all" executive power. Scalia supports his position with selective quotes from the THE FEDERALIST and a clear rules argument that separate must mean completely separate or else there is no principled basis on which the Court can draw lines. *See id.* However, neither historical scholars nor the Court's decisions uniformly support Scalia's approach. In fact, there is substantial historical evidence of the "pragmatic actions of government officials immediately after the Constitution was ratified [that] cast doubt on Scalia's view that the framers intended to implement a rigid, clear principle of separation of powers." SHULTZ & SMITH, *supra* note 385, at 87. *See also* Elbert P. Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the 'Blending' of Powers*, 37 EMORY L.J. 587, 588 (1988) (arguing that the Framer's "much ballyhooed separation of powers was, in essence, a blending of powers").

388. Mistretta v. United States, 488 U.S. 361, 425 (1989) (Scalia, J., dissenting). *See also* Morrison v. Olsen, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

389. Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 822 (1987) (Scalia, J., concurring) (citation omitted).

390. United Mine Workers v. Bagwell, 512 U.S. 821, 840 (1994) (Scalia, J., concurring).

391. *Young*, 481 U.S. at 824 (Scalia, J., concurring). In addition, Scalia's general

Scalia's ability to act on his objections to the nature and modern uses of contempt power is hampered by his theoretical commitment to historical practices-based originalism. An unfettered contempt power had strong roots in the common law at the time of ratification.[392] To escape from the historical practices governing contempt, Scalia's *modus operandi* in contempt cases has been to drive a wedge between the modern contempt sanction and its common law antecedents.[393] To his mind, if modern contempt shares no more than the same name as its historical counterpart, he is not bound by the historical rules for common law contempt.[394] Scalia's arguments, however, are so strained as to reveal their ideological underpinnings.

B. Scalia's Contempt Opinions

In his two solo opinions in contempt cases, *Young v. United States ex. rel. Vuitton et Fils, S.A.*[395] and *United Mine Workers v. Bagwell*,[396] Scalia abandoned or distorted the applicable history and precedent which support a strong contempt power. He also uncharacteristically relied on Warren Court decisions and abstract principle arguments that are incompatible with his methodology. These unusual features are also found in *Dixon*.

1. Young v. United States ex. rel. Vuitton et Fils, S.A.

The best example of Scalia's efforts to cut modern contempt from its roots is found in his *Young* concurrence. The underlying civil suit in *Young* was settled when the defendants agreed to a permanent injunction that forbade them from infringing on the plaintiffs' trademark.[397] Upon alleged violations of the injunction, the district court appointed the plaintiffs' attorneys to prosecute the violations.[398] The majority reversed on the grounds that it was improper to have the opposing party prosecute the contempt action.[399]

The Court limited its decision in two important respects. First, the majority relied solely on its supervisory powers over the federal courts.[400] Second, the majority held that aside from the interested prosecutor infirmity, it was

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mistrust of the judiciary adds fuel to his unwillingness to allow courts to wield the mixed powers of contempt. In *Madsen v. Women's Health Clinic, Inc.*, Scalia warned that injunctions "are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders." *See* Madsen v. Women's Health Clinic, Inc., 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part, dissenting in part). Thus, Scalia warned that "[t]he right to free speech should not lightly be placed within the control of a single man or woman." *Id.*

392. *See supra* notes 370–372 and accompanying text.

393. *See infra* Part V.B.

394. *See infra* Part V.B.

395. 481 U.S. 787, 815 (1987) (Scalia, J., concurring in the judgment).

396. 512 U.S. 821, 839 (1994) (Scalia, J., concurring).

397. *See Young*, 481 U.S. at 790.

398. *See id.* at 792.

399. *See id.* at 802.

400. In this capacity, the Court also instructed the lower courts to first request that the government prosecute the contempt before appointing a private prosecutor. *See id.*

otherwise constitutional for a federal court to appoint a private attorney to prosecute an out of court violation of a court order.[401] Therefore, *Young* did not hold unconstitutional the widespread state practice of allowing private litigants, such as battered women, to litigate violations of restraining orders as criminal contempts.[402]

Scalia concurred in the judgment but contended that only the executive branch can decide to prosecute a contempt.[403] Therefore, courts lack the derivative power to appoint any private attorney as a prosecutor in a contempt action. Scalia began his analysis with the premise of an absolute separation of powers and asserted that the power to initiate criminal prosecutions rests entirely within the executive branch.[404] However, Scalia had to concede that each branch has some power to "protect the functioning of its own processes, although those implicit powers may take a form that appears to be nonlegislative...or nonjudicial...."[405] For the judicial branch, of course, this means contempt power. Scalia argued that judicial power to initiate self-protective contempt actions is narrow, limited solely to contempts that interfere with "the orderly conduct of their business or disobey orders necessary to the conduct of that business (such as subpoenas)."[406] Correspondingly, Scalia contended that federal courts have no power, inherent or under Article III, to prosecute out-of-court disobedience to their judgments and orders.[407] Throughout the opinion, though, he struggled to find evidence consistent with his methodology for this position.

First, Scalia ignored his usual originalist sources, which is not surprising because each contradicted his position. Blackstone wrote that courts had the power to punish contempt "in the face of the court" and those which "arise at a distance, of which the court cannot have so perfect a knowledge."[408] Historians believe that the Framers were well aware of Blackstone's view on the reach of the common

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401. *See id.* at 793.

402. *See* Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 103–07 (1992) (discussing and defending this widespread practice).

403. *See Young*, 481 U.S. at 815 (Scalia, J., concurring in the judgment).

404. Scalia tried to frame this as a textualist and originalist argument implicit in the text and structure of the Constitution. However, Scalia's rigid separation of powers argument falls prey to historical research which suggests a more flexible concept of the doctrine in the early period of the Republic. Daniel Reisman has explored Scalia's selective use of historical materials to demonstrate this point. See Daniel Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49, 81–82 (1988).

405. *Young*, 481 U.S. at 821 (Scalia, J., concurring in the judgment). Scalia recognized this power under the common law principle of necessity. *See id.* (Scalia, J., concurring in the judgment).

406. *Id.* (Scalia, J., concurring in the judgment).

407. *See id.* at 821 (Scalia, J., concurring in the judgment). Scalia argued that to allow the courts this power would grant the judicial branch greater powers of self-enforcement than the other two branches. In a typical Scalia-ism, he stated that any claim to greater self-enforcement power had no basis other than "self love." *Id.* at 821–22 (Scalia, J., concurring in the judgment).

408. 4 WILLIAM BLACKSTONE, COMMENTARIES *283.

law contempt power and did not intend to change it in the Constitution.[409] The Judiciary Act of 1789, passed by the First Congress, evinces a similar intent. That Act granted federal courts broad discretion to punish "all contempts of authority in any cause or hearing."[410] Lastly, early Supreme Court decisions confirm that the Framers and the immediately succeeding generation understood the contempt power to reach disobedience to court orders outside the courtroom.[411]

Unable to rest his position on historical practices or precedent, the true foundation for Scalia's position in *Young* was the Warren Court decision in *Bloom v. Illinois*.[412] *Bloom* established that serious criminal contempts were sufficiently like criminal offenses and required jury trials as a fundamental due process

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409. *See* RONALD L. GOLDFARB, THE CONTEMPT POWER, 17–18 (1963). *See also* Schick v. United States, 195 U.S. 65, 69 (1904) ("*Blackstone's Commentaries* are accepted as the most satisfactory exposition of the common law of England."). Historians now dispute Blackstone's assertion that an extensive common law contempt power was "'as ancient as the laws themselves.'" Bloom v. Illinois, 391 U.S. 194, 198 n.2 (1968) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *286–87). They mark the rise of broad contempt powers only to the Star Chamber practices. However, none contest that by the 18th Century, both the English and American courts had adopted Blackstone's view. *See id.* (reviewing common law sources of the period).

410. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 (current version at 28 U.S.C. § 1350 (1994)).

411. *See Ex Parte Robinson*, 86 U.S. 505, 511 (1873) (interpreting the 1831 Judiciary Act to authorize contempt actions, *inter alia*, "where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised to...enforce obedience to their lawful orders, judgments, and processes."). *See also* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and *submission to their lawful mandates*...." (emphasis added)). While the *Anderson* "submission to their lawful mandates" language had long been interpreted to mean the power to enforce all court orders, Scalia took the dubious position in *Young* that it meant no more than "orders necessary to the conduct of a trial, such as subpoenas." *Young*, 481 U.S. at 821 (Scalia, J., concurring in the judgment). Actually, Scalia himself appeared to recognize the implausibility of this interpretation, for immediately after making the argument, he retreated and merely contended that "in any event," this quote was dictum that did not "carefully consider[]...the outer limits of the federal court's inherent contempt powers." *Id.* (Scalia, J., concurring in the judgment). An even earlier case, *United States v. Hudson & Goodwin*, stated, "To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court...." United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). Scalia also cited *Hudson* in *Young* but argued that the case did not refer to court judgments and was therefore ambiguous. *See Young*, 481 U.S. at 819 (Scalia, J., concurring in the judgment). As Daniel Reisman points out, more important than his dismissal of *Hudson*, Scalia utterly failed to discuss *Ex parte Robinson*, which explicitly endorsed the common law rule that the contempt power includes enforcing judgments. *See* Reisman, *supra* note 404, at 86.

412. 391 U.S. 194 (1968). *Bloom* overruled the infamous labor injunction case, *In re Debs*, 158 U.S. 564 (1895). *Debs* had affirmed the common law rule that criminal contempts could be tried summarily by the court as well as reaffirming the common law contempt is exempt rule. *See supra* notes 256–257 and accompanying text.

right.[413] Typical of the balancing in modern inherent power cases, *Bloom* concluded that the passage of time had shown that the potential for abuse of summary procedures for serious contempts outweighed the principle of necessity that animates the common law rule.[414] While speaking broadly at times, *Bloom*'s holding was limited to the question presented—did the Constitution require jury trials for serious contempts?

Nevertheless, in *Young*, Scalia took the broadest phrases from *Bloom* and ran with them. He argued that *Bloom* overruled the cases holding that courts have inherent power to enforce their orders through self-initiated contempt actions.[415] However, as Justice Brennan noted in the majority opinion, *Bloom* did "nothing to undermine" this well-established view.[416] Scalia apparently realized the weakness of arguing that *Bloom* was controlling precedent for his position and uncharacteristically backed off. Instead, he alternatively argued that *Bloom* was at least "highly relevant" to the issue in *Young*.[417] *Bloom*, he said, stood for the principle that arguments based on judicial necessity "must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty."[418] Applying this principle, Scalia then wrote, "it is inconceivable to me that [this principle] would not prevent so flagrant a violation of [the separation of powers] as permitting a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place."[419]

Given Scalia's methodology, this was an amazing statement. Finding no text, historical practice, or precedent-based rule for his position, he rested his argument on the implicit principle of a Warren Court decision that overruled a common law practice over the dissent of that era's originalists.[420] He then held that

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413. *See Bloom*, 391 U.S. at 201.

414. *Bloom* therefore fits neatly within the Court's modern inherent power cases that balance the principle of necessity with the threat of potential arbitrariness on an issue by issue basis. *See supra* note 373 and accompanying text.

415. "But *Bloom* repudiated more than *Deb*'s holding. It specifically rejected *Debs*' rationale that courts must have self-contained power to punish disobedience of their judgments...." *Young*, 481 U.S. at 823 (Scalia, J., concurring in the judgment).

