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SCALIA'S CONSTITUTION

Essays on Law and Education

Edited by
Paul E. Peterson
Michael W. McConnell

Scalia's Constitution

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Editors

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Preface

Antonin Scalia was an Associate Justice of the United States Supreme Court who wrote and signed opinions that bore directly upon fundamental elements of the American educational system. He was also a scholar-educator, and leading public figure. It is appropriate, then, to honor this man with a collection of reflections on his impact on education—seen broadly as not just schools but scholarship and public discourse as well. In doing so, we shall discover that the education window allows for a direct look into fundamentals of the justice's thinking.

Few doubt Scalia's impact on constitutional jurisprudence. "Justice Antonin Scalia changed . . . the way that the Constitution and laws are interpreted," says one biographer.[1] "He was not only one of the most important Justices in the nation's history; he was also among the best," says Harvard scholar Cass Sunstein. "Part of his greatness consisted in his abiding commitments—above all to the rule of law."[2] Justice Elena Kagan agrees: "His articulation of textualist and originalist principles, communicated in that distinctive, splendid prose, transformed our legal culture."[3]

Despite this applause, and despite nearly thirty years of service on the Supreme Court, only a few have sympathetically considered Scalia's constitutional approach to judicial interpretation. Scalia's powerful, prolific writings themselves are partly to blame. He is co-author of at least five currently available books: (1) a selected collection of his opinions, with introductory commentary by a co-author[4]; (2) a collection of his dissents[5]; (3) his Tanner lectures delivered at Princeton University[6];

(4) an extended exegesis on textualism by Scalia and a co-author[7]; and (5) a guide to writing briefs, written by Scalia and a co-author.[8] Scalia was able to defend his position so skillfully his disciples seem to have held back—perhaps out of fear their contribution could not stand comparison with the original. Apart from Ralph Rossum's thoughtful assessment of *Antonin Scalia's Jurisprudence*,[9] most assessments of Scalia's life and work are critical. Two journalistic biographies are barbed, and the central thesis of the most widely circulated one—Scalia wrote only for himself—is brazenly mistaken.[10] A self-professed liberal has found some things to cheer in Scalia's "unexpected" liberal opinions, but he has little sympathy for Scalia's originalism.[11] A Princeton professor finds it necessary to line up three critics to refute Scalia's Tanner lectures.[12] The *Harvard Law Review* honors one of its own by "respectfully" dedicating an issue to Scalia at the time of his passing, but even on this occasion the offer of respects comes from three academic liberals, two more liberals on the High Court, the Chief Justice and just one former law clerk close to Scalia.[13] Scattered praise is to be found in journal articles. But a sustained set of commentaries sympathetic to the Justice is hard to come by.

We offer this collection of writings with the hope that it will go some ways toward balancing the current Scaliana and encourage others to add their own contributions. That said, this is no eulogy for a recently departed justice. The collection includes an essay by a strong proponent of the living constitution, and other authors identify tensions and limitations in Scalia's thought. Still, the main thrust of what follows is sympathetic to textualism, originalism, and a conservative philosophical tradition that sustains these analytic approaches to constitutional interpretation.

Education may be thought to be an odd entry point into Scalia's thought, but philosophers from Plato to Rousseau to Dewey thought it fundamental to a society's well-being. Basic constitutional questions—free exercise of religion, freedom of speech, equal opportunity, due process of law, federalism, and the role of the expert—all arise when considering the institutions that prepare a country's next generation. We hope and expect the reader of these essays will find a focus on education law leading to the very heart of Antonin Scalia's reasoning.

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Notes

1. Bruce A. Murphy, "Justice Antonin Scalia and the 'Dead' Constitution," New York Times (February 14, 2016).
2. Cass R. Sunstein, "In Memoriam: Justice Antonin Scalia," Harvard Law Review 130, no. 1 (2016): 40.
3. Elena Kagan, "In Memoriam," Harvard Law Review, 11.
4. Antonin Scalia, Scalia's Court: A Legacy of Landmark Opinions and Dissents, ed. Kevin A. Ring (Washington, DC: Regnery, 2016).
5. Antonin Scalia, Scalia's Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice, ed. Kevin A. Ring (Washington, DC: Regnery, 2012).
6. 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, ed. Amy Gutmann, (Princeton: Princeton University Press, 1997).
7. Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (St. Paul, MN: Thomson/West, 2012).
8. Antonin Scalia and Bryan A. Garner, Making Your Case: The Art of Persuading Judges (St. Paul, MN: Thomson/West, 2008).
9. Ralph A. Rossum, Antonin Scalia's Jurisprudence: Text and Tradition (Lawrence, KS: University of Kansas, 2006).
10. Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia (New York: Farrar, Straus and Giroux, 2009); Bruce A. Murphy, Scalia: A Court of One (New York: Simon & Schuster, 2014).
11. David M. Dorsen, The Unexpected Scalia: A Conservative Justice's Liberal Opinions (Cambridge, UK: Cambridge University Press, 2017).
12. Interpretation, 1997.
13. "In Memoriam: Justice Antonin Scalia," Harvard Law Review 130, no. 1 (2016): 1–40.

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CHAPTER 1

Introduction: Scalia on Education Law, Philosophy, and Pedagogy

Paul E. Peterson and Michael W. McConnell

Abstract Contributors to this collection explore the application of Scalia's textualism and originalism to education law and reflect upon Scalia's teachings and his pedagogy. Education law may seem to be an odd vehicle for considering Scalia's constitutional approach, but thinking about schools requires attention to political fundamentals—freedom of speech, free exercise of religion, equality of opportunity, federalism, and the proper role of the expert.

Keywords Antonin Scalia · Textualism · Originalism · Education law

Education law may seem to be an unusual vehicle for considering Scalia's constitutional approach. Scalia's approach to legal interpretation relied first and foremost on the text of the document to be interpreted, and

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the text of the Constitution contains nothing specific on the subject. Yet thinking about schools requires attention to political fundamentals—freedom of speech, free exercise of religion, equality of opportunity, federalism, and the proper role of the expert. Scalia wrote at least 37 opinions—majority, dissenting and concurring—on cases that bore on the workings of the nation's education system. That raises many questions, which are explored in the first part of this collection. What is his understanding of the Equal Protection Clause? How did he reconcile a focus on the original text with his respect for judicial precedent? When did he defer to the elected branches of government, and when was he willing to find their decisions unconstitutional? Was he results-oriented, or did his objective method drive his conclusions?

Scalia's more general teachings and pedagogy are explored in part two. What larger philosophical understanding sustains textualism and originalism? Why was Scalia so skeptical of the scientific expert? Why did Scalia write with such eloquence and directness?

Rugged Originalism

In this chapter Paul Peterson offers a general introduction to Scalia's approach to constitutional law by contrasting Scalia's rugged originalism with three earlier approaches that had great influence on judicial decision-making: (1) the "naïve" originalism of the nineteenth century, (2) the legal realism of late New Deal justices, and (3) the living Constitution doctrine guiding a substantial segment of the Court from the early 1960s to at least the mid-1980s, with many recurrences thereafter. Naive originalism pervaded Court thinking well into the late nineteenth century and beyond. Justices declared laws of the states and of Congress unconstitutional whenever they identified a conflict between those laws and the intentions of those who wrote the Constitution. In response, legal realists, who accused the Court of acting on behalf of dominant economic and social interests, urged it to exercise judicial restraint and defer to the will of the legislature. That point of view came to dominant court thinking from the late New Deal until the transformative *Brown* decision in 1954. But jurists since then have broadened the discretion available to their own branch of government by identifying a "living constitution," which is given new meaning by judges who presumed to be capable of discerning the Constitution's current meaning. Scalia countered that view by constructing a more rugged originalism.

He combined textual analysis with a search for the document's meaning among those who originally read it. Further, he allowed for social and political change by deferring to the will of elected officials except in cases where their decisions violated basic values the Constitution was designed to sustain. And he deferred to well-established judicial precedents unless they, too, were serious violations of constitutional fundamentals. In other words, Scalia's originalism is rugged enough to survive the turmoil of an ever-changing democratic republic.

But does the complexity of Scalia's thought leave him no more governed by principle than those who act according to the living constitution? Was he not as policy-minded as those with whom he disagreed? That question draws a variety of responses in the remaining essays. When it comes to the Equal Protection Clause, says James Ryan, Scalia interpreted original meaning in ways consistent with his policy preferences, not with the clause as originally understood. "In cases involving the use of race or gender in student assignment or admissions, Justice Scalia was faithful neither to originalism nor to precedent." The authors of the Fourteenth Amendment were the same people who authorized the Freedman's Bureau, which built schools in the South for the sole purpose of enhancing black education. Clearly, they expected the Equal Protection Clause would promote the welfare of those who had suffered from discriminatory practices in the past. They did not intend the Constitution to be blind to racial distinctions. A proper reading of original intentions compels the Court to intervene not only where schools are legally segregated but also when it is necessary to promote integration for its own sake.

