Letter to the Editor: Ralph Nader on Scalia's "originalism"

By Ralph Nader and Robert Weissman

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Re: "Scalia Defends Method of Originalism," Page 1, October 9, 2008, former Record editor and presidential candidate Ralph Nader '58 and Robert Weissman '95 write:

Justice Scalia may have a theory of jurisprudence, but it is not originalism.

Justice Scalia reportedly acknowledged that originalism "is not perfect" as a theory of constitutional interpretation -- and this is surely true. But more than a theory of interpretation, Justice Scalia uses originalism as a cloak for a pro-corporate, rights-limited policy agenda. The proof is in his selective application of so-called originalism.

We wrote to Justice Scalia twice in 2006 to raise one manifestation of this selective application: The application of Bill of Rights and related constitutional protections to the artificial creations known as corporations. Justice Scalia did not reply to our letters.

In a later conversation, he did say that he simply does not have the time to research the subject of corporate personhood until a case directly raising the issue comes before the Court.

The Fourteenth Amendment specifies that no state shall deny due process or equal protection to any person, but for more than a century the Supreme Court has interpreted the language to apply to corporations -- a word that appears nowhere in the Constitution, Neither Justice Scalia nor the other purported originalists on the Court has challenged this interpretation.

Expansion of Bill of Rights protections to corporations undergirded the Lochner line of cases, impedes, among others, efforts to restrict public health menaces such as tobacco advertising, and has prevented consumers from joining together in ratepayer and other membership organizations through costless notices in billing envelopes (*Pacific Gas and Electric v. Public Utility Commission*, 475 U.S. 1 (1986)).

The jurisprudential origin of the doctrine that the Fourteenth Amendment's protection should apply to corporations is *Santa Clara County v. Southern Pacific Railroad* 118 U.S. 394 (1886). However, the Court's decision itself did not decide or even address the issue. Instead, a court reporter, a former railroad company president, simply wrote in the headnotes that "[t]he defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."

We asked Justice Scalia: From an originalist approach to constitutional interpretation, or under any prevailing school of constitutional interpretation, is there a rationale for relying on a rogue headnote, not reflective at all of the content of the Court's actual decision, as establishing precedent on a critical matter of constitutional law?

The answer is self-evident. But that would only trouble the forceful Justice Scalia if he were truly an originalist.

Sincerely,

Ralph Nader, '58
Robert Weissman, '95