416. *Id.* at 796 n.8. The *Debs* Court had merely taken the hoary principle that courts could enforce their orders and judgments by contempt as a given and used it to support its more specific argument that the issuing judge, not another judge or a jury, must have the power to enforce the order. Therefore, the Court's decision in *Bloom* to overrule *Debs'* endorsement of summary proceedings did not imply the Court's disapproval of the more general common law rules for contempt.

417. *Id.* at 824 (Scalia, J., concurring in the judgment).

418. *Id.* (Scalia, J., concurring in the judgment).

419. *Id.* (Scalia, J., concurring in the judgment).

420. In *Bloom*, Justices Harlan and Stewart dissented and argued that the majority had substituted its conception of due process in place of historical practices and the original understanding of the Fourteenth Amendment. Harlan wrote that the "Court's actions here can only be put down to the vagaries of the times." Bloom v. Illinois, 391 U.S. 194, 215 (1968) (Harlan, J., dissenting). Indeed, the majority conceded that it was overruling a rule that was based on "weighty and ancient authority." However, sounding the theme of the evolving that Constitution Scalia opposes, the Court held that "the ultimate question is not whether the traditional doctrine is historically correct but whether the rule...is an acceptable construction of the Constitution." *Id.* at 199–200 n.2.

this open-ended principle—that necessity arguments should be limited whenever possible—must govern this case because any other alternative was "inconceivable" to him.[421] Thus, instead of any methodology-based arguments, Scalia's position in *Young* boils down to precisely the kind of barely veiled statement of personal opinion that he derides as illegitimate.[422] The operative value for Scalia in *Young* was his hostility to judicial power and, in particular, his separation of powers complaint about contempt. Thus, *Young* demonstrates that when contempt is at issue, Scalia's ideology prevails over his methodology.

2. United Mine Workers v. Bagwell

In *Young,* Scalia mostly ignored the relevant historical sources. In *Bagwell,* he manipulated his originalist methodology and the historical evidence to advance his thesis that modern contempt and historical contempt are different animals.

Bagwell revisited the line between civil and criminal contempt in the context of a complex labor injunction.[423] After a hearing, a state judge held a labor union in civil contempt and imposed a large fine.[424] On appeal, the union argued the contempt proceedings were criminal, which entitled it to jury trial under *Bloom.*[425] Writing for the majority, Justice Blackmun found the case difficult, but ultimately agreed with the union and reversed.[426]

Justice Scalia agreed that the contempt sanctions in *Bagwell* were criminal but used his concurrence to lecture the Court on the historical practices relevant to the issue in the case.[427] He contended that common law equity orders

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421. *See Young,* 481 U.S. at 824 (Scalia, J., concurring in the judgment).

422. *See supra* notes 15–25 and accompanying text.

423. *See* United Mine Workers v. Bagwell, 512 U.S. 821 (1994).

424. At one point in the litigation, the court had set out a schedule of fines for future violations. After additional violations of the order, the court held hearings it denominated as "civil and coercive." The court permitted the parties to conduct discovery, introduce evidence, and call and examine witnesses as in a civil proceeding but required the contumacious acts to be proven beyond a reasonable doubt. However, the court did not afford the union a jury trial. After the labor dispute was settled, the parties moved to dismiss the resulting contempt fines but the court ordered some of the money paid to the counties and the state which had expanded resources to combat the illegal strike activities. The parties and local government withdrew from the litigation, so the court appointed a Special Commissioner to litigate and collect the fines. The Supreme Court of Virginia held that, as a matter of state law, the fines were civil and coercive and thus properly collected in a civil proceeding without a jury. *See Bagwell,* 512 U.S. 821, 824–26.

425. *See id.* at 826.

426. The majority opinion did little to clarify the distinction between civil and criminal contempt in ambiguous situations. The two main factors in the Court's decision appeared to be: (1) that the extensive fact-finding required to determine if the union had complied with the order's comprehensive code of conduct was best resolved by the rigor of a criminal proceeding; and (2) that the amount of the fines qualified this as a serious contempt. The majority refused to establish a definitive test and rejected the two advanced by the parties. *See id.* at 834-38.

427. In characteristic fashion, Scalia claimed that the existing tests for distinguishing criminal and civil contempt were irreconcilable and only historical practices

generally required affirmative acts because "[a] general prohibition for the future does not lend itself to enforcement through conditional incarceration...."[428] In addition, he claimed that common law injunctions were limited to simple acts that either advanced the litigation, such as discovery, or terminated it, such as the conveyance of a deed.[429] Although Scalia acknowledged that some common law equitable decrees were prohibitory rather than affirmative, he declared that early injunctions were still "much less sweeping than their modern counterparts" and did not involve "any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior."[430] Therefore, according to Scalia, the modern injunction had "lost some of the distinctive features that made enforcement through civil process acceptable."[431] In this way, Scalia distinguished common law injunctions from the complex prohibitory regulations in the *Bagwell* court order.

By framing the modern injunction as a historical departure from historical equity practices, Scalia saw significant ramifications for future contempt cases.[432] Whereas the majority was content to evaluate each contempt proceeding on a case-by-case basis to determine whether it was civil or criminal, Scalia was inclined to announce a more drastic rule. He suggested that if "the modern judicial order is in its relevant essentials *not the same device*" as the historical injunction, the Court would at some point have to decide "whether modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement."[433] In other words, Scalia reached beyond the facts of the case to declare his readiness to rule that civil contempt sanctions should no longer be a permissible remedy for a violation of a modern injunction. Thus, as in *Young*, Scalia advanced arguments that would limit contempt power to the narrowest of circumstances.

The flaw in Scalia's *Bagwell* opinion is that he subtly altered his originalist methodology to reach this conclusion. Normally, Scalia holds that due

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provided a clear answer to the issue presented. *See id.* at 840 (Scalia, J., concurring).

428. *Id.* at 841 (Scalia, J., concurring).

429. *See id.* (Scalia, J., concurring). More recently, in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961 (1999), Scalia, writing for a 5-4 majority, quoted A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928), for the proposition that "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." *Id.* at 1968. Therefore, Scalia held that the district court had no power to issue the preliminary injunction in this case. *Id.* at 1974-75. *But see id.* at 1975-78 (Ginsberg, J., dissenting) (stressing the adaptable character of federal equity power, and that equity can evolve over time).

430. *Bagwell*, 512 U.S. at 842 (Scalia, J., concurring).

431. *Id.* at 843 (Scalia, J., concurring).

432. Scalia agreed with the majority that the level of fact finding required to determine compliance with a complex prohibitory order was better served by criminal procedures than civil process. However, the heart of his argument was that enforcement of this type of order by civil process would be a historical "novelty." *Id.* (Scalia, J., concurring).

433. *Id.* at 844 (Scalia, J., concurring) (emphasis added).

process is only that process (or a close historical analogue) which the Framers recognized as necessary.[434] Scalia therefore faults other Justices when they frame due process issues as an abstract inquiry into fairness devoid of historical foundations.[435] However, although Scalia claimed in *Bagwell* that the case could be resolved by resort to historical practices, Scalia's analysis *did not start* with the historical practices governing civil contempt. Instead, as in *Young*, he began with the abstract, ahistorical premise that the very nature of contempt power presents a threat to due process and the separation of powers principle.[436] Based on this *a priori* premise, Scalia argued that "only the clearest of historical practices" could justify the denial of jury trial for the union.[437] Essentially, Scalia used a presumption of a due process violation to impose a heavier historical burden of proof on contempt practices than for other historical practices. In other words, Scalia stacked the rules of the game against contempt.

This higher burden of historical proof for contempt skewed Scalia's analysis in *Bagwell.* Normally, when Scalia finds a historical analogue to the contested practice, his presumption is that due process is not offended, even if the practice has evolved into something quite different from its common law root.[438] Given that civil contempt sanctions based upon prohibitory injunctions were at least a small part of historical equity practice, Scalia could have traced the continuous existence of civil contempt sanctions based on prohibitory orders from their simple beginnings through their evolution to the more complex creatures of today. Under his normal approach, he would therefore have held that modern civil contempt sanctions were the equivalent of common law's civil contempt sanctions, regardless of the complexity of the underlying order.[439] Instead, under this stricter version of originalism, Scalia used the difference in complexity between common law injunctions and the *Bagwell* injunction to declare that the "clearest of historical practices" standard was not met.

However, even Scalia's assertion that the modern "sweeping injunction" is a clean break from historical equity practices is dubious. The "sweeping injunction" is not a Twentieth Century phenomenon that emerged from the Warren Court or even the New Deal. Rather, as early as the 1880s, federal district courts issued complex prohibitory orders during the strikes that accompanied the rise of organized labor, which in many instances were enforced by civil contempt sanctions.[440] Moreover, the ease with which the tradition-bound Nineteenth

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434. *See* Albright v. Oliver, 510 U.S. 266, 275–76 (1994) (Scalia, J., concurring).

435. *See* Michael H. v. Gerald D., 491 U.S. 110, 122, 123 n.2 (1989).

436. *Bagwell*, 512 U.S. at 840 (Scalia, J., concurring). Because this was a civil contempt case, Scalia added that it was even worse to allow a contempt proceeding without the "protection usually given in criminal trials." *Id.* (Scalia, J., concurring).

437. *Id.* (Scalia, J., concurring).

438. Scalia accomplishes this by constructing a historical continuum that shows continuation and/or evolution of the past practice to the present time. *See Michael H.*, 491 U.S. at 123–25.

439. *See supra* notes 51–62 and accompanying text.

440. The rise of unionism was resisted by the courts, which used "broad injunctions" to stymie organized labor. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 62 (1991) ("[I]njunctions figured in virtually every

Century courts issued complex labor injunctions suggests that Scalia's dichotomy between historical equity practice and the modern injunction is a fallacy.[441] As one commentator similarly concluded, "[I]t is difficult to see the 'sweeping' decrees as an entirely new phenomenon...."[442] Scalia even acknowledged the early labor cases in *Bagwell*, but apparently considered them the product of "contemporary courts."[443] For Scalia, the "modern era" in civil contempt appears to have begun around the 1880s (conspicuously when the courts began to issue the kinds of orders of which Scalia disproves).[444] However, because Scalia changed the rules of the originalism game, he required an exact match between the *Bagwell* injunction and historical practices. With this as the test, Scalia could easily seize on the expanded scope of modern injunctive relief as proof that modern injunctions should not be governed by the historical rules for civil contempt.[445]

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railroad strike" and "in most strikes which industrial unionism...was an issue....") "Federal courts went so far as to deputize private police or seek state or federal troops to assist employers." *Id. See also* Phillip A. Hostak, Note, International Union, United Mine Workers v. Bagwell*: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 191–92 (1995) (chronicling how federal district courts "regularly policed labor disputes by issuing injunctions and subsequently enforcing them via contempt proceedings").

441. Prior to the 1880s, injunctions issued by American courts primarily involved nuisances and protecting public carriers. Both kinds of injunctions were justified under traditional equitable principles. *See* Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 834 (1926). The courts that first issued the more complex labor injunctions of the 1880s relied on these earlier cases, as well as statutory provisions and other case law that broadly defined judicial power in equity. *See id;* Sherry v. Perkins, 147 Mass. 212, 214 (1898) (finding that injury to plaintiff's business and property "was a nuisance such as a court of equity will grant relief against"); Worthington v. Waring, 157 Mass. 421, 428 (1892) ("Under pre-existing statutes, courts of equity have the right to issue 'all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations, and persons, when necessary to secure justice and equity.'" (citation omitted).