In "The Dilemma of a Conservative Jurist," R. Shep Melnick finds value in Scalia's commitment to a racially blind constitution. The distinction between "benign" and "malignant" racial classifications is not nearly as clear as is often claimed, he says. In a multi-ethnic country, the use of racial classifications by school officials may produce disturbing results—such as discriminating against some minorities in order to help others. Further, racial classification inevitably encourages racial thinking—not exactly what those who litigated *Brown* or supporters of the Civil Rights Act had in mind. Still, Scalia's efforts to balance judicial restraint against textualism do not always have happy results. At times the justice found himself in odd dilemmas when he sought to strike a balance among the various components of his rugged originalism. "Reconciling [Scalia's] multiple commitments–to 'text and tradition,' to judicial modesty,

and to respect for federalism, separation of powers, and political accountability—proved difficult, if not impossible, in practice," Melnick concludes. "In deciding particular cases and controversies he approved policies he never would have voted for if he had been a legislator or initiated had he been an administrator."

Few clauses of the Constitution have been as wrenched as far from their original meaning as the First Amendment's ban on the "establishment of religion." Justice David Souter argued that "Jefferson necessarily condemned what, in modern terms, we call official endorsement of religion. He accordingly construed the Establishment Clause to forbid not simply state coercion, but also state endorsement, of religious belief and observance."[1] Souter's account of the original meaning of the Establishment Clause is assailed in Michael McConnell's "The Secret History of School Choice," which explores state and local practices in the late eighteenth and early nineteenth century with a thoroughness that Scalia would have applauded. McConnell finds that the First Amendment did preclude the establishment of the Church of England or any other denomination as a national religion, but it was nonetheless generally understood that local schools, even when publicly funded, would provide instruction in religion. Only later do Protestants oppose public support for the religious schools built by Catholic immigrants arriving from Ireland, Germany, and elsewhere. More radically, McConnell hints that it is the government school monopoly on public support—taxing everyone for the propagation of values-laden curriculum approved by the majority—that most resembles the establishment of religion. School choice, on the other hand, dis-establishes uniform belief systems in a manner that is quite in accord with First Amendment requirements.

The essays in Part II place Scalia's originalism within a larger philosophical tradition. In "The Foundations of Originalism," Mark Blitz says Scalia regards originalism not as dogma but as a "rule of thumb." If jurists respect the meaning of the Constitution, they will honor the most precious of the values, traditions, and practices of a democratic republic. In Blitz's words: "Original meaning, together with [some] attachment to precedent, and to common and continued practice [or tradition] in considering the law's proper scope, is, for Scalia, the proper guide to judicial decisions." In *Virginia*,[2] Scalia expresses a commitment to values deeper than devotion to a text for its own sake:

> In my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees…[W]hatever abstract tests we may choose to devise, they cannot supersede–and indeed ought to be crafted so as to reflect–those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.

Blitz admits that Scalia's "principles of interpretation… almost always permit him to reach the result he otherwise desires" but that is only because the "Constitution's original meaning, on which Scalia's views purportedly rest, is more favorable to sound government than are later views." He concludes that "Scalia's education opinions are consistent with his 'originalism,' and that originalism is a sensible but ultimately limited mode of constitutional interpretation" that needs to be justified by basic philosophical principles.

In her discussion of "Scientific and Legal Expertise," Amy Wax places the thought of Antonin Scalia solidly within the tradition of such conservative thinkers as Friedrich Hayek, Alasdair Macintyre, and Michael Oakeshott. Hayek distrusted "managerial experts exerting authority through distant administrative centers of power." MacIntyre said the social sciences had demonstrated a "signal failure… to discover 'any law-like generalizations whatsoever.'" Michael Oakeshott celebrated "what has grown up and established itself unselfconsciously over a period of time" over the "consciously planned and deliberately executed." Scalia's thinking fits well within this tradition. He prefers "the traditional practices of ordinary people to expert-enunciated certainties." He doubts university administrators when they claim diversity is necessary for learning. He is dubious of social workers' claims to special expertise in psychological counseling. For generations, "men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders."

Experts are often wrong, but among biographers few are as mistaken in their fundamental assessment of their subject, despite the hundreds of pages penned and the array of specifics assembled, than Allan Murphy, author of *Scalia: A Court of One*. It is the central conceit of this biographer that Scalia ended up writing for himself and himself alone. The former University of Chicago professor's dogmatic views and bitter tongue

left him writing exercises in solipsism that had no influence among the justices or elsewhere. "He would write opinions that would repeat and refine his originalism and textualism, but he made no effort to attract new voices to his choir." No matter how clever or acerbic, Scalia was "singing in the shower."[3]

Wrong, says Adam White in his essay on Scalia's "Teaching Methods and Message." When Scalia could not convince a majority of the justices, he wrote not for his diary but for the next generation of legal scholars. Scalia did not accept the Brennan canard that history was moving deterministically in a single direction. Men and women make history, and what is said today can move men and women tomorrow. Only by concerted intellectual effort can the next generation of law students be convinced that courts would best preserve the fundamentals of the American democratic republic by remaining close to the text, traditions, and original meaning of the Constitution. For that reason, Scalia while serving on the Court traveled to campuses stretching from Villanova to Oxford, gave an amazingly substantive set of Tanner Lectures at Princeton, and even allowed himself to be subjected to a lengthy interview by a left-leaning journalist on CBS's "60 Minutes." For that reason, Scalia, eschewing obscurantism, wrote with the wit and energy that, in Justice Kagan's words, "mesmerize law students."

Scalia's teaching went beyond instruction in textualism, tradition, and original meaning. Three months after his appointment to the Court, Scalia, Adam White tells us, Scalia used a speaking opportunity at Catholic University to state clearly some of his basic beliefs about human nature, power, and the law.

> As teachers, I hope, then, you can teach your students that those who hold high office are, in their human nature and dignity, no better than the least of those whom they govern; that government by men and women is, of necessity, an imperfect exercise; that power tends to corrupt; that a free society must be ever vigilant against abuse of governmental authority; and that the institutional checks and balances against unbridled power are essential to preserve democracy. In addition to these secular truths, I hope that you will teach that just government has a *moral* claim, that is, a divinely prescribed claim, to our obedience.[4]

Notes

1. *Lee v. Weisman* 505 U. S. 629–30 (1992), Souter, J. concurring, as quoted in Murphy, 2014, p. 205.
2. *United States v. Virginia*, 518 U. S. 515 (1996).
3. Murphy, 2014, p. 221.
4. Antonin Scalia, "Teaching about the Law," *Christian Legal Society Quarterly,* Fall 1987, as quoted in Adam White, "Teaching Methods and Message," this volume.

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PART I

Scalia on Education

CHAPTER 2

Scalia's Rugged Originalism

Paul E. Peterson

Abstract Throughout the nineteenth century and beyond, a "naïve" originalism pervaded Court thinking. That changed when legal realists urged the Court to exercise judicial restraint and defer to elected branches of government. The Court exercised restraint from the late New Deal until *Brown* (1954). Since then jurists have broadened the discretion available to their own branch by identifying a "living Constitution," which changes with judicial decisions. To counter that view, Antonin Scalia constructed a rugged originalism that combines textual analysis with a search for original meaning while maintaining respect for the legislative branch and the principle of *stare decisis*.

Keywords Antonin Scalia · Original meaning · Living Constitution
Judicial review

The Scalia project cannot be understood apart from its place in the tradition of constitutional interpretation. Antonin Scalia both synthesized and advanced beyond earlier interpretative approaches in order to combat a contemporary approach he found pernicious. By coupling legal realism

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with an older naïve originalism, and by calling attention to the text as the source of meaning, Scalia constructed an originalism rugged enough to battle those who said they were interpreting a "living constitution."

Scalia was not the first jurist to interpret the Constitution in ways consistent with its original meaning. A "naïve" originalism pervaded Court thinking throughout the nineteenth century, and, as that century came to an end, the doctrine was used and abused to exercise enormous judicial power. In response, legal realists, accusing jurists of asserting raw power, urged the Court to exercise restraint by deferring to the elected branches of government. Judicial restraint doctrine dominated Court thinking from the late New Deal until the transformative *Brown* decision handed down by the Warren Court in 1954.[1] Since then, jurists have broadened the discretion available to the courts by identifying a living Constitution that changes in meaning over time. Scalia countered that view by constructing an alternative we shall characterize as "rugged originalism," an approach to constitutional interpretation that combines textual analysis with a search for original meaning while maintaining a respect for the legislative branch and the principle of *stare decisis*.