442. Hostak, *supra* note 440, at 221. Thus, while restrictions on the use of civil contempt sanctions in complex cases may be a good idea, originalism fails to provide the justification as Scalia contended in *Bagwell*.

443. *Bagwell*, 512 U.S. at 842.

444. *See* Michael H. v. Gerald D., 491 U.S. 110, 123–25 (1989). Scalia's treatment of these Nineteenth Century cases is curious for two additional reasons. First, in historical practices opinions, Scalia frequently relies on Nineteenth Century cases to show a continuity between a common law practice and its modern equivalent. *See* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 454 (1996) (Scalia, J., dissenting) (citing a case from 1883 to support historical argument about the scope of appellate review). *See also* Burham v. Superior Court of California, 495 U.S. 604, 612–13 (1990). Second, even when Nineteenth Century precedents conflict with his methodology, Scalia often accepts their rules under stare decisis. *See* Lamf v. Gilbertson, 501 U.S. 350, 364–66 (1991); Granfinanciera v. Nordberg, 492 U.S. 33, 66 (1989).

445. Although Scalia contends that he looks to the most specific historical analogue to the challenged modern practice, the level of specificity of tradition is in the eye of the beholder. In *Bagwell*, the formulation of the most specific tradition could be either: (1) whether prohibitory civil injunctions were permissible at common law; or (2) whether complex prohibitory injunctions were permissible. Because complex injunctions were unknown at common law, Scalia's decision to focus on complexity as the key issue resolves

C. Scalia and Contempt in the Dixon *Opinion*

In light of Scalia's contempt jurisprudence, the structural and analytic peculiarities of his *Dixon* opinion make more sense. Specifically, the conflict between Scalia's originalism and his hostility to contempt, played out in *Young* and *Bagwell*, is repeated in *Dixon*.

1. The Structure of Scalia's Discussion of Contempt

In several ways, the very structure of the opinion reflects Scalia's struggle between his methodology and his hostility to contempt. First, although the case was briefed and argued as a vehicle for the Court to reconsider the *Grady* double jeopardy test,[446] Scalia began the analysis section of his opinion with a discussion of the history of contempt that had nothing to do with double jeopardy. The first sentence reads: "To place these cases in context, one must understand that they are the consequence of a historically anomalous use of the contempt power."[447] Curiously, however, he never explained why it was necessary to distinguish these contempts from their historical analogues to resolve the double jeopardy issue. Only within the context of Scalia's constitutional methodology does his diversion into the history of contempt make sense. In *Dixon*, Scalia was once again faced with a historical practice favorable to contempt power—the contempt-is-exempt rule.[448] Under his originalist methodology, he could not discard this historical rule without first showing that the contempts at issue were a significant departure from their historical analogues.[449]

Scalia drew two distinctions between historical contempts and the *Dixon* contempts. Scalia first reiterated his argument from *Young* that common law "criminal contempt power was confined to sanctions for conduct that interfered with the orderly administration of judicial proceedings," thereby excluding out-of-court violations of court orders and judgments.[450] Scalia then moved quickly to a second, more specific contention about the contempts in *Dixon*. Scalia argued that the common law and early American courts could not have issued the Dixon and Foster injunctions because there was a "long common-law tradition against judicial orders prohibiting violation of the law."[451] To Scalia, it was "not surprising, therefore, that the double jeopardy issue presented here...did not occur at common law, or even quite recently in American cases."[452] Toward the end of

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the case. Scalia's methodology, however, provides no value neutral rule to guide this decision.

446. *See Brief for Petitioner*, *supra* note 266, at 33–46.

447. United States v. Dixon, 509 U.S. 688, 694 (1993).

448. *See id.*

449. *See supra* note 51 and accompanying text.

450. *Dixon*, 509 U.S. at 694. While he cited some of the same sources, curiously, Scalia did not cite his *Young* concurrence as a reference.

451. *Id.* at 695. Scalia cited to Blackstone and to various English and American treatises and cases on equity law. *See id.* at 694.

452. *Id.* at 695. Scalia characterized the issue as "whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense." *Id.* However, while that characterization

this second argument, Scalia acknowledged the existence of the common law and early American cases that permitted prosecution for criminal contempt and a subsequent criminal charge based on the same conduct.[453] Nevertheless, Scalia concluded the existence of these cases did not undermine his argument that the *Dixon* contempts were historically anomalous because these early cases were allegedly examples of contempt "as originally understood" since they all involved the "disruption of judicial process."[454]

Scalia's claims are difficult to analyze because he did not develop either argument in great detail and because he switched between the two arguments without clear demarcation. However, Scalia's rhetorical maneuver at the end of his second historical argument is the first clue that his attempt to distinguish the *Dixon* contempts is flawed. Rather than end on a high note, Scalia had to try to explain away the common law contempt-is-exempt cases which appear to undercut his second assertion that the Foster and Dixon orders could not have been issued at common law. In doing so, however, Scalia actually abandoned this second argument—about the scope of historical injunctions—and switched back to his first and broader claim from *Young*—that common law contempt did not cover out-of-court violations of court orders and judgments (except for a narrow class relating to disruptions of judicial process).[455] This shifting and blending of arguments suggests that neither of his historical points was strong enough to stand on its own and that his broader *Young* argument was actually the heart of his position in *Dixon*.

2. A Critique of Scalia's Historical Claims About Contempt

Beyond being merely confusing, the evidence for both of Scalia's historical claims with regard to Foster's domestic violence injunction in *Dixon* is weak. Examination of his sources and additional historical evidence reveals that Scalia was either partially inaccurate or just plain wrong about several of his critical assertions.

While Scalia's second argument that common law equity rules would have forbidden these court orders makes sense in the context of Alvin Dixon's release order, the protection order in Foster's case did not contradict the rules of common law equity, even as defined by Scalia. According to Scalia, common law prohibited injunctions that enjoined "violation of the civil or criminal law *as such.*"[456] On the other hand, injunctions that forbade harmful acts that produced a "separate injury to private interest" and which incidentally were punishable under the criminal law, were allowed.[457] In fact, if this had not been so, the contempt-is-exempt rule could never have arisen at common law. In applying this common law equity principle in the opinion, Scalia only analyzed the injunction in Dixon's

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may be fair for Alvin Dixon's contempt, it is not an accurate characterization of the Foster injunction which on its face, barred a range of conduct far beyond criminal acts.

453. *See id.*

454. *Id.*

455. *See supra* notes 406–411 and accompanying text.

456. *See Dixon*, 509 U.S. at 695 (emphasis added).

457. *Id.*

case. That order enjoined further criminal violations while on release in a criminal case.[458] The defendant then violated this release order by committing a new offense.[459] Here, Scalia is correct that no private party was implicated and thus no identifiable private interest was at stake; therefore his historical anomaly argument is reasonable.

The court order in Foster's case is a profoundly different matter. Foster's restraining order was issued at the request and for the benefit of a private party, Ana Foster. Moreover, she sought the court's protection under a specific legislative provision directed at individuals in certain statutorily defined relationships.[460] The District of Columbia Code therefore established a private legal interest, separate from that protected by the criminal law. The order itself reflected this distinction because it enjoined a range of conduct far beyond that which could violate the criminal law.[461] Thus, while family court regulation of domestic violence did not exist at common law, the Foster restraining order still squarely fit within the common law equity rule that permitted injunctions which, although designed to protect private interests, might also result in violations that constituted criminal conduct. Scalia avoided this problem by focusing solely on the Dixon facts and omitting any discussion of the Foster order in this part of the opinion.

Turning back to his broader *Young* claim that common law contempt was not used to enforce judgments and most out-of-court violations of judicial orders, Scalia's historical arguments in *Dixon* were no better those that he advanced in *Young*. In the first half of his bifurcated *Young* argument in *Dixon*, Scalia cited to Blackstone for the proposition that "the criminal contempt power was confined to sanctions for conduct that interfered with the orderly administration of judicial proceedings."[462] However, Scalia failed to identify the specific language in Blackstone that supports his claim nor did he quote the other passages from Blackstone which contradict his position.[463]

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458. *See id.* at 691.

459. *Id.*

460. *See supra* notes 305–306.

461. In fact, under Scalia's analysis later in the opinion, he held that individual terms of the order, such as the "in any manner threaten," precluded both criminal and non-criminal wrongs. *See supra* notes 327–330.

462. *Dixon*, 509 U.S. at 694.

463. Scalia only cited to 4 WILLIAM BLACKSTONE, COMMENTARIES *280–85, thus it is impossible to know which passages he believes support his claim. One possibility could be Blackstone's statement that a court could punish disobedience by parties to "any rule or order, made in the progreſs of a cauſe." *Id.* at 282. The language "progress of a cause" might be interpreted to refer to just judicial process. However, "any rule or order" suggests Blackstone believed in a broad contempt power. Additional language in Blackstone supports the latter, broader interpretation. Blackstone also wrote that all persons, including non-parties, could be punished for contempts that arise as at distance for "disobeying or treating with diſreſpect the king's writ[s], or the rules or proceſs of the court;... and by any thing in ſhort that demonſtrates a groſſ want of that regard and reſpect, which when once courts of juſtice are deprived of, their authority (so neceſſary for the good order of the kingdom) is intirely loſt among the people." *Id.* at 282. Finally, my interpretation of Blackstone is more consistent with the cases from the times. *See infra* notes 470–477 and

Next, Scalia argued that this "limitation was closely followed in American courts."[464] As in *Young*, however, Scalia neglected to discuss *Ex parte Robinson*, which contains language that undermines his argument.[465] Scalia also noted that Congress amended the Judiciary Act of 1789 in 1831 to "allow[] federal courts the summary contempt power to punish generally 'disobedience or resistance' to court orders."[466] Here, Scalia seemed to suggest that the 1831 Act expanded the federal courts' statutory contempt power to include judgments and all other court orders and, by implication, that the First Judiciary Act had limited contempt to the narrow class that Scalia believed was all the common law had permitted. If this was his intended point, he appears to have gotten it backwards. The Judiciary Act of 1789 allowed the federal courts to punish "all contempts" of their "authority in any cause or hearing before the same."[467] Commentators agree that the plain language of the 1831 Judiciary Act and Congress' clear intent in 1831 was to limit the common law contempt power that the 1789 Act had codified, not expand that power to new classes of court orders.[468]

Scalia's final claim here was that the common law cases that gave birth to the contempt-is-exempt rule were limited to contempts that "were for disruption of judicial process,"[469] thereby excluding any contempts analogous to the *Dixon* and *Foster* scenarios. In support, Scalia cited to the 1739 English case, *King v. Lord Ossulston*.[470] An examination of that case, however, proves the opposite to be true.

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accompanying text.

464. *Dixon*, 509 U.S. at 694.

465. *See supra* note 411 and accompanying text. Nor did Scalia advance his strained interpretation of the *Anderson v. Dunn* "lawful mandates" language as he had in *Young*. Instead, all Scalia could muster in *Dixon* was a 'see' citation to the 1812 case, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). See *Dixon*, 509 at 694. All that case decided was that the lower federal courts had no inherent jurisdiction over common law criminal offenses. *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34. Thus, in the absence of legislation federalizing an offense, the federal courts had no authority to entertain a criminal prosecution for a substantive offense. Moreover, the Court was quite careful to deny that it was imposing any restrictions on traditional inherent powers, specifically singling out contempt power as excepted from its holding. *See id.* at 33. ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution....To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others...."). Therefore, *Hudson & Goodwin* added nothing to Scalia's claims about the limited scope of contempt power soon after ratification of the Fifth Amendment.

466. *Dixon*, 509 U.S. at 694. *See also* Judiciary Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487, 487–88 (1831) (codified as amended at 18 U.S.C. § 401 (1994)).

467. Judiciary Act of 1789, ch. 20, § 16 at 83, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1652 (1994)).

468. *See* Tuttle & Russell, *supra* note 387, at 594. Historians agree that the 1789 Act was understood to recognize the existing broad contempt power at common law rather than define a new power. *See id.* However, after the infamous *Peck* case, Congress decided to preclude judges from using summary contempt to punish persons for libelous statements about them outside the courtroom. *See id.*

469. *Dixon*, 509 U.S. at 695.

470. 93 Eng. Rep. 1063 (K.B. 1739). *See also* The King v. Pierson, 95 Eng. Rep.

The defendants in *Ossulston* were Lord Ossulston, Pierson, and various servants who together had "contrived to get a young lady out of the custody of her guardian assigned in Chancery, and marry her."[471] She apparently consented "and was carried into Sussex, and there married."[472] Ossulston and his coconspirators were held in contempt and committed for violating the guardianship order.[473] There was also a criminal statute to punish those who married underage women with inheritances without the consent of their legal guardian (whether their natural father or a guardian appointed by the court).[474] Subsequent to the contempt, Ossulston and his co-defendants were charged by information under this statute.[475] On appeal, the King's Bench refused to dismiss the information despite the earlier contempt proceeding, holding that there were different purposes served by contempt and the criminal law.[476]

With the facts laid out, Lord Ossulston's contempt cannot be conceived as a "disruption of judicial process." First, these nonparty contemnors clearly committed an out-of-court violation, not a classic in-court verbal or physical disruption of judicial proceedings. Nor did the *Ossulston* contempts relate to any out-of-court form of judicial process, such as a subpoena, as part of ongoing litigation in the guardianship proceeding. Rather, the guardianship decree was a standing order that governed the conduct of guardian, as well as any person who interacted with the ward in a way that implicated the terms of the order (such as marriage or her inheritance).[477] By conspiring together and then spiriting away the

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412 (K.B. 1738) (providing a fuller recitation of the facts than the Strange report to which Scalia cited in *Dixon*). Scalia also cited *State v. Yancy*, 4 N.C. 133 (1814), for support. *Yancy*, however, involved an in-court contempt for disrupting court proceedings which neither advances nor detracts from Scalia's argument about the scope of out-of-court contempts at common law.

471. *Ossulston*, 93 Eng. Rep. at 1063. Lord Ossulston was the eldest son of the Earl of Tankerville. *Pierson*, 95 Eng. Rep. at 412. He is referred to as "Lord O." in the *Pierson* version. *See id.* The groom was Pierson, the eldest son of one of the stewards of the Earl of Tankerville who was "in low circumstances." *Id.* The female ward was "Mary Eads, an heiress, a little under sixteen years of age, and worth 10,000l. personal estate, and 900l. per. ann." *Id.* Her guardian appointed by the Court was Mr. Brierton, her uncle on her mother's side. *Id.* Guardians, of course, were appointed by Chancery only if the ward had an income via an inheritance. *See Marrying in Contempt of Court*, THE IRISH LAW TIMES, April 13, 1889 at 194 [hereinafter *Marrying in Contempt*].

472. *Ossulston*, 93 Eng. Rep. at 1063.

473. *See id.*

474. *See* 4 & 5 Phil. & M. c. 8. *See also Marrying In Contempt*, *supra* note 471, at 194 (noting that "Most people who read romances are well acquainted with the doctrine, that for an adventurous tuft-hunter to marry a female ward of Chancery in a clandestine manner, whether out of a boarding school or not, is a somewhat perilous proceeding").

475. *See Pierson, 95* Eng. Rep. at 412. The Attorney General refused to *nolle prosequi* the case. *See Ossulston*, 93 Eng. Rep. at 1063.

476. "As to the commitment by the Court of Chancery, that was for a contempt only; and therefore it is no reason against punishing the defendant's for the satisfaction of publick justice, and by way of publick example." *Pierson*, 95 Eng. Rep. at 413.

477. Furthermore, contrary to Scalia's characterization of equity orders that were enforced by contempt, the guardianship decree did not require a simple, single act that either advanced or terminated the proceeding. This Chancery Court order had given a wide

ward, the contemnors violated the substance of the order—the court's assignment of guardianship authority to the guardian. Therefore, *Ossulston*'s case actually refutes Scalia's claim that common law out-of-court contempts were limited to a narrow class of acts that interfered with judicial process.

Why Scalia cited *Ossulston* remains a mystery. Additional historical records suggests several possible sources for Scalia's misconceptions about common law contempt. It may be that Scalia (or his secondary sources) relied upon medieval notions of contempt that were long superceded by the mid- to late-Eighteenth Century[478]—the critical period to which Scalia's originalism turns to find the benchmark common law practices for constitutional analysis. Scalia's misunderstanding may also be attributed to an overly literal interpretation of certain common law terms. For example, in medieval times, the term "in the presence of the court" actually included whole classes of out-of-court contempts.[479] Similarly, the phrase, "hinder the administration of justice" appears to have long included much more than simply disrupting court proceedings or disobeying a limited class of out-of-court orders such as subpoena.[480] Thus, to the

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range of powers to the guardian, including the power to approve the marriage of the ward as well as manage her finances. *See id.*

478. Medieval English courts treated the out-of-court disobedience of court orders as a civil rather than criminal contempt. Early common law criminal contempt was likely reserved for actions that "hinder[ed] the administration of justice, such as libeling a judge, or creating a disturbance while the court [was] sitting." *Contempt of Court in Legal History*, 173 THE LAW TIMES 286 (1932). In addition, the out-of-court criminal contempts that did exist and were committed by strangers (non-parties and non-officers) were accorded a regular trial by jury. By the late 16th Century, much of this had changed. The Star Chamber asserted power over most contempts of the common law courts and it proceeded by summary process, not trial. In addition, the Star Chamber penalty for most contempts, including violations of court orders which had been considered civil, was both a fine and imprisonment. By the mid-Eighteenth Century, most criminal contempts, be they in or out-of-court, or by parties and non-parties, were afforded only summary process by the King's Bench (which had assumed the power of the Star Chamber in 1641). *See id.* This practice was cemented by the unpublished opinion in Almon's case in 1765. While the historical assertions about summary contempt in Almon's case were critiqued in 1908 by Sir John Fox, this could not change the fact that the Framers of the Constitution believed in a broad, summary contempt power that included violations of court orders. Therefore, to the extent there is historical support for Scalia, it is from the wrong time period.

479. Although medieval courts claimed to punish contempts as criminal only if they were committed "in the actual presence of the court," officers of the court were always deemed "present" and therefore their out-of-court contempts were always deemed criminal. *See Contempt of Court in Legal History*, *supra* note 478, at 286.

480. One early American commentator explored the English history of contempt in the context of advocating against summary contempt proceedings for certain out-of-court contempts. *See* Kihahan Cornwallis, *The History of Constructive Contempt of Court*, 35 ALB. L. REV. 145 (1886). Cornwallis divided English contempts in two categories, direct contempts and constructive contempts. He defined constructive contempt as acts "committed beyond the view or hearing of a court having reference to its judges or proceedings, which may or may not be construed to have tendency to obstruct or retard the duties of the court." *Id.* Direct contempts comprised any "act committed within the view of hearing of a court, *or a hindrance or disobedience of its lawful process, where it is directly and intentionally retarded or obstructed in the discharge of the duties imposed upon it by*

extent that these terms were used in cases or by commentators in the Eighteenth Century, it is likely the broad, not the literal, meaning of these terms was intended. Finally, there are a few historical statements that, when viewed in a vacuum might support Scalia's position, but actually arose in the context of a much narrower debate over the use of contempt to punish out-of-court libels of judges, not out-of-court violations of substantive orders.[481] In any event, regardless of the origin of Scalia's historical misconceptions, the available historical evidence supports neither his *Young* argument about the scope of criminal contempt at common law nor his *Dixon* test for contempt and double jeopardy.[482]

3. Scalia's Bloom *Argument in* Dixon

After purporting to show that the *Dixon* contempts were historical anomalies, Scalia again invoked *Bloom*'s broad language that "contempt is a crime

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law for the benefit of society." *Id.* at 145 (emphasis added). Thus, unlike the modern view of direct contempt which now includes only acts in the courtroom, Cornwallis believed the common law considered both in-court disruptive behavior and virtually all out-of-court violations, other than out-of-court libels, to have been committed in the presence of the court, i.e., as a direct contempt, and therefore punishable by criminal sanction.

481. Several early commentators quote Chief Justice Anderson in 1599 who stated that "a man may be committed for a contempt done in court, but not for a contempt out of court, and therefore he ought not to have been committed for such a private abuse." Cornwallis, *supra* note 480, at 146. While at face value this statement seems to support Scalia's view (although more one hundred years too early), the context of the case strongly suggests the justice was referring only to the use of constructive contempts to punish unfavorable statements about judges made outside the courtroom. As Cornwallis reports, this case involved "one Dean, a merchant of London, who publically called one Garret, an alderman, a fool and a knave, whereupon the alderman being a magistrate, he was committed to Newgate for contempt, but on being brought before the Court of Common Pleas on a writ of habeas corpus, he was discharged." *Id.* Even in their day, constructive contempts for libel were criticized, and many believed it unfair to punish them by summary criminal sanctions. *See id.* Thus, a modern writer seeing a common law critic argue that out-of-court contempts (i.e., constructive contempts) should not be punished criminally, might easily misunderstand this to mean contempts that violated court orders rather than just libel. However, as *Ossulston's* case, Blackstone, and the early American cases show, this would be a mistaken interpretation because criminal contempts sanctions for out-of-court violations of substantive orders appeared to have been well-accepted. Therefore, even to the extent that there are common law sources that appear to support Scalia's point, they appear to be directed at a different issue than the one he raised in *Young* and *Dixon*.

482. While challenged by Chief Justice Rehnquist, Scalia never really gives an originalist explanation for rejecting a straightforward application of the elements test. A tentative hypothesis for Scalia's position would go like this: Because these contempts were an entirely "new context," not only did Scalia feel released from the historical contempt is exempt rule, but in addition, he felt free of all doctrinal constraints—including his own prior double jeopardy jurisprudence (which included a strong preference for the traditional elements test). In other words, because he deemed injunctions that incorporated criminal laws to be modern anomalies, he was not required to rigidly apply the traditional elements tests which had been designed for substantive criminal offenses. Instead, he could create a rule that comported with his sense of the correct result. In doing so, I believe Scalia was influenced by his antipathy to contempt because the results generated by his test violate his clear principles.

in the ordinary sense" to support his holding.[483] He also relied on the Court's prior decisions extending a broad variety of constitutional safeguards to contemnors.[484] Based on these authorities, Scalia stated that "it was obvious" that the Double Jeopardy Clause should also apply to all out-of-court contempts.[485]

While presented as a supporting argument, Scalia's two sentence discussion of *Bloom* was the real foundation of his position on contempt and double jeopardy in *Dixon*. This can be shown in two ways. First, as demonstrated above, Scalia's historical arguments that modern contempt is significantly different from the contempt doctrine of the Framers is without support. Thus, Warren Court precedent is the only authority in the opinion that actually supports his position that contempt should be covered by the Double Jeopardy Clause.[486]

Second, Scalia's ultimate conclusion, that all out-of-court contempts are covered by double jeopardy, is broader than even his flawed historical claims supports. Even assuming Scalia was correct that the *Dixon* contempts were historical anomalies, all that conclusion justifies is that double jeopardy should apply to those contempts. Even under Scalia's version of history, there were a limited number of out-of-court contempts that fell under the disruption of judicial administration heading, and thus, were prosecutable at common law.[487] A faithful application of Scalia's originalist principles would have still held open the possibility that the contempt-is-exempt rule would be valid for those contempts. However, Scalia never discussed this possibility.[488] The import of his failure to even discuss the issue signals that *Bloom* and the modern contempt cases, rather than historical practices, were sufficient and independent grounds to support his broad holding that the Double Jeopardy Clause applies to all out-of-court contempts.