When in a jocular mood, Scalia enjoyed shocking his audience by declaring: "The only good Constitution is a dead Constitution," because then its meaning would remain unchanged. "The problem with a living Constitution, in a word, is that somebody has to decide how it grows … And that's an enormous responsibility in a democracy to place upon nine lawyers."[2] Upon reflection, he changed "dead Constitution" to an "enduring Constitution." Its meanings are conserved by traditional practices, which may be modified by legislative enactments. But when jurists can abruptly change the meaning of a constitution on their own hook, they endanger the life of a democratic republic.

Naïve Originalism

Rugged originalism differs from the naïve originalism of the nineteenth and early twentieth centuries. Early jurists grounded their decisions—or at least said they did—in the Constitution as written. In *Marbury v. Madison* (1803), John Marshall quotes directly from the Supremacy Clause of the Constitution when exercising for the first time the Court's right of judicial review.[3] In *McCullough v. Maryland* (1819), he declares a law unconstitutional only after giving the Necessary and Proper Clause the following meaning:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[4]

Marshall's interpretation of the Constitution in each decision is open to question, but, indisputably, the Chief Justice rests his case on the Constitution's original meaning.

That Constitution continues to be the Court's apparent guide well into the twentieth century even when the Court is straying into distant territory. In *Lochner* (1908), both the Court's majority and its minority claim to be interpreting the original meaning of the Fourteenth Amendment's Due Process Clause.[5] Rufus Peckham says the clause "would have no efficacy and the legislatures of the States would have unbounded power… [if they could exercise] arbitrary interference with the right of the individual to his personal liberty… [to enter] contracts."[6] In his persuasive dissent, John Harlan has better cause to be just as originalist: "[T]he New York statute… cannot be held to be in conflict with the Fourteenth Amendment, without enlarging the scope of the Amendment far beyond its original purpose."[7] In a second dissent, Oliver Wendell Holmes identifies original meaning with traditional practice:

> The liberty of the citizen to do as he likes … is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.[8]

As the *Lochner* majority opinion illustrates, Court confidence in its ability to discern original intent was open to abuse. In *E. C. Knight* (1895), Melville Fuller found a Pennsylvania company *not* engaged in the kind of "commerce among the states" that Congress could constitutionally regulate under the Commerce Clause,[9] even though the company was selling the sugar throughout the country.[10] Since it produced the staple only within Pennsylvania, the company was said to be engaged only in intrastate, not interstate commerce. But drawing a distinction between sugar's production and its sale is rather like distinguishing between the pitcher's wind-up and throw. Disaster looms if the two are not synchronized. A plain reading of the Commerce Clause does not allow for such tortured separations. Naïve originalism had acquired a license to write law through the concoction of legal fantasies.

Judicial Restraint

As *E. C. Knight* was being written, legal realists were taking aim at this kind of formalistic reasoning. Arcane distinctions between intrastate and interstate commerce barely concealed the economic interests the justices were seeking to serve, they said. Jurists did not find the law but imposed it in service to those in power. Realists concluded that jurists should leave law-making to the elected representatives of the people in all but extreme circumstances. As Harvard Law Professor James Thayer put it, judges should affirm a law unless its unconstitutionality is "so clear that it is not open to rational question."[11]

The doctrine was not accepted by the Court until the New Deal when it provided a justification for the Court's "switch in time that saved nine."[12] The "switch" is often attributed to Charles Evans Hughes, even though he was not the most conservative of the justices on the Court, for it is his opinions—perhaps because he was the Court's pivotal justice—that sharply reveal the shift in thinking taking place amid the turmoil invoked by President Franklin Delano Roosevelt's court-packing plan. In *Schechter* (1935), Hughes draws "a necessary and well established distinction between direct and indirect effects" on interstate commerce.[13] "Direct effects are illustrated by the railroad cases we have cited, as, *e.g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce," but fixing the hours and wages of employees of poultry workers is not.[14] Unless the distinction is maintained, "the federal authority would embrace practically all the activities of the people."[15] But when Roosevelt proposes to add more judges to the Court, Hughes' alters his Commerce Clause jurisprudence.[16] Exercising a restraint not practiced in *Schechter,* Hughes defers to the Congress he had so recently snubbed: "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."[17] Labor relations could now be regulated. "[A]cts which directly burden or obstruct interstate or foreign commerce … are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."[18]

Even without a court-packing law, Roosevelt was able to consolidate his new majority on the Court within months.[19] The Court became so deferential to the legislative will that a majority, which included Robert

Jackson and Felix Frankfurter, two of Roosevelt's most esteemed appointees, overlooked the Due Process Clause when it found no constitutional objection during World War II to the Administration's decision to confine Japanese citizens living on the West Coast within Montana-based relocation centers.[20] Conservatives also learned to defer to Congress, and the Court achieved unanimity in 1964 when it affirmed the authority of Congress under the Commerce Clause to ban segregation in public accommodations.[21] Still later, Chief Justice John Roberts shows even greater deference to the legislative branch when he construes a congressional law to mean exactly the opposite of what it says.[22] He declares central elements of the Obama Administration's Affordable Care Act to be constitutional after finding that an unconstitutional fee imposed on the non-insured was not a fee but a tax, even though Congress had specifically stated it was not a tax, for only if it were a tax would it be constitutional.[23]

Living Constitution (Non-originalism)

Such judicial restraint nearly eviscerates the Court's power of judicial review. For decades New Deal liberals welcomed this development—until a new group of liberal justices came to embrace a polar opposite of view. According to their conception of constitutional interpretation, known as living Constitution doctrine, the judiciary is permitted wide scope for overturning legislative enactments. Who developed this new doctrine? What is its rationale? The answers to these questions remain unclear. The living constitution was born, but its parentage—and also its legitimacy—is obscure.

Origins of the Living Constitution

Some trace the baby's DNA to Holmes when, in *Missouri v. Holland* (1920), he says the Constitution "called into life a being the development of which could not have been foreseen [and]…must be considered in the light of our whole experience."[24] The phrase seems apposite, but the Justice, far from limiting the authority of the elected branches, is upholding a treaty Congress had approved. In *Brown*, Earl Warren has a better claim to be the dogma's progenitor, when he uses contemporary psychological findings to help him determine the meaning of the Equal Protection Clause. Black children develop a sense of inferiority, he says,

when they attend legally separate schools.[25] Warren uses psychological research to distinguish the *schools* of Topeka, Kansas from the *railroads* of Louisiana found constitutional in *Plessy* (1896).[26] Presumably, black children acquire a sense of inferiority only in class, not when riding the train. By respecting *stare decisis*, the Court reached unanimity in a difficult case, but the Chief Justice would have been better advised to rule that the Equal Protection Clause mandates a color-blind Constitution, as Harlan said in his *Plessy* dissent.[27] Warren's opinion, though politically understandable, drifts off into a realm he need not have entered. Yet the decision itself is quite consistent with the Constitution's requirement that "no state shall …deny to any person within its jurisdiction the equal protection of the laws."[28]

Warren need not have ventured into the land of the living Constitution, but once launched on the journey, the Chief Justice forged ahead, joining the majority in *Griswold* (1965) when it declared unconstitutional a Connecticut state law banning the sale of contraceptives.[29] As in *Lochner,* the Court majority once again discerns in the Due Process Clause the authority to limit state regulatory powers. The issue at hand is minuscule. The Connecticut law was a fossil and the plaintiffs could show no injury. Any number of judicial strategies could have been used to strike the law from the books without wandering into the meaning of the penumbras of the Ninth Amendment. But the Court seemed determined to find a new constitutional right of privacy. Though but a fetus, the living Constitution is kicking its feet.

Then arrives *Roe v. Wade*, a most consequential and enduringly controversial act of judicial legislation.[30] Here, a Constitution is so alive and active, it allows Harry Blackmun to write a new law that divides a woman's pregnancy into three trimesters, each subject to its own rules of engagement. William Brennan, a member of the *Roe* majority, defends the deed by asserting, "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[31] It's not clear what "current problem" was being solved when the Court denied each state the authority to decide for itself the best balance between the rights of the mother and the rights of the unborn child. Such challenging ethical issues are ordinarily decided by the elected branches of government, allowing for resolutions consistent with local community values. Judicial imposition of a universal will is not obviously the preferred alternative, even when one might agree with

the substance of the Court's policy preference.[32] Certainly, Blackburn, Brennan, and their colleagues, in *Roe*, did more to damage than to secure domestic tranquility.