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483. United States v. Dixon, 509 U.S. 688, 695 (1993).

484. *See supra* note 377 and accompanying text..

485. *Dixon*, 509 U.S. at 696. While not at issue, Scalia did note that what is now called summary contempts, an immediate finding of contempt for in-court disturbances, might warrant a different rule. *Id.* Summary contempts are the one area in which judges are still permitted to hold persons in contempt without a hearing or any other due process proceedings.

486. The problem with relying on *Bloom*, as noted earlier, is that it ultimately rests upon an evolutionary argument: The Framers did not understand contempt to fall under double jeopardy but the Court now does today. *See id.* Scalia's originalism should have required him to either reject such an argument outright or subject it to a faint-hearted originalist analysis. With a more flexible approach to constitutional analysis, White's *Dixon* dissent made a more thoughtful case for applying double jeopardy to contempt than Scalia.

487. Other than disobeying subpoena, Scalia was vague about what kinds of out-of-court contempts constituted "disruption of judicial process." *Dixon*, 509 U.S. at 695.

488. Perhaps Scalia believed that he would never meet a modern out-of-court contempt sufficiently similar to a common law out-of-court criminal contempt to merit any discussion of the continued viability of the common law rule. There are, however, such possibilities such as a contempt based upon a violation of a guardianship order similar to the *Ossulston* case. An additional example might be an out-of-court act by judicial officers such as a bailiff's conduct with a jury that might constitute both criminal jury tampering and contempt, which at common law was treated as criminal contempt. *See* Scalia, *supra* note 23.

4. Scalia and His "Feigned Originalism" in Dixon

Scalia's approach to contempt in *Dixon* was anti-originalist; however, his need to demonstrate allegiance to his methodology required him to outwardly maintain that historical practices support his position on contempt and double jeopardy. In other words, his position in *Dixon*, as well as in *Young* and *Bagwell*, can best be described, to coin a phrase, as "feigned originalism." Still, Scalia claims that his originalism is practical because it contains a safety valve, the faint-hearted component which allows the Constitution to adapt to significant changes in society.[489] Thus, the final issue to consider is whether Scalia's decision to abandon the common law rule for contempt and double jeopardy can be justified under the mantle of faint-hearted originalism.

Scalia's "faint-hearted" principle allows him to depart from a historical rule if it is clear that an "evolution in social attitudes has occurred."[490] This evolution must appear in extant sources, such as widespread legislation at the state level, and must evince an overwhelming trend.[491] Thus, although "faint-heartedness" is a safety-valve in theory, its requirements usually lead to a strong preference for finding continuity between historical and current practices, despite significant societal or institutional changes.[492] One need look no further for an example of this strong form of originalism than Scalia's defense of the elements test in *Grady* and *Dixon*. In this context, Scalia was immune to the argument that the evolution of complex and overlapping modern criminal codes has created a situation in which the traditional elements test no longer implements the underlying principles of the Double Jeopardy Clause envisioned by the Framers.[493]

Given how high Scalia has set his "faint-hearted" bar, it was therefore impossible for him to avail himself of this principle to justify abandonment of the common law contempt-is-exempt rule in *Dixon*. In fact, the best evidence under Scalia's originalism for the faint-hearted exception—existing legislation—is against him in this area. The restraining order statute at issue in *Dixon* explicitly endorses the contempt-is-exempt rule.[494] Moreover, at least twenty-four states

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489. *See supra* notes 68–70 and accompanying text.

490. *See* Scalia, *supra* note 23, at 864.

491. Scalia's reasoning is that to permit judges to make nuanced decisions about the level of societal change necessary to shrug off the constraints of history invites personal values back into the process. Thus, he prefers to err on the side of restraint—in his words, to be "librarian who talks too softly." *Id.* at 864. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring in judgment) (Scalia concurred on the grounds that "punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species").

492. *See* Scalia, *supra*, note 23.

493. In fact, Scalia ignores the evidence that the societal view of the fairness of the element's test has changed significantly. *See* Scalia, *supra* note 23. Nor was Scalia open to a critical historical inquiry that the elements test was a 17th Century common law accident—nothing more than a judicially devised means to prevent a windfall to defendants under the technical rules of the common law pleading, rather than a true reflection of the common law concept of the double jeopardy guarantee.

494. *See* United States v. Dixon, 509 U.S. 688, 697 (1993) (citing D.C. CODE ANN. § 23-1329(a)).

legislatively mandate that successive prosecution of contempt and substantive offenses be permitted while only three forbid it.[495]

As a result, Scalia had to resort to backdoor tactics in *Dixon* because he was unable to prove that this "historically approved practice from our national life," i.e., the contempt-is-exempt rule "is no longer the law of the land."[496] Therefore, one of the true ironies of *Dixon* is that Scalia advertises the opinion as a paradigm of originalism; one which returned the common law elements test to its rightful place in double jeopardy doctrine.[497] In reality, however, the opinion can be more accurately described as a "feigned originalist" decision about contempt in which Scalia engaged in the kind of ad hoc judicial lawmaking his methodology condemns.[498] Not only is Scalia's *Dixon* test a methodological disaster, but as will be discussed in the next Part, it is also bad public policy.

VI. JUSTICE SCALIA AND BATTERED WOMEN

This Part documents the confusion created by Scalia's *Dixon* test in domestic violence cases. This confusion has made it more difficult to use of the best tools for combating domestic violence—easily obtained civil protection orders enforced by swift criminal contempt actions.

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495. *See, e.g.*, ALA. CODE § 13A-5-2 (1975); ARIZ. REV. STAT. § 1-253 (1997); CAL. PENAL CODE § 658 (West 1997); COLO. REV. STAT. § 18-9-111 (1997); HAW. REV. STAT. § 710-1077 (1988); IND. CODE § 24-2-2-4 (West 1997); KAN. STAT. ANN. § 21-3835 (1996); KEN. REV. STAT. ANN. § 403.760 (Banks-Baldwin 1984); ME. REV. STAT. ANN. tit. 19-A, § 852 (West 1998); MICH. COMP. LAW Ch. 750.411h (1997); MINN. STAT. § 518B.01 (1997); MONT. CODE ANN. 37-3-326 (1996); NEV. REV. STAT. 193.300 (1997); N.H. STAT. § 173-B:8 (1996); N.J. STAT. ANN. 2C:28-5.2 (West 1997); N.Y. PENAL LAW § 215.54 (McKinney 1997); N.C. GEN. STAT. § 14-226.1 (Michie 1997); OHIO REV. CODE ANN. § 2945.04 (Anderson 1997); OKLA. STAT. tit. 21, § 27 (1997); OR. REV. STAT. § 33.045 (1996); 18 PA. CONS. STAT. § 4955 (West 1998); R.I. GEN. LAWS § 8-8.1-3 (1956); VT. STAT. ANN. tit. 13, § 1030 (1989); WASH. REV. CODE § 9.92.040 (1997); WYO. R. CRIM. PRO. 42. *But see* ILL. COMP. STAT. 5/112A-23 (1998); S.C. CODE ANN. § 16-9-380 (1998); WISC. STAT. 785.03 committee comment (1981).

496. *Haslip*, 499 U.S. at 39 (Scalia, J., concurring in judgment). Moreover, some state courts had explicitly endorsed the contempt-is-exempt rule in light of *Bloom* and *Grady*. *See* State v. Newell, 532 So. 2d 1114 (Fla Dist. Ct. App. 1988); In re Marriage of D'Attomo, 570 N.E.2d 796 (Ill. App. Ct. 1991); Commonwealth v. Aikins, 618 A.2d 992 (Pa. Super. Ct. 1993). *See also* Commonwealth v. Manney, 617 A.2d 817 (Pa. Super. Ct. 1992) (refusing to apply double jeopardy to contempt). Thus, Scalia's decision in *Dixon* is also an affront to federalism, another structural principle of the Constitution he has endorsed. *See* Printz v. United States, 521 U.S. 898, 921 n.11 & 924 n.13 (1997).

497. *See* United States v. Dixon, 509 U.S. 688, 704 (1993).

498. Scalia's focus on the changes in the scope of modern contempt versus extant legislation on the precise issue before the Court also appears to conflict with Scalia's somewhat vague definition of what evidence "counts" in a faint-hearted originalist inquiry. *See* Scalia, *supra* note 23, at 861-64. In addition, if general changes in a societal practice are sufficient to abandon a historical rule, than the massive expansion of criminal codes should be considered valid faint-hearted evidence on the viability of the elements test. *See id.*

A. The Lower Courts Struggle to Apply Scalia's Dixon *Test*

One of Scalia's major criticisms of the *Grady* test was that the lower courts had trouble understanding and applying its confusing formula.[499] Part IV showed that Scalia's *Dixon* test is theoretically flawed because it requires the inherently problematic comparison of the terms of civil protection orders with the elements of criminal offenses.[500] I also noted that the *Dixon* test was likely to produce inconsistent results because slight changes in the wording or interpretation of a protection order would lead to different outcomes in similar cases.[501] In fact, the post-*Dixon* domestic violence cases involving contempt and double jeopardy cases demonstrate the unworkable nature of *Dixon.* The state reporters are replete with both reversals of trial court rulings and dissenting opinions as judges have struggled to apply Scalia's test in domestic violence prosecutions that follow contempt hearings for violations of protection orders.[502] As predicted, the outcome of many of these cases has turned on minor differences in the terms of the court order, or the gloss put on the order at the contempt hearing, or later, by the criminal trial court or appellate court.[503] Like the counts in

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499. Scalia claimed that *Grady* "has produced 'confusion'" in the lower courts. *See Dixon*, 509 U.S. at 711 n.16 (citations omitted).

500. *See supra* notes 341–366 and accompanying text.

501. *See id.* Protection orders are drafted in simple language, to ensure fair notice to the respondent. They also strive to be responsiveness to the facts of the case, sometimes leading to highly particularized orders. A legislature drafting a criminal law need only write a general rule that can pass a vagueness or notice challenge. It is not surprising therefore that protection orders are rarely written with terms that can be easily matched up with the elements of criminal offenses in a logical and consistent manner.

502. *See* People v. Stenson, 902 P.2d 389, 391 (Colo. Ct. App. 1994) (reversing lower court); State v. Johnson, 676 So. 2d 408, 411 (Fla. 1996) (reversing the dismissal of an aggravated stalking charge by trial court that had been affirmed by intermediate appellate court); State v. Miranda, 644 So. 2d 342, 343 (Fla. Dist. Ct. App. 1994) (reversing and remanding trial court dismissal of criminal charges and finding that "[a]lthough the trial court cited [*Dixon*], the...language in the order of dismissal appears to apply the 'same conduct' test rejected in *Dixon* rather than the 'same elements' test required by *Dixon*"); State v. Gonzales, 940 P.2d 185, 190 (N.M. Ct. App. 1997) (reversed lower court); Commonwealth v. Decker, 664 A.2d 1028, 1031 (Pa. Sup. Ct. 1995) (reversed lower court); *Ex parte* Busby, 921 S.W.2d 389, 393–94 (Tex. Ct. App. 1996) (partial reversal of trial court's ruling). *See also* Commonwealth v. Burge, 947 S.W.2d 805, 813 (Ky. 1996) (Stumbo, J., dissenting) (arguing that state constitution should provide more protection than *Dixon*); *Ex Parte* Rhodes, 974 S.W.2d 735, 739 (1998) (reversing lowercourt, appeals court stated that "fractured nature of Dixon provides little guidance").

503. *See Decker*, 664 A.2d at 1028–31. The order enjoined defendant from "physically abusing" or "from placing them in fear of abuse." *Id.* at 1028–29. The simple assault count was barred because rather than compare the term "physically abusing" with the elements of simple assault, the court looked to the protection order statute for the definition of abuse. That definition mirrored the elements of simple assault and, therefore, as in *Foster*, the assault was a lesser included offense of contempt. *See id.* at 1031. *See also* People v. Allen, 868 P.2d 379, 385 (Colo. 1994) (stating that criminal trespass prosecution was not barred because court order contained only stay away and no contact provisions); People v. Benson, 627 N.E.2d 1207, 1208–11 (Ill. Ct. App. 1994) (rejecting defendant's argument where the order barred "striking, harassing, or interfering" with personal liberty of his ex-wife, and defendant argued that home invasion charge was barred because

Foster's indictment in *Dixon*, Scalia's test has also led to split results within a single case, with some charges barred and others permitted to go forward.[504]

A few courts have taken Scalia's hairsplitting distinctions between the Foster protection order and the District of Columbia threats statute as a license to use the subtlest distinctions to distinguish protection orders from subsequently charged criminal offenses. For example, one court distinguished between the mental states of "willfully" and "maliciously" to hold two crimes distinct.[505] Several courts have also used the difference between a single act requirement in a court order versus a multiple act element in a statute to avoid a double jeopardy finding, even though multiple acts were introduced in both proceedings.[506]

Another area of discord created by Scalia's *Dixon* opinion is the proper level of scrutiny of the contempt hearing that precedes the criminal case. Some courts look only at the face of the protection order to determine if there is overlap with the criminal charge.[507] Others recognize that Scalia's opinion appears to require an inquiry into the interpretation of the protection order terms by the

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breaking into her home and attacking her included harassing and interfering with liberty); State v. Kraklio, 560 N.W.2d 16, 20 (Iowa 1997) (stating that the narrowly drawn restraining order narrowly did not overlap with elements of criminal offense); *Busby*, 921 S.W.2d at 393 ("[T]he contempt order contains findings which encompass [only three of five elements] of the indictment. Moreover, by necessary implication, the contempt order must encompass [the remaining two elements].").

504. *See Busby*, 921 S.W.2d at 392–93 (misapplication of fiduciary property not barred; aggravated perjury barred).

505. *See Johnson*, 676 So. 2d at 411 (court held that stalking was not a lesser included offense of contempt because it required maliciousness whereas contempt only required willfulness).

506. In *State v. Miranda*, the contempt was based upon an order not to "harass" the victim. State v. Miranda, 644 So. 2d at 343 n.3 (Fla. Ct. App. 1994). The criminal charge was aggravated stalking defined as "knowingly, willfully, maliciously and repeatedly follows or harasses another person [after the imposition of a protective order]." FLA. STAT. ANN. § 784.048 (West 1993). Although the state proceeded on a theory of stalking by harassment, the court distinguished "harass" in the statute from "harass" in the order. Harass was defined in the stalking statute as a "course of conduct." Although the protection order statute did not define "harass," because a plain meaning of "harass" in the protection order could be a single incident, the court held that the elements were different although each offense used the word "harass." *See Miranda*, 644 So. 2d at 345. *See also* State v. Jones, No. CA94-11-094, 1995 WL 367197, at *3 (Ohio Ct. App. June 19, 1995) (contempt and criminal non-support not barred. Contempt of support order supported by single act and willful disobedience. Criminal nonsupport has distinct element of showing inadequacy of support over given period); *Gonzales*, 940 P.2d at 189 (stalking (multiple acts of harassment) versus contempt (single act of harassment)). For a case in which such hairsplitting was rejected, see *Fierro v. State*, 653 So. 2d 447, 448–49 (Fla. Dist. Ct. App. 1995) (contempt conviction barred charge of removing a child contrary to a court order. The state unsuccessfully argued that contempt required taking the child without consent outside the court's jurisdiction whereas the removal offense required concealment within the court's jurisdiction or removal from the state).

507. *See* Gilliland v. Commonwealth., No. 2303-93-1, 1995 WL 293072, at *1 (Va. Ct. App. May 16, 1995) (holding that breaking and entering charge not barred by contempt, court reviewed only the protection order, not the findings of the trial court at the contempt).

contempt court.[508] Unfortunately, this deeper inquiry has sometimes been frustrated where contempt courts have failed to specify the basis for the finding of contempt, particularly when the court order contained multiple proscriptions.[509] Even more troubling are cases affirming convictions despite the unavailability of the necessary transcripts from nonrecord family court proceedings.[510] Finally, a few unclassifiable decisions just seem plainly in conflict with Scalia's analysis in *Dixon*.[511]

Another group of post-*Dixon* courts never even reaches Scalia's *Dixon* test. A few opinions purport to follow Scalia's analysis but actually apply the generic elements of contempt, either ignoring or misunderstanding that a review of the court order and the contempt hearing is required.[512] Other cases explicitly

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508. *See* State v. Winningham, No. 01C01-9504-CC-00109, 1996 WL 310370 at *7, *12 (Tenn. Crim. App. 1996) (Peay, J., dissenting); State v. Vice, 519 N.W.2d 564, 567 (Neb. Ct. App. 1994).

509. *See* People v. Stenson, 902 P.2d 389, 391–92 (Colo. Ct. App. 1994) (reversing dismissal of burglary charges, the court interpreted the findings of the contempt court to have rested solely on violation of the contact order and not the criminal code violations even though the contact came via the alleged burglary); *Gonzales*, 940 P.2d at 188–89 (rejecting appeal because although the judge below failed to "indicate the basis for the finding of contempt," the protection order contained numerous prohibitions upon which sufficient evidence of violations had been presented); Commonwealth. v. Yerby, 679 A.2d 217, 222–31 (Pa. 1996) (dismissing double jeopardy claim rather than remanding to clarify the record even though contempt hearing transcript did not reveal "the precise basis for the trial court's finding of contempt."

510. *See Vice*, 519 N.W.2d at 568. For example in *Vice*, the protection order enjoined threats, assaults, molestation, attacks or entering the premises of the complainant. *See id.* at 565. The criminal charge was that of terroristic threats. The appellate court could not determine from the record which of specific proscription from the protection order was found to have been violated. Rather than remand, the court rejected Vice's appeal holding simply that it "cannot determine the elements of the conduct underlying Vice's conviction." *Id.* at 568. Similarly, in *People v. Benson*, 627 N.E.2d 1207, 1208-09 (Ill. Ct. App. 1994), no transcript of the contempt hearing was available and the written contempt contempt order was illegible. Nevertheless, the defendant's double jeopardy claim was rejected on the grounds that the defendant bore the burden of production.

511. In *Hernandez v. State*, while barring prosecutions for battery and violation of an injunction, the court failed to analyze the terms of the protection order as required by *Dixon*. 624 So. 2d 782, 783 (Fla. Dist. Ct. App. 1993). Instead, the opinion simply stated that, "subsequent prosecution for criminal contempt, the basis of which is substantive offense for which a conviction has been obtained, violates the Double Jeopardy Clause." *Id.* Under the meager facts provided, however, the underlying facts included a threat as well as a battery. Thus, depending on the breadth of the initial order and the finding of contempt, the prosecutor might have been able to avoid a bar under Scalia's test if properly applied. *See also* Ivey v. State, 698 So. 2d 179, 184 (Ala. Crim. App. 1996) (appearing not to understand that under *Dixon*, contempt is the greater offense and the charge the lesser)

512. *See* Commonwealth v. Burge, 947 S.W.2d 805, 812 (Ky. 1996). While citing *Dixon* as controlling, the court used the generic elements of contempt. The opinion did not cite the language of the protection order, which makes it impossible to perform Scalia's analysis. *See also* Ivey, 698 So. 2d at 183–85 (citing *Dixon* but using the generic elements of contempt to hold that aggravated stalking—which includes as elements, violation of court order, harassment and threats to injure—is distinct from contempt based on order that barred harassment and threats); People v. Kelley, 60 Cal. Rptr. 2d 653, 658–59 (Cal. Ct.

disavow Scalia's approach and adopt either Rehnquist's generic elements test,[513] Blackmun's "contempt is exempt" approach,[514] or reject the elements test for a same-transaction test under state constitutional law.[515] Along the way, many of these decisions criticize Scalia's opinion for confusing the same offense issue and for establishing a test fraught with analytic and practical difficulties.[516] All in all, the post-*Dixon* cases reveal that Scalia's opinion fails to provide a workable rule with which to decide these cases,[517] and therefore results in inconsistent and questionable double jeopardy results.[518]

App. 1997) (fails to analyze court order to determine if it incorporated crime of stalking); Village of Bentleyville v. Pisani, No. 69063-69066, 1996 WL 476434, at *2 (Ohio Ct. App. Aug. 22, 1996) (holding that prosecution of telephone harassment was not barred by contempt where analysis employed only generic elements of contempt). At the other extreme, the court in *Flores v. State* erred in the opposite direction, believing that Justice Scalia appeared "to have focused on the underlying conduct of the offenses." 906 S.W.2d 133, 137 (Tex. Ct. App. 1995).

513. *See* People v. Arnold, 664 N.Y.S.2d 1008, 1014 (N.Y. Sup. Ct. 1997); *Yerby*, 679 A.2d 217, at 220; State v. Warren, 500 S.E.2d 128, 134–35 (S.C. Ct. App. 1998).

514. *See Ex parte* Jackson, 911 S.W.2d 230, 232–33 (Tex. Ct. App. 1995). The court analogized contempt sought by a private party to dual prosecutions by distinct sovereigns. Thus, when contempt was sought by a private party, there is no double jeopardy bar when the state seeks to press criminal charges for the same event. This was so even in this case where the state Attorney General's office prosecuted the contempt on behalf of the former wife. *See also Ex parte* Ivey, 698 So. 2d 187, 189 (Ala. 1997) (contempt statute allowing a maximum of five days in jail was a "violation," not a criminal offense and thus not subject to double jeopardy review).

515. *See* State v. Lessary, 865 P.2d 150, 156 (Haw. 1994) (rejects *Dixon* and elements test, holding that state constitution provides greater protection to criminal defendants than U.S. Constitution and adopts *Grady* test under state version of Fifth Amendment).