Yet it must be admitted that the living Constitution has had one undoubted success. It creates a sense of power in the Halls of Justice. "Five votes. Five votes can do anything around here," Brennan loved to whisper in the back halls of the Court.[33] Heady stuff, that kind of power. But is it legitimate? How do the Justices know what this growing, changing document means at any point in time? What rules guide them to reach the right interpretation? Or is it just a matter of counting up to five?

Academic Defenders

Scalia was relentless at scolding his liberal colleagues for their failure to create a set of rules that guided their exercise of the vast power the living Constitution had given them. "You can't beat somebody with nobody," Scalia insisted. "It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him.… As the name 'nonoriginalism' suggests (and I know no other, more precise term by which this school of exegesis can be described), it represents agreement on nothing except what [it thinks] is the wrong approach."[34]

If liberal justices have offered no explicit, developed response to this jeremiad, a number of academics have responded to Scalia's challenge.[35] The late Ronald Dworkin interpreted it "as a framework or charter of abstract aspirational principles."[36] Very nice sentiment, but it does not really give the Court much guidance. Harvard's Cass Sunstein argues for a Constitution that "embodies a political theory of deliberative democracy."[37] In his view, "much of constitutional law consists of a requirement of public-regarding justifications for what might otherwise be seen as naked preferences. This requirement helps distinguish deliberative democracy from authoritarianism, whether through majority rule or otherwise."[38] Conversations are good to have, but dictators have never been at a loss for words when justifying their deeds. Yale's Bruce Ackerman wants today's living Constitution—not the ancient one—to bind future judges.[39] We all find much to applaud in the Civil Rights Movement, but why should future judges be bound when today's judges are not? Boston University's James Fleming recommends that the judges try "thinking

for themselves about what constitutional provisions seem to refer to—like equal protection *itself* and due process *itself*, not anyone's specific *conceptions* of equal protection and due process. This thinking for oneself must be conducted with an attitude of self-criticism, seeing constitutional interpretation as a self-critical question for truth about… the Constitution."[40] The proposal sounds like a distress call for Uriah Heap.

In what may be the most persuasive defense of the living Constitution, David Strauss, a professor at the University of Chicago, suggests that justices follow common law practice to find the path through the judicial thicket to fundamental principles. By remaining faithful to precedent, but distinguishing current cases from previous ones, a modern Constitution can be fashioned without opening the door to unconstrained impositions of judicial desires. "The idea is to find common ground on which people can agree today. The current meaning of words [in the Constitution] will be obvious and a natural point of agreement."[41] Strauss's respect for *stare decisis* can hardly be faulted, but his use of precedent leaves the judge with great discretion. When he applies his doctrine to *Roe*, for example, he finds ample precedent in society's general agreement that women may not be forbidden from having children and medical experimentation cannot be performed without the patient's consent.[42] It is a great leap forward to get from these propositions to a rule that denies legislatures the right to forbid abortion. Further, Strauss seems quite willing to keep *Roe* intact despite the obvious lack of "a natural point of agreement."[43] If it is "common ground" that one seeks, why not leave discovery to the elected branches of government? Are they not better equipped than un-elected judges to discern the natural point of agreement? And if there is no common ground, then why not let each state find its own point of agreement that works best for it?

Whatever the merits of any or all of the academic apologists for a living Constitution, their theories have not yet had an acknowledged impact on Court thinking. None of the current justices perched on the left end of the Court bench openly say they adjudicate according to the principles of a living Constitution, much less define what those principles entail. Until these are discovered, the justices are floating on an uncharted sea, free to impose either justice or tyranny, or both, much as they please. In Posner's words: "The liberal academic theories of constitutional decision making, widely derided as mush, have little appeal to

even liberal Justices, who have been unable to project a coherent vision of a liberal constitutional jurisprudence."[44]

Constitution by Expert

To "adapt great principles" to "current problems and current needs," requires expertise as well as authority. In the Temple of the Living Constitution, the black-robed gods must have high priests who can help them right the wrongs of modern society. When jurists do not have principles to guide them, they need the advice of experts. The practice is foreshadowed in *Brown* where Warren cites psychologists to justify his distinction between schools and railroads. In *Roe,* the justices purport to have learned from medical science that a fetus is not viable until the third trimester, a judicial finding that later proves to be false. Since those seminal decisions, expert witnesses in courtrooms have become a commonplace. When judges do legislative work, they need to acquire information specific to the sphere within which they are acting.

School finance is a case in point. The appropriate level of government spending is just about the last topic one expects to be settled in a courtroom. Fiscal matters have been a legislative responsibility since colonial times. Assemblies used the power of the purse to control the authority of the King's representative, and the practice was enshrined in the revolutionary war slogan, "No taxation without representation." The Constitution specifically requires that all revenue bills originate in the legislative chamber directly elected by the people, and state constitutions have inserted similar provisions in their own constitutions. Yet courts are deciding specific levels of state expenditure.

The Supreme Court faced this question in *Rodriguez* (1973), the very year *Roe* was decided. Even at this time of broad judicial reach, the Supreme Court was unwilling to stretch a *Brown*-enlarged Equal Protection Clause to matters of school finance. Speaking for the majority, Justice Powell declared that "Education …is not among the rights afforded explicit protection under our Federal Constitution."[45] Despite this ruling, numerous state courts—from Alabama and Arkansas to Washington and Wyoming—have identified in their state constitutions a right to an "adequate" education that requires specific expenditure levels in vague constitutional phrases that stipulate an "adequate" or "thorough and efficient" educational system.[46] Interpreting the clauses as

licenses to pursue their own policy preferences, judges have conjured up exact sums of money that state legislatures must spend on schools, often with judicial rules as to where and how.

To find the remedy required by their constitutional deliberations, judges turn to consulting firms, think tanks, and university-based academics. These experts concoct various methodologies to discover the truth of the matter. One approach relies on panels of educators; a second calculates an amount based upon the latest education research; and a third draws upon actual expenditure levels in schools said to be successful. But, as one scholar has noted, "There simply is not any reliable, objective, and scientific method to answer the question of how much it would cost to obtain achievement that is noticeably better than that currently seen."[47] Still, courts are routinely relying upon this alchemy to determine the amount legislatures must allocate. Experts are spinning gold out of the breath of a living Constitution.

The Scalia Phenomenon

In 1986, the twin gods of the living constitution—Blackmun, the author of *Roe,* and Brennan, the intellectual leader of the Court's liberal wing—were exercising great influence over their brethren. Then, as the Court opened that fall, William Rehnquist was elevated from Associate to Chief Justice and Scalia was provided his first opportunity to participate in oral argument. The second event was at least as momentous as the first. For one thing, the new justice did not obey laws of decorum that do more to stultify than facilitate thought. Scalia appropriately performed the traditional task of the Court's most junior member by holding the door used by the justices to enter the courtroom, but he then leaped into the interrogation of the government's representative by immediately posing 11 consecutive questions or comments and, after an intermission for inquiries by others, closed out the interrogation with nine additional ones.[48] In subsequent years, the justices learned to tolerate—perhaps even enjoy—the seemingly endless outpouring of quips and jibes that routinely convulsed the audience. By one count, he generated 40% of the "laughters" officially recorded by the court reporter.[49] Some of the jests were used to expose the flaccid reasoning underpinning living-constitution doctrine: "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."[50]

None of this would have been consequential had Scalia not been in the business of fashioning a lance that could cut through the soft underbelly of the living Constitution. Scalia began with the plain meaning of the text, an approach that he, as an administrative law scholar, had long applied to statutory interpretation. The Due Process Clause, he said, "[b]y its inescapable terms … guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require," which led him to the conclusion: "It may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation."[51] Scalia had little time for those who wish to substitute the "spirit" of a law for what is explicitly said.[52] Nor, and this point is crucial, did Scalia think an interpretation of a law should be rooted in the subjective intentions or motivations of those who wrote it. "[T]he objective indication of the words, rather than the intent of the legislature, is what constitutes the law," he insists.[53] The modern propensity to base interpretations on legislative histories, rather than the plain meaning of the text, "has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law."[54]

For Scalia, the distinction between meaning and intention was crucial. Originalism requires that one interpret the original text as it was originally understood, not according to the wishes, hopes, or expectations of those who wrote the document. Those who drafted the Constitution in Philadelphia had multiple intentions, and the intentions of most of those who ratified the Constitution are unavailable. Just as legislative histories are so ambiguous they allow judges to interpret laws in any way they please, so a search for the original intentions of the founders is a will of the wisp. Scalia did consult the "writings of some men who happened to be delegates to the Constitutional Convention" such as Alexander Hamilton and James Madison, but he did so "not because they were Framers," but because "their writings …display how the text of the Constitution was originally understood."[55]

But if meaning is the basis for interpretation, should the judge not consider the meaning of the words in the founding document in light of the nation's subsequent experience? Why should Scalia attend to the original meaning of the Constitution instead of its current meaning, as the living constitutionalist prefers? Does that not permit the kind of flexible document needed to adapt to modern times? No, says Scalia.

A constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."[56] The Constitution has established legislative and executive branches that could respond to change; it does not "take the power of changing rights away from the legislature and give it to the courts."[57] In other words, judges should exercise their power of judicial review to protect ancient rights, not to invent new ones.

Scalia was prudent in his exercise of judicial review. Marshall may have stretched the plain meaning of the text in *Marbury*, but that decision has become so embedded in the laws of the land that it is foolish even to consider revisiting it. Scalia never said whether he thought *Brown* fell within the same category as *Marbury,* but that implication might be read into some of his language. Yet judicial restraint for Scalia was not the same thing as abandoning *Marbury* altogether, as legal realists demanded. When legislative enactments seriously disturb the checks and balances of a federal system,[58] or interfere with procedural rights of defendants,[59] or interfere with the exercise of effective free speech,[60] Scalia looked to the original meaning of the Constitution to call a halt.

Scalia once called his doctrine "faint-hearted originalism," a misstatement often exploited by his critics. By that phrase, he meant to distinguish himself from those naïve originalists who abused the power of judicial review by declaring laws of Congress unconstitutional without carrying out the careful inquiry necessary to establish the document's original meaning. For Scalia, the meaning of the constitutional text provides a basic guideline for the jurist, but its meaning has to be carefully discerned and the application to the case at hand needs to respect principles of *stare decisis* whenever possible and due deference should be given to the elected branches of government. At times the complexity led Scalia into directions he may not have wished to have gone. But by embedding his doctrine in a larger framework Scalia gave originalism a strength and durability it would not have had otherwise—the precise opposite of faint-hearted originalism. It is an originalism rugged enough to be used in battle. It establishes, Scalia said, a "historical criterion that is conceptually quite separate from the preferences of the judge himself."[61]

Notes

1. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
2. Bruce Allen Murphy, "Justice Antonin Scalia and the 'Dead' Constitution," *New York Times* February 14, 2016, opinion page.
3. The text of the Supremacy Clause is as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. IV, cl. 2. To justify judicial review, Marshall says that "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." Marbury v. Madison, 5 U.S. 180 (1803).
4. McCulloch v. Maryland, 17 U.S. 421 (1819).
5. The Due Process Clause and the Equal Protection Clause are embedded in the following text of the Fourteenth Amendment to the Constitution: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added).
6. Lochner v. New York, 198 U.S. 56 (1905). The Court appears to be saying that states have only the police power to regulate public safety, health, welfare, and morals. It's not clear what there is in the Due Process Clause or in any other clause in the Constitution that warrants such a conclusion, especially when the Tenth Amendment reserves to the states all powers not explicitly granted to the federal government.
7. *Lochner*, 198 U.S. at 73 (dissent).
8. Id. at 75 (dissent).
9. Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
10. United States v. E. C. Knight Co. 156 U.S. 17 (1895).
11. James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (Oct. 25, 1893): 144, quoted in Richard Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* 100, no. 3 (June 2012): 522.

12. The judicial switch first appears in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
13. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 546 (1935).
14. Id.
15. "Direct effects are illustrated by the railroad cases we have cited, as, *e.g.,* the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprise and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *Schechter Poultry*, 295 U.S. at 546. But "the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power." Id. at 550.
16. Cushman argues that the "switch in time" was not driven by external political events but by changes in doctrine evolving within the court. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998). All events have multiple causes, and the justices involved may have been quite conscientious in their approach to the task at hand, but the doctrinal evolution was very likely affected by the Court's recognition that it needed to attend to its own self-preservation.
17. National Labor Relations Board v. Jones & Laughlin, 301 U.S. 30 (1937).
18. Id. at 31–32.
19. "[T]he legislative judgment… is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Products, 304 U.S. 152 (1938). A potential exception is suggested in a note: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." Id. at 152, note 4. From this tiny seed of *obiter dicta*, a living Constitution forest will grow.

20. Korematsu v. United States, 323 U.S. 214 (1944). The Court seems to have forgotten its note 4 in *Carolene Products.*
21. Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964).
22. National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
23. In a quite brilliant move, Roberts makes clear the Court is not giving up the power of judicial review by declaring another portion of the Affordable Care Act unconstitutional on the grounds that it is a violation of state sovereignty for the federal government to condition large subsidies to states upon compliance with federal mandates. *Sebelius*, 567 U.S. at 577.
24. Missouri v. Holland, 252 U.S. 433 (1920).
25. *Brown*, 347 U.S. at 494.
26. Id. at 495.
27. Plessy v. Ferguson, 163 U.S. 559 (1896) (dissent).
28. U.S. Const. amend. XIV, § 1.
29. Griswold v. Connecticut, 381 U.S. 479 (1965).
30. Roe v. Wade, 410 U.S. 113 (1973).
31. William Brennan, "The Constitution of the United States: Contemporary Ratification" (speech, Text and Teaching Symposium, Georgetown University, Washington, DC, October 12, 1985), quoted in Bruce Allen Murphy, *Scalia: A Court of One* (New York: Simon and Schuster, 2014), 147.
32. At the time of the decision many states had laws that permitted abortion. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 2008). Many other "victories" of the living Constitution simply apply nationally what is already in place in many parts of the country. The social goals of the justices might have been better accomplished had they allowed the electoral processes to work their will gradually.
33. Nat Hentoff, "Profiles: The Constitutionalist," *New Yorker,* March 12, 1990, 45, quoted in Murphy, *A Court of One*, 135.
34. Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57, no. 3 (1989): 855, quoted in Murphy, *A Court of One*, 164.
35. A good deal of scholarly writing is content to criticize rugged originalism without offering a defense of the living Constitution alternative. For example, three distinguished academics—Gordon Wood, Laurence Tribe, and Ronald Dworkin—replied to Scalia's Tanner lectures at Princeton. All three spent pages criticizing originalism, but offered no defense of its principle alternative, the living Constitution. A fourth, Mary Ann Glendon, suggested that judges interpret constitutions in the way

they interpret the common law, a position similar to the one offered by David Strauss (2010). Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law,* ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997).

36. James E. Fleming, *Fidelity to our Imperfect Constitution: For Moral Readings and Against Originalisms* (Oxford: Oxford University Press, 2015), 10.
37. This is Fleming's characterization of Sunstein's thought. Fleming 2015, 85.
38. Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993), 352.
39. "We see it as a paradigmatic achievement of popular sovereignty in the twentieth century and [we should] give full constitutional recognition to the landmark statutes and judicial superprecedents that mark its enduring legacy." Bruce Ackerman, *We the People,* vol. 3 (Cambridge, MA: Harvard University Press, 2014), 47.
40. Fleming, *Fidelity*, 22.
41. David Strauss, *The Living Constitution* (New York: Oxford University Press, 2010), 106.
42. Strauss, *Living Constitution*, 94–95.
43. Ibid., 95, 106.
44. Posner, "Judicial Self-Restraint", 548.
45. San Antonio Independent School District v. Rodriguez, 411 U.S. 35 (1973).
46. The provisions in state constitutions upon which these Court decisions are based vary from state to state. Georgia's constitution states that "an adequate public education for the citizens shall be a primary obligation of the State." Florida's constitution also refers to an "adequate" education. The most common formulation calls for the establishment of a school system that is "thorough and efficient"—a phrase found in the constitutions of Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia. Wyoming's constitution has it both ways, requiring the state to provide an education system that is at once "thorough and efficient" and "adequate to the proper instruction of all youth." John C. Eastman, "Reinterpreting the Education Clauses in State Constitutions," in *School Money Trials: The Legal Pursuit of Education Adequacy,* eds. Paul E. Peterson and Martin R. West (Washington, DC: Brookings Institution Press, 2007), 55–76. See also *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm our Children,* ed. Eric Hanushek (Stanford: Hoover Institution Press, 2006). Adequacy lawsuits have continued to enjoy success even in the wake of the 2009 recession. In a 2017 decision, the Kansas Supreme Court declared: "Under the facts

of this case, the state's public education financing system provided by the Legislature for grades K–12, through its structure and implementation, is not reasonably calculated to have all Kansas public education students meet or exceed" educational standards. Jonathan Shorman, "Kansas Supreme Court Rules School Funding Inadequate," *The Topeka Capital-Journal*, March 2, 2017.

47. Eric A. Hanushek, "The Alchemy of 'Costing Out' an Adequate Education," in Peterson and West, *School Money Trials*, 97.
48. Transcript of Oral Argument at 15:09–19:28; 22:29–24:29, Hodel v. Irving, 481 U.S. 704 (1987) 85–637. *See also* Murphy, *A Court of One*, 139–140.
49. Jay D. Wexler, "Laugh Track," *The Green Bag* 9, no. 1 (autumn 2005), 59–61; Jay D. Wexler, "Laugh Track II – Still Laughin'!" *Yale Law Journal Forum* 117 (Nov. 12, 2007).
50. Obergefell v. Hodges, 576 U.S. 622, note 22 (2015) (dissent).
51. Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in Scalia, *Matter of Interpretation*, 24.
52. Scalia, *Matter of Interpretation*, 19.
53. Ibid., 29.
54. Ibid., 35.
55. Ibid., 38.
56. Ibid., 40.
57. Ibid., 41.
58. See New York v. United States, 505 U.S. 144 (1992).
59. See Crawford v. Washington, 543 U.S. 36 (2004).
60. See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
61. Scalia, *Originalism*, 864. quoted in Murphy, *A Court of One*, 166.

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CHAPTER 3

Justice Scalia's Unoriginal Approach to Race and Gender in Education

James E. Ryan

Abstract Although Justice Scalia purported to be driven by originalism and precedent, his opinions in three education cases—*Grutter v. Bollinger* (2003), *Parents Involved v. Seattle School District* (2007), and *United States v. Virginia* (1996)—tell a different tale. In these cases, his arguments are difficult to defend on originalist grounds and, surprisingly, Justice Scalia himself makes no attempt to do so. Similarly, his views are difficult to square with precedent. It is hard to escape the conclusion that, in some of his most noteworthy cases related to education, Justice Scalia was as results-oriented as the justices and judges he loved to criticize.

Keywords Antonin Scalia · School desegregation · Affirmative action Pragmatism · "Faint-hearted originalist"

Justice Scalia was a giant in the law and a remarkably talented writer, especially in dissent. His most significant contribution was to advance

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the idea of "originalism," an interpretive approach that insists that cases be decided based on the original understanding of constitutional text. Justice Scalia was a forceful and colorful proponent of this approach, defending it as the only principled way for judges to avoid enshrining their policy preferences into the law and chastising those who instead believed in a "living" constitution, which Justice Scalia argued was simply a way for judges to decide cases however they chose.[1] Justice Scalia also, at least sometimes, practiced what he so ably preached. In some high-profile cases, for example, Justice Scalia pursued his approach even when it led to results that he almost certainly did not favor as a matter of policy. In *Texas v. Johnson* (2007), for example, Justice Scalia joined the majority in striking down laws prohibiting the desecration of the American flag—an act he despised[2] but that he nevertheless concluded was protected by the First Amendment.[3]

His education cases, by contrast, show a less flattering side of Justice Scalia, at least those cases relating to the use of race and gender in student assignment and admissions policies in K-12 schools and higher education. Justice Scalia had a normative view about whether and when race and gender should be taken into account. But it would be difficult to contend that he had a legally principled view.

Although Justice Scalia was an avowed originalist, he also made clear that he was willing, at times, to depart from originalism in order to follow precedent.[4] However, in cases involving the use of race or gender in student assignment or admissions, Justice Scalia was faithful neither to originalism nor, at least in the race cases, to precedent. He also varied, sometimes dramatically, in the degree of deference or skepticism he brought to assertions made by states that were parties to the litigation. When states wished to integrate schools or create more diverse campuses, Justice Scalia showed them no deference; when they wished to preserve an all-male military academy, Justice Scalia offered great deference to their position. All told, these cases show a Justice who seemed just as results-oriented as the judges and justices he scolded and occasionally ridiculed.[5]

One need only consider three cases, both singly and in combination. The first is *Grutter v. Bollinger* (2003), an affirmative action case out of Michigan, in which the Court upheld the University of Michigan Law School's admissions plan and struck down the University's plan. Justice Scalia wrote a separate opinion, agreeing with the decision to strike down the University's plan and disagreeing with the decision to uphold

the Law School's plan.[6] The second is *Parents Involved v. Seattle School District* (2007). Justice Scalia did not write separately but joined in full the striking plurality opinion authored by Chief Justice Roberts.[7] The third is *United States v. Virginia* (1996), in which the Court, in an opinion by Justice Ginsburg, struck down the male-only admissions policy at the Virginia Military Institute. Justice Scalia wrote a scathing dissent.[8]

Start with *Grutter v. Bollinger*. Justice Scalia's view of affirmative action, generally, was that it was impermissible except to remedy a specific, identifiable harm.[9] As many commentators have convincingly explained, it is difficult to square this position with the original understanding of the Equal Protection Clause.[10] The conventional view among historians appears to be that the Equal Protection Clause, as originally understood, would not have prevented states from *helping* African-Americans as opposed to hurting them. Perhaps even more surprising than Justice Scalia's seemingly ahistorical position on affirmative action was his failure even to engage in the historical debate. Remarkably, in some of the most high-profile cases the Court ever heard—namely, cases involving affirmative action—Justice Scalia never offered an originalist defense of his views.

Justice Scalia instead made simple, bare assertions about the meaning of the Constitution. A good example comes in the his last line in *Grutter,* in which Justice Scalia asserts that "the Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."[11] But this is an over-simplification, and an inaccurate one, which fails to acknowledge that what counts as unconstitutional "discrimination" is a complicated question. There is no provision in the Constitution that explicitly prohibits any and all consideration of race; there is simply the Equal Protection Clause. The Equal Protection Clause vaguely says that no state shall deny to any person the equal protection of the laws.[12] That language is not self-enforcing and instead requires choices about the kinds of "discrimination" that are allowed and the kinds that are not. To give an example: speeding laws arguably violate the Equal Protection Clause, insofar as some people are treated differently (they are fined or arrested) than others (who are not). But no one would ever think this sort of "discrimination" is prohibited, because it is obviously justified to treat people differently based on whether or not they speed. As this simple example shows, the question with respect to the Equal Protection Clause is always which forms of "discrimination" are tolerable and which ones are not.

An originalist, like Justice Scalia, should abide by the choices contemplated and understood at the time that the Fourtheenth Amendment was drafted. In other words, an originalist would proscribe the sort of discrimination that was originally understood to be prohibited by the Equal Protection Clause and tolerate the rest. As mentioned, most historians appear to believe that the original, common understanding of the Equal Protection Clause is that it permitted benign uses of race in government decision-making or, to put it differently, that the Equal Protection Clause permitted "discrimination" in favor of African-Americans but not against them. One might think that an originalist like Justice Scalia, therefore, would have no problem with affirmative action, even if he thought it was a bad idea from a policy perspective. This makes it even more surprising, and disappointing, that Justice Scalia never even attempted to defend his decision from an originalist perspective. And it raises the obvious question: why abandon originalism here?

The answer, it should be noted, is not that precedent supported Justice Scalia's views and therefore justified abandoning originalism. Justice Scalia famously remarked once that he was a faint-hearted originalist, by which he meant in part that he would sometimes follow the command of stare decisis rather than originalism.[13] In *Grutter*, however, Justice Scalia ignored the original understanding of the Equal Protection Clause not to follow precedent, but to break from it. Rather than abide by the precedent of *Bakke v. Regents*, which allowed for affirmative action within certain constraints,[14] Justice Scalia expressed categorical opposition to race-based affirmative action. All of which means that, in *Grutter*, Justice Scalia appears to have abandoned both the original understanding of the Equal Protection Clause and precedent to arrive at his own position.