516. *See* Flores v. State, 906 S.W.2d at 137 ("Courts, relying on *Dixon* for guidance, may face difficulty in properly applying the standard in successive prosecution cases."). *See also* Parrish v. State, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994) ("Indeed, the core meaning of *Blockburger* is now evidently more in dispute than ever before."); People v. Allen, 868 P.2d 379, 384 (Colo. 1994) (discusses *Dixon* but notes that "fact specific application of *Harris* that fragmented the *Dixon* majority" was not applicable to the case).

517. One case that demonstrates a variety of these issues is *State v. Winningham.* 1996 No. 01C01-9504-CC-00109, WL 310370 (Tenn. Crim. App. June 11, 1996). The defendant was held in contempt for multiple violations of a protection order, including setting fire to his ex-wife's home. The order had enjoined him from "abusing, threatening to abuse...or committing any acts of violence" against his ex-wife. *Id.* at *1. In a split decision, the appellate court upheld the dismissal of a subsequent criminal indictment for arson. The majority held that the phrase "any acts of violence" incorporated any punishable act of violence into the order and therefore barred the arson charge. *Id.* at *5. While the majority claimed to apply Scalia's lesser-included analysis, they did not really seem to understand it. For example, the court said that the "elements of arson were implicitly included in the contempt proceeding," without really explaining what this "implicitly" meant. *Id.* Neither the state nor the dissent argued under *Dixon* that the "any acts of violence" term in the court order included non-criminal acts of violence such as tortious assaults. The dissent instead said that the arson charge contained elements relating to property damage, the contempt to attacks on the wife. *See id.* at *12. Unlike the majority,

B. The Dixon *Test and Civil Protection Orders*

The persistence of batterers and the battering relationship lies at the heart of the domestic violence problem.[519] Available in every state, the civil protection order is considered the centerpiece of legislative reform designed to address this issue.[520] Protection orders are viewed as a middle ground between inaction and directing all domestic violence incidents into the criminal justice system.[521] By focusing prospectively, protection orders seek to step between the batterer and the victim to break the cycle of violence.[522] They provide additional remedies, such as stay-away provisions and support and custody terms, that improve the likelihood that the primary goal of ending the violence will be achieved.[523] Furthermore, by providing simplified court procedures, protection orders are relatively easy to obtain, regardless of the economic status of the victim.[524] Depending on the state, a

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the dissent tried to understand how the contempt court had defined the terms of the order but aptly pointed out that to perform Scalia's analysis correctly, they were required to become "mired in the minutia of an expedited contempt hearing." *Id.* at *16. Even without going into all nuances that were or could have been argued in this case, *Winningham* demonstrates that the *Dixon* test is miserably failing as a clear rule.

518. The inconsistencies are both of results and analysis. *Compare* Gov't of the Virgin Islands v. Crossley, No. F475/1995, 1997 WL 88020, at *3 (V.I. Jan. 21, 1997) (holding that aggravated stalking prosecution was barred by contempt conviction for violation of protective order), *with* State v. Johnson, 676 So.2d 408, 411 (Fla. 1996) (holding that aggravated stalking prosecution was not barred by contempt conviction). For contradictory analysis of CPO language, compare State v. Miranda, 644 So.2d 342, 345 (Fla. Ct. App. 1994) (holding that the term "harass" has different meanings in CPO and in stalking statutes), with Commonwealth v. Decker, 664 A.2d 1028, 1031 (Pa. Sup. Ct. 1995) (holding that different words in CPO and statute have same meaning).

519. The substantial research on this issue focuses on the psychological dynamic of the battering relationship and social and cultural attitudes that condone or ignore domestic violence. Economic factors also play a role in some cases. *See generally* BEVERLY BALOS & MARY L. FELLOWS, LAW & VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (1994); FAMILY VIOLENCE, AN INTERNATIONAL AND INTERDISCIPLINARY STUDY (John M. Eekelaar & Sanford N. Katz eds., 1978); ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS (1977); LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATIONS (N. Zoe Hilton ed., 1993); TREATMENT OF FAMILY VIOLENCE: A SOURCE BOOK (Robert T. Ammermann & Michel Hersen eds., 1990).

520. *See* R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE 167 (1992).

521. *See* Margaret M. Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995).

522. *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1501, 1514 (1993); Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1047–48 (1992).

523. *See* Topliffe, *supra* note 522, at 1064 (reviewing the remedies available to courts via civil protection order).

524. Civil protection order forms have been simplified so that the majority of victims can successfully obtain an order *pro se*. *See* Barry, *supra* note 521, at 350 & n.38.

violation of a protection order can be punished as a contempt, as a separate misdemeanor offense, or by either sanction.[525]

Unfortunately, the confusion spawned by Scalia's *Dixon* test has undermined the effectiveness of the contempt remedy, which often provides the swiftest relief. Because the double jeopardy consequences of a contempt motion can no longer be easily predicted, some victims' advocates and prosecutors have altered their strategy, either watering down contempt motions,[526] or hesitating to

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525. *See* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1194–95 & nn.185–87 (1995). A few jurisdiction make protection order violations grounds for civil rather than criminal contempt sanctions. *See* Mary E. Collins, Comment, *Mahoney v. Commonwealth: A Response to Domestic Violence*, 29 NEW ENG. L. REV. 981, 982 (1995). *See also* Mary C. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325, 1405 (1991). A majority of jurisdictions—approximately thirty-four—specifically authorize contempt sanctions. *See* Zlotnick *supra* at 1195 & n.186. Even where there are no explicit statutory provisions, judges retain their inherent power to punish violations of court orders. *See, e.g.*, Walker v. Bentley, 678 So. 2d 1265, 1266 (Fla. 1996) ("[C]ontempt is an inherent [power] that exists independent of any statutory grant of authority...."). Contempt is therefore available in most jurisdictions to enforce protection orders. While both the criminalization and contempt mechanisms have their proponents and critics, there are substantial arguments that the contempt route offers significant practical and theoretical advantages. In fact, some commentators, including myself, have argued that contempt sanctions should be preferred initial remedy for protection order violations. *See* Zlotnick, at 1214. *See also* Kin Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 199–200 (1993); Topliffe, *supra* note 398, at 1047–48.

526. *See* telephone interview with Jo Sterner, Pennsylvania Coalition Against Domestic Violence (July 30, 1998) (stating that the public interest group is training police officers to do exactly that when charging domestic violence assaults that also violate protective orders); telephone interview with Catherine F. Klein, Associate Professor of Law, Columbus School of Law, Catholic University (July 29, 1999) (stating that she advises domestic violence attorneys to carefully draft contempt motions when there might be a subsequent criminal prosecution but agreeing that such an approach can result in a "watered down" contempt motion); *id.* (stating that junior prosecutors in Washington, D.C. sometimes do not understand when a contempt proceeding might jeopardize a criminal prosecution); telephone interview with Lore Rogers, Domestic Violence Project, Ann Arbor, Mich. (Aug. 18, 1999) (stating that in rare cases where contempt goes forward before decision on criminal charges is made, advocates purposely introduce evidence only of violation of stay-away order and do not put in evidence of later criminal conduct in same incident, but that many prosecutors are still unaware of the double jeopardy concerns in this area); telephone interview with Kim Susser, New York Legal Assistance Group (July 30, 1999) [hereinafter *Susser Interview*] (noting routine lack of communication between domestic violence workers and prosecutors on same case which would be a problem if more women were encouraged to file contempt motions, because both family court and criminal court have concurrent jurisdiction over contempts arising out of violations of protection orders). *See also* POLICE RESPONSE TO DOMESTIC VIOLENCE: PENNSYLVANIA LAW AND PRACTICE 69 (1997) (published by the Pennsylvania Coalition Against Domestic Violence).

Even the chief deputy of a domestic violence unit of a prosecutor's office in New York was unaware of both the *Dixon* case, and a reported post-*Dixon* case from his city, that explicitly discussed the confusing double jeopardy issues in domestic violence

seek the swift but relatively light sentences provided by contempt, for fear of barring more serious criminal punishment, particularly for protection order violations involving violent conduct.[527]

Nor are these double jeopardy concerns unfounded. While post-*Dixon* decisions in which serious criminal charges have been barred are rare,[528] *Dixon* does jeopardize the most commonly charged offense in domestic violence cases—simple assault. Many, if not most protection orders contain a term prohibiting "assaults." At the same time, the majority of domestic violence incidents that result in criminal prosecution includes the charge of simple assault.[529] Following

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cases. *See Susser Interview. See also* People v. Arnold, 664 N.Y.S.2d 1008, 1013–15 (Kings Cty. Sup. Ct. 1997) (applying Rehnquist's elements test to subsequent prosecution but noting that Scalia might resolve case differently).

527. *See* telephone interview with Leslie Orloff, AYUDA, Washington, D.C. (June 1993); telephone interview with Lore Rogers, Domestic Violence Project, Ann Arbor, Mich. (Aug. 18, 1999) (stating that in that jurisdiction, criminal contempt violations are joined by prosecutors in a criminal case, although the court issuing the order has the option to enforce it seperately); telephone interview with Lisae Jordan, Chief of Litigation at House of Ruth, Baltimore, Md. (Aug. 16, 1999) (stating that advocates for battered women are very careful to include purge conditions in contempt proceedings to ensure that contempts are treated as civil, not criminal sanctions, to avoid double jeopardy problem; but noting that holding batterers in civil contempt is often ineffective); telephone interview with Laura Kniaz, Managing Attorney, House of Ruth, Baltimore, Md. (Aug. 16, 1999) (stating that because of double jeopardy concerns, advocates often drop contempt when criminal charges are filed on the same incident; even though most judges treat contempt motions as seeking civil sanctions, an "acquittal" in the contempt can constitute collateral estoppel in the criminal case); telephone interview with Rod Underhill, Senior Deputy District Attorney, Moultnomah County, Or. (Aug. 12, 1999) [hereinafter *Underhill Interview*] (stating that protection order violations are only enforceable via contempt proceedings in family court, and are brought almost exclusively by special unit in D.A.'s office); telephone interview with Larry Busching, Deputy Bureau Chief, Family Violence & Child Abuse Unit, Manhattan District Attorney's Office, (Aug. 11, 1999) (stating he would encourage victims not to testify in family court criminal contempt proceeding if his unit was contemplating a criminal action on the same incident because of double jeopardy concerns; but notes rarity of pro se contempt motions by victims in this jurisdiction). Pro se victims are rarely even aware of the double jeopardy consequences of a protection order, let alone understand how the specific terms of relief may limit either their ability to enforce the order or the state's ability to file criminal charges.

According to Senior Deputy District Attorney Underhill, the special unit in Moultnomath County District Attorney's Office never brings both contempt and separate criminal case because it would be "too risky," given the double jeopardy issue. *See Underhill interview.* This is true despite case law which should theoretically alleviate such risk. *See* State v. Delker, 858 P.2d 1345 (Or. Ct. App. 1993) (holding that under an interpretation of Oregon double jeopardy statute, criminal contempt action brought by battered woman did not bar later criminal charges). While noting that contempt hearings are resolved faster than criminal cases, Mr. Underhill felt comfortable that bail and release conditions ensure victim's safety while criminal case was pending. *See Underhill interview.*

528. *But see* State v. Winningham, No. 1996 WL 310370 (Tenn. Crim. App. June 11, 1996) (barring arson charge based on prior contempt conviction) *overruled by* State v. Winningham, 958 S.W.2d 740 (Tenn. 1997).