The position at which Justice Scalia arrived, moreover, was entirely consistent with his stated "policy" views about affirmative action. Justice Scalia was not a fan of race-based affirmative action, as he spelled out clearly (and bitingly) in an article he wrote before becoming a judge. This article, he explained at his confirmation hearing, represented his view about "policy."[15] One can agree or disagree with that policy position, of course. But to ignore originalism and break from precedent to reach a result that is consistent with a stated policy preference is difficult to defend as legally principled. This is not to say, of course, that Justice Scalia's view of affirmative action policy was itself unprincipled; reasonable people can and do disagree on whether affirmative action causes

more harm than good, can be administered fairly, or is morally justified. But in cases like *Texas v. Johnson*, Justice Scalia remained true to his legal principles and struck down an anti-flag burning law that, as a matter of policy, he obviously favored. Why he seems to have abandoned those principles when it came to affirmative action remains a mystery, one that Justice Scalia surprisingly failed to resolve himself.

One sees a similar approach in *Parents Involved*, which presented the analogous question of whether K-12 schools can take voluntary steps to integrate schools. The question, in other words, was whether and when K-12 schools could consider race in student assignments. In *Parents Involved*, Justice Scalia joined the plurality opinion of Chief Justice Roberts, which took the categorical view—similar to Scalia's view in race-based affirmative action cases—that race can never be taken into account, even when districts are trying to integrate schools rather than segregate them. Roberts argued that this position was commanded by the Constitution and was consistent with *Brown*, which in Robert's view was a case not about school integration but about prohibiting any use of race in school assignments, regardless of the purpose.[16]

Here, again, one finds Scalia willing to abandon originalism and break from precedent. Critics of originalism as a methodology have pointed out that *Brown* is difficult to justify on originalist grounds, as there is little evidence that the Equal Protection Clause was originally understood to outlaw school segregation.[17] If *Brown* cannot be justified by originalism, some critics contend, this is reason enough to reject originalism, because *Brown* is an iconic case, the outcome of which has overwhelming support. Scalia found this argument annoying, accusing critics of waving the "bloody shirt" of *Brown*.[18] He offered different responses over time, sometimes suggesting that critics were right about *Brown* but wrong in concluding that it proved originalism wrong, and sometimes suggesting that Harlan's dissent in *Plessy*—arguing for a colorblind constitution[19]—captured the correct original understanding. None of his responses, however, justify his position on voluntary integration.

To begin, most legal historians seem to agree that the Equal Protection Clause, as originally understood, did not prohibit segregation because education was a social right that fell outside the ambit of that Clause.[20] Scalia, as indicated, sometimes seemed to accept this argument and agree that the original understanding of the Equal Protection Clause could not justify the outcome in *Brown*. But in his view, it did not follow that originalism should be rejected out of hand. (As Scalia sometimes

pointed out in this context, the fact that Hitler's Germany produced good automobiles does not mean that Hitler was a good leader.[21]) If the Equal Protection Clause does not reach school segregation, however, it obviously would not prohibit the voluntary integration of schools, either. In each instance, the Equal Protection Clause would not apply because of the status of education as a social right. Under this view, states would be free either to segregate or integrate.

On the other hand, if school segregation was indeed incompatible with the original understanding of the Equal Protection Clause, there are only two possible rationales. The first is that the Equal Protection Clause was actually intended to prohibit the perpetuation of a caste-system, and that school segregation was obviously attempting to perpetuate a racial caste-system. If that is the correct understanding of history, then attempts to break down that system—whether through courts or legislatures—would be consistent with the original understanding. School segregation would be prohibited, but school integration would be tolerated—indeed, encouraged.

That leaves just one rationale: the notion that the Equal Protection Clause requires colorblindness and prohibits any and all uses of race. The argument for colorblindness in this context, however, is no different than the argument used in race-based affirmative action cases. As mentioned, most historians seem to believe that argument is false and, again, Scalia never tried to make the originalist case that race cannot be taken into account even when the government seeks to help, not hurt, African-Americans. Justice Harlan's dissent in *Plessy* might be compelling—though it also contains some less than admirable statements as well[22]—but it does not establish the original understanding of the Constitution, and the weight of historical evidence seems to point in a different direction.

No matter how you approach it, therefore, when it came to voluntary integration, Justice Scalia abandoned what a commitment to originalism would appear to require. He also rejected precedent—twice. First, the idea that voluntary integration was inconsistent with *Brown*, which Roberts suggested in the plurality opinion Scalia joined, is implausible. *Brown* dismantled state-enforced segregation with the obvious hope that doing so would lead to integrated schools. The whole thrust of *Brown* was that segregation was actually harmful to students, not that the use of race itself was always and everywhere to be rejected.[23] In addition, the idea that legislatures would take voluntary efforts to integrate schools

would have seemed far-fetched at the time of *Brown*. The related idea that the Justices who voted in *Brown*, or the lawyers who argued against segregation, would have had objections to voluntary efforts to integrate is equally implausible.[24]

Just how implausible is demonstrated in *Swann v. Charlotte-Mecklenburg*, the second precedent rejected by Roberts and Scalia. *Swann* was a 1971 case, in which the Court approved the use of busing to desegregate schools under court order.[25] Writing for a unanimous Court, Chief Justice Burger explained that the case involved the limits of judicial authority, and he sought to distinguish the scope of judicial authority from the authority of school officials. In a telling passage, he wrote:

> School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities;* absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[26]

This passage is technically dicta, of course, but it is neither easily ignored nor easily explained away. Indeed, Roberts did not have a convincing explanation as to why the Court would have made this plain statement in a unanimous opinion if it were not obvious to the Court in 1971 that this was the proper understanding of *Brown*. And it was this statement, as much as anything, that was behind Justice Stevens's observation in his dissenting opinion in *Parents Involved* that no member of the Court he joined in 1975 would have agreed with the Chief Justice—and Justice Scalia—that voluntary integration is categorically prohibited.[27]

The final case for consideration, *United States v. Virginia*, otherwise known as the VMI case, involved single-sex schools. In *Virginia*, the Court struck down the all-male admissions policy of VMI, finding that the State failed to justify excluding women and that the all-female counterpart that the State had hastily created was nowhere near equal to VMI.

Justice Scalia dissented. His dissent is, in many ways, a powerful critique of the majority's somewhat loose and scattered opinion,

and it shows Scalia at his pugilistic best. But his approach in this case, at least when contrasted to the affirmative action and voluntary integration cases, also suggests a Justice on a mission—a mission to save VMI. In particular, Justice Scalia's deference to Virginia in the VMI case stands in sharp contrast to his skepticism of Michigan in the affirmative action case and his skepticism of school districts in the voluntary integration cases. Justice Scalia seemed eager in the VMI case to accept Virginia's explanation of the need for a school like VMI, yet he later seemed incredulous that Michigan would see a need for affirmative action in a public law school. He also joined Chief Justice Roberts' opinion, which was highly skeptical and critical of the school districts that were attempting to integrate their schools voluntarily.

To begin, gender discrimination cases, including the VMI case, are an additional instance where Justice Scalia did not adhere to his originalist methodology. It seems fair to say that no one would have thought at the time of the passage of the Fourteenth Amendment that it prohibited gender discrimination—in part because the Amendment itself enshrines discrimination on the basis of gender in section 2.[28] For Justice Scalia, that should have been enough to dispose of the VMI case, as someone faithful to his version of originalism would simply conclude that the Equal Protection Clause does not address gender discrimination.

But Justice Scalia could not quite bring himself to declare in his VMI dissent, simply and plainly, that the Equal Protection Clause does not extend to women. He did voice a more categorical view of the Equal Protection Clause in a 2011 interview, in which he stated: "Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that."[29] Interestingly enough, however, Justice Scalia walked back from that position just 2 years later in another interview, in which he took a more nuanced view. "The issue is not whether [the Constitution] prohibits discrimination on the basis of sex. Of course it does. The issue is, 'What is discrimination?'"[30] And then he added: "there are some intelligent reasons to treat women differently. I don't think anybody would deny that. And there really is no, virtually no, intelligent reason to treat people differently on the basis of their skin."[31]

There are two difficulties with Justice Scalia's changing views. The first is that Scalia's later, more nuanced, view of the Equal Protection Clause—that it prevents some kinds of "discrimination" against

women—is difficult to square with the original understanding of the Equal Protection Clause that Justice Scalia himself stated in his first interview. The second problem is that Scalia's nuanced view of gender discrimination underscores that his categorical view of race-based affirmative action is difficult to defend as legally principled. Why, in other words, allow some kinds of "discrimination" on the basis of sex but none at all on the basis of race, when the language of the Equal Protection Clause says nothing about this kind of distinction? Here, Justice Scalia can rely neither on original understanding nor on precedent to justify the distinction, because the original understanding and precedent supports just the kind of nuanced approach to "discrimination" on the basis of race that Justice Scalia rejects; and the original understanding with respect to gender would seem to put it entirely outside the scope of the Equal Protection Clause. All Justice Scalia can fall back on is the empirical assertion he gives in his interview: there are some good reasons to treat women differently, but there is almost never an "intelligent reason" to treat people differently based on race. One can agree or disagree with Scalia's empirical assertion, to be sure. But to accept that judges should decide cases this way is to give license to judges to strike down legislation whenever those judges do not think it is backed by an "intelligent reason." It is unlikely that Justice Scalia himself would have considered that a legally principled way of deciding cases.

As mentioned, Justice Scalia did not contend in his dissenting opinion in the VMI case that sex discrimination is simply outside the scope of the Equal Protection Clause and therefore permissible. Instead, he argued that single-sex admissions at VMI survived intermediate scrutiny, the test established by the Court in earlier cases involving sex discrimination. The argument, in other words, involved the application of established precedent to the VMI case, and Justice Scalia argued that VMI should be tolerated based on that precedent. In this respect, the case simply featured a quarrel between the majority and dissent over the application of precedent—albeit amorphous precedent.

What is nonetheless striking, and telling, about Justice Scalia's dissent in the VMI case is the extent to which he defers to the state's arguments about the need for single-sex admission to VMI, which stands in sharp contrast to the lack of deference he would later afford to the state's arguments about the need for race-based affirmative action in the *Grutter* case. To begin, Justice Scalia accepted, without much analysis, that single-sex education is substantially related to the State's important interest

in providing an effective college education because some students benefit from it.[32] Simply because some students benefit from single-sex education, however, does not *ipso facto* establish that single-sex education is "substantially related" to providing an effective education for all students. VMI, moreover, was unique and uniquely powerful, so cutting out women left them out of one of the state's premier public institutions.

Justice Scalia then turned to two alternative arguments. First, he focused on the distinctive "adversative method" used by VMI, a physically punishing regime which would have to be somewhat altered if women were admitted. He tacitly endorsed the suggestion that the State had an important interest in fostering the "adversative method" of instruction.[33] But he never explained why.

Justice Scalia's deference to Virginia here, moreover, stands in sharp contrast with his intense skepticism of Michigan's arguments about the need for race-based affirmative action in the *Grutter* case. The real question in *Grutter*, Justice Scalia argued—agreeing with Justice Thomas—was not whether a racially diverse student body provided educational benefits, but whether the state had an interest in maintaining a diverse, *elite* law school.[34] The only reason the state needed affirmative action, in other words, was because it wanted to have high admissions standards, but the state never explained why it had a compelling interest in an elite law school. One could ask exactly the same question about the adversative method: why does Virginia have an important interest in a particular pedagogical method? But Justice Scalia never asked this question. (The fact that U.S. military academies were already co-ed by the time of the VMI case, moreover, suggested that you could prepare citizen soldiers quite effectively without resort to the adversative method, so it was hard to understand why this method was, in itself, so important.) To be sure, cases involving race involve more intense scrutiny—strict scrutiny, to be exact—than cases involving gender, but it is difficult to justify the stark differences in deference to the state's arguments based on levels of scrutiny alone.

Scalia's final approach was to suggest that keeping VMI all male was substantially related to Virginia's important interest in providing a diverse array of college options. Putting aside whether this was an important state interest, and whether providing diverse educational options actually motivated the continuation of VMI's all-male admissions policies or was just an ad hoc justification created for litigation, the only way to accept this argument was to consider the existence of *private* colleges

and universities as well. VMI was the only public single-sex institution in the state, until Virginia put together a program for women in response to litigation against VMI. Scalia nonetheless argued that VMI was furthering diversity because there were already four *private* colleges for women and none for men.[35]

Whatever else one might say of his approach to assessing diversity, it is hard to imagine that Scalia would have taken the same approach were race-based affirmative action involved. Indeed, one can readily imagine Scalia relishing the opportunity to skewer a state that tried to defend a race-based affirmative action plan in a public university on the grounds that there were already a number of private universities that were not elite and did not care as much about racial diversity, so maintaining a racially diverse, elite school was a legitimate way to foster diversity among higher education institutions.

Finally, it is worth noting Justice Scalia's uncritical acceptance of the wisdom behind the creation of the Virginia Women's Institute for Leadership, which Virginia proposed as a way to remedy the fact that VMI was all male. The VWIL was not equal to VMI in terms of funding, facilities, and faculty, and although it claimed to have the same end as VMI—preparing citizen soldiers—it followed a "cooperative" method rather than an adversative one. Whatever its merits, VWIL was not remotely comparable to VMI. Chief Justice Rehnquist, who concurred in the judgment, had little trouble dismissing VWIL as an obviously poor substitute for VMI.[36] Justice Scalia, however, twice praised the fact that "VWIL was carefully designed by professional educators who have long experience in educating young women,"[37] and that "VWIL was carefully designed by professional educators who have tremendous experience in the area."[38] Suffice it to say that deference to the judgment of "professional educators" was not a hallmark of Justice Scalia's jurisprudence in the area of race-based affirmative action, nor was it evident in the Roberts opinion, which Scalia joined, in *Parents Involved*.[39]

This not to say that Justice Scalia's dissent is indefensible or that the majority opinion in the VMI case is beyond reproach. The striking contrasts between Justice Scalia's opinions in the VMI case and in the race-based affirmative action cases, however, do illustrate a very different analytical approach—one that cannot be fully explained by the different levels of scrutiny applied to race and gender cases. In the VMI case, Justice Scalia seemed eager to defer to the state's judgment; in *Grutter* and later in *Parents Involved*, he seemed highly skeptical.

At the end of the day, it is hard not to conclude that Justice Scalia thought there was an "intelligent reason" to maintain an all-male VMI, but not an "intelligent reason" to consider race in order to promote diverse universities or integrated K-12 schools. That sort of pragmatic assessment is an approach to deciding cases that have some ardent and well-respected defenders, including Judge Richard Posner.[40] But pragmatism was not Justice Scalia's self-avowed approach, and it is hard to square with his professed commitment to originalism and to stare decisis. Why Justice Scalia was willing to abandon originalism in these cases, but not in others—like the flag-burning case—where a commitment to originalism led to outcomes that Justice Scalia almost certainly disfavored as a matter of policy remains a puzzle that perhaps others may some day solve. It also necessarily raises the question of whether Justice Scalia's commitment to originalism was principled, strategic, or a bit of both. At the very least, these three high-profile and politically charged cases complicate the picture of a jurist best known for a methodology—originalism—that was strikingly absent in all of them.

Notes

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7. Parents Involved v. Seattle School Dist. 1, 551 U.S. 701 (2007).
8. United States v. Virginia, 518 U.S. 515 (1996).
9. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) at 239.
10. See Eric Schnapper, "Affirmative Action and the Legislative History of the Fourteenth Amendment," *Virginia Law Review* 71 (1985):

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11. *Grutter*, 539 U.S. at 349.
12. U.S. Const. amend XIV, § 1.
13. Scalia, "Originalism," 864.
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24. James E. Ryan, "The Supreme Court and Voluntary Integration," *Harvard Law Review* 121, no. 4 (2008): 131.
25. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
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32. United States v. Virginia, 518 U.S. at 576.
33. Id. at 578–579.
34. *Grutter*, 539 U.S. at 356.
35. *Virginia*, 518 U.S. at 578–579.
36. Id. at 563–566.
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CHAPTER 4

Scalia's Dilemmas as a Conservative Jurist

R. Shep Melnick

Abstract Justice Scalia's opinions in education cases display his profound skepticism about judges' constitutional authority and institutional capacity to reform public education in the United States. His "text and tradition" jurisprudence was designed above all to prevent judges from reading their own policy preferences into the vague words of the Constitution. Rather than read *Brown* as an invitation to judges to join with academic experts to remake our schools to achieve equal educational opportunity for all, he interpreted the equal protection clause and *Brown* to incorporate a simple command: thou shall not classify by race. But two other tenets of Justice Scalia's jurisprudence, respect for precedent and obedience to the commands of Congress, sometimes pushed in a different direction. This chapter explores how these principles can come into conflict with one another in education cases. Justice Scalia's efforts to balance and reconcile these competing principles helps us understand the dilemmas faced by conservative jurists in the twenty-first century.

Keywords Antonin Scalia · Text and tradition · Due process
Color-blind interpretation · Civil Rights Act of 1964

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If Justice Scalia had been asked to contribute an essay to this volume, it is likely that he would have given this gruff reply:

> I don't have much to say about law and education. To the extent I have coherent views on education, they influence where I send my children to school and the decisions I register in the voting booth, not what I do as a judge. Unlike