529. Many prosecutors still undercharge domestic violence, relying on simple assault where aggravated charges are possible under the state code. *See* Johanna R. Shargel,

Scalia's analysis of the "assault" term in *Dixon*, the lower courts are likewise holding that a simple assault prosecution that follows a contempt proceeding for the same incident is barred.[530] Thus, while the appellate case law does not contain many reversals of criminal charges, at the practitioner's level, *Dixon* acts as a deterrent to contempt actions in the typical case.

As a result, the double jeopardy dilemma created by Scalia's *Dixon* opinion has also affected the larger debate over how to best enforce protection orders.[531] First, the fractured results under *Dixon* harm efforts to promote the use of contempt as the primary or equal partner with criminal sanctions.[532] Successful domestic violence reform programs are well publicized and copied in other states. Because of the different approaches being taken by state supreme courts and the uncertainty of result in individual cases, one jurisdiction's success with contempt is not easily transferrable to another. Second, the double jeopardy problems

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In Defense of the Civil Rights Remedy of the Violence Against Women Act, 106 YALE L.J. 1849, 1874 (1997).

530. *See supra* notes 503, 511 and accompanying text.

531. Effective enforcement of protection orders remains a significant problem. *See* Barry, *supra* note 521, at 348. Some argue for a pure criminalization approach to make a "statement about the seriousness of the orders and the situations they reflect." *Id.* at 356. *See also* Natalie L. Clark, *Crime Begins At Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 281 (1987). Unfortunately, this strategy relies on the very criminal justice system that has so often failed to protect victims of domestic violence in the past. In this context, many police, prosecutors, and juries are resistant to criminalizing conduct which would not otherwise constitute an offense absent the protection order. *See* Richard Barbieri, *Saving Money on Misdemeanors; Faced with a Statewide Budget Crisis, a Few Prosecutors Are Rethinking Their Opposition to ADR and Other Cost-Saving Alternatives to Prosecution*, RECORDER, June 1, 1993, at 1; Daniel D. Polsby, *Suppressing Domestic Violence with Law Reforms*, 83 J. CRIM. L. & CRIMINOLOGY 250, 251 (1992). Contempt sanctions, on the other hand, are often a better fit with institutional attitudes towards the entire range of conduct that can constitute a protection order violation. I have argued that "contempt language" is uniquely suited to enforcing protection orders because of its dual nature as a powerful legal sanction and as a label that shifts the focus away from why women stay in destructive relationships and onto the batterers as bullies who also disregard judicial orders. Anecdotal evidence suggests that judges are more likely to incarcerate a batterer for a clearly willful violation of court order than if the same conduct is presented as a criminal offense. *See* Zlotnick, *supra* note 525, at 1203 n.222. *See also* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993); Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665 (1990). Finally, I have argued that contempt actions for violations can be an empowering experience for the victim, place the victim at the center of the decision-making process, and avoid reliance on the police and prosecutors. *See* Zlotnick, *supra* note 525, at 1197–99.

532. The confusion in the post-*Dixon* case law about when contempt sanctions may bar a successive criminal prosecution are pushing policymakers away from contempt. *See* John Brunetti, *The Judiciary Law's Criminal Contempt Statute: Ripe For Reform*, 69 N.Y. ST. B.J. 47, 48–49 (1997) (claiming state statute that permits contempt and criminal charges for the same conduct is invalid under *Dixon*, and arguing that "[t]hese statutes should be repealed as they are misleading").

created by *Dixon* are also used by criminalization proponents as secondary support for their position.[533]

These are unfortunate results for several reasons. The advantages the contempt route offers is lost over concern about a narrow class of cases; those involving violent conduct in which the state seeks criminal penalties after a contempt proceeding has already occurred. While this latter group contains some significant cases, the double jeopardy concerns for one class of cases should not be driving the entire policy debate. In addition, there are cases for which the dual pursuit of contempt by the victim and criminal charges by the state is exactly the right strategy.[534] For persistent and violent batterers like Michael Foster, an immediate contempt sanction and a later severe criminal penalty may be necessary to protect the victim's immediate safety needs and fully punish the offender for his conduct.[535] While there are other possible options, such as revising pretrial detention rules in domestic violence cases, the mechanisms for contempt plus criminal prosecution are already in place. But for confusion over *Dixon*, this strategy could be immediately and aggressively pursued. Nor are the problems created by *Dixon* easy to countermand in any practical way. While education about the limits of Scalia's opinion and how to craft a double-jeopardy-proof order can be helpful,[536] in the end these limited measures are unlikely to stem the tide away from contempt and toward criminalization. In domestic violence reform, uniformity and predictability are critical and *Dixon* simply makes this impossible.[537] True relief would consist only in a definitive Supreme Court ruling that Scalia's incorporation approach to contempt is not the majority rule. In its place, the Court could either adopt the generic elements test that *Dixon* requires for substantive offense to contempt or reaffirm the common law contempt-is-exempt rule.[538]

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533. For example, in 1995, the Florida Legislature passed a bill drafted by the Governor's Task Force on Domestic Violence which eliminated provisions for criminal contempt in domestic cases and mandated that all protection order violations be prosecuted as criminal offenses. *See* FLA. STAT. ANN. § 741.2901(2) (West. Supp. 1995). After an outcry over the constitutionality of this change, *see In re Report of the Comm'n on Family Courts*, 646 So. 2d 178, 180 & n.1 (Fla. 1994), the legislature reinstated the contempt power the next year. Originally, the bill's sponsors focused solely on the perceived advantages of criminalization. However, in the course of this debate, the double jeopardy problem created by *Dixon* was invoked by judicial supporters of criminalization to defend the first bill. *See* Walker v. Bentley, 660 So. 2d 313, 325 (Fla. Dist. Ct. App. 1995) (Altenbernd, J., dissenting) ("The restrictions in [the bill eliminating contempt] prevent problems of double jeopardy.").

534. *See* Zlotnick, *supra* note 525 at 1215.

535. *See id.*

536. *See supra* note 526.

537. *See supra* note 502 and accompanying text.

538. Given the change on the Court, the generic elements approach might now command a majority without Scalia. Justices Blackmun and White, who dissented in *Dixon*, have been replaced by Breyer and Ginsburg, whose votes on criminal issues are frequently more conservative. Because Justice Blackmun was the sole vote for the contempt-is-exempt approach, realistically that view is unlikely to prevail if the issue were revisited now.

VII. CONCLUSION

The initial optimism with which some in the domestic violence community greeted the *Dixon* decision proved unwarranted. While superficially, the result in Foster's case appeared to represent a victory, in reality, the decision has frustrated efforts to use contempt sanctions to enforce civil protection orders. Nor, in light of Scalia's driving ideology should this result be a surprise, for Scalia's contempt opinions reveal a consistent effort to limit the use of contempt sanctions to enforce judicial orders. In fact, based upon Scalia's *Young* concurrence, domestic violence contemnors have begun to argue that the current practice in many states which permits battered women to litigate contempt motions on their own behalf violates due process.[539] Thus, Scalia's contempt jurisprudence will likely continue to be a hindrance to those in the domestic violence legal community and in law enforcement who believe that contempt sanctions should play an important role in combating this serious societal problem.[540]

This Article also confirms one of the most important accusations against Justice Scalia's jurisprudence—that when his strongest ideological values are at stake, he manipulates his vaunted constitutional methodology to reach his preferred outcome.[541] Throughout the *Dixon* opinion, I have shown that Scalia abandoned or distorted key tenets of his methodology. No component of Scalia's methodology was immune from tampering. In interpreting the Fifth Amendment, Scalia never considered what textualist supremacy seems to require; that the plain meaning of "same offence" is exactly the same offense and nothing more. Nor did he ever explain why he could ignore a textualist reading of the "same offence" clause without violating the principle of methodological hierarchy. Most significantly, my research reveals that Scalia committed aggravated historical malpractice in *Dixon*.[542] To justify his rejection of the still vibrant contempt-is-exempt rule, Scalia painted a picture of common law contempt practices that is demonstrably wrong. Most egregiously, Scalia cited *Lord Ossulston* as an example of how the common law limited contempt to in-court disturbances and interference with court process, when, in fact, *Lord Ossulston* proves quite the opposite. In this 1739 Chancery Court decision, nonparties were held in contempt for violating the substance of an injunctive decree—the very thing Scalia claims the common law did not permit.[543] Elsewhere in *Dixon*, Scalia ignored or mischaracterized key historical sources such as *Blackstone's Commentaries*, the actions of the First Congress, and the early Supreme Court cases.[544] Having abandoned text and

539. Some commentators have noted this danger and argued that contrary to Scalia's claim, contemnors are not entitled to a "disinterested prosecutor" in this context. *See* Cheh, *supra* note 525, at 1408–11; Meier, *supra* note 384. *See also* Green v. Green, 642 A.2d 1275, 1278 (D.C. Ct. App. 1994) (rejecting *Young* argument that contemnor was denied fundamental right because his wife participated in intra family court contempt hearing for violation of a civil protection order).

540. *See* Zlotnick, *supra* note 525, at 1214.

541. *See* David M. Zlotnick, *Justice Scalia & His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 51 EMORY L. J. (forthcoming 1999).

542. *See supra* notes 456–477 and accompanying text.

543. *See supra* notes 476–477 and accompanying text.

544. *See supra* notes 462–468 and accompanying text.

distorted history, Scalia's convoluted *Dixon* test for successive prosecutions involving contempt was his final blow to any pretense of methodological fidelity in these doctrines. Stripped of its metaphoric content and contradictory assertions, Scalia's incorporation approach to the elements of contempt simply has no basis in the common law or Supreme Court precedent. Worse yet, Scalia's ersatz test requires the same kind of fact-intensive, unpredictable analysis that Scalia criticized in *Grady v. Corbin*, the case *Dixon* overruled.[545] Thus, in a variety of ways, Scalia's *Dixon* opinion embodies the kind of judicial lawmaking that stands in opposition to his vision of a constitutional law of clear and inviolable rules.

The Article also directly links his methodological lapses in these cases to his hostility to contempt power and his absolutist vision of the separation of powers principle. In fact, all of Scalia's contempt opinions abandon his originalist commitment to historical practices. Instead, each begins with a presumption that virtually any exercise of modern contempt power violates the separation of powers principle. Thus, instead of his usual preference for finding historical continuity, Scalia seizes upon minor differences between historical and modern contempt as proof of a clean break with tradition. Because his historical proof is lacking, he is forced to embrace Warren Court era cases such as *Bloom v. Illinois*, with which he would ordinarily find fault.[546]

The proven failure of Scalia's methodology in *Dixon* rebuts Scalia's assertion that his system is superior at cabining judicial discretion. Moreover, because Scalia personally identifies the motivating principle for his methodology as his fear of an unrestrained judiciary let loose in a constitutional democracy, it makes sense to continue to test whether the methodology succeeds first and foremost in restraining him in judicial power cases. However, Scalia's opinions and public speeches are rife with references to other strongly held political and ideological positions. It is critical to test his opinions on these subjects for methodological purity as well, for if he does not successfully implement his methodology in the arena where he feels the strongest pull of personal preferences, then he cannot justify the central reason for its existence.[547]

545. *See supra* notes 194–206 and accompanying text.
546. *See supra* notes 15–25, 45–47 and accompanying text.
547. *See* Zlotnick, *supra* note 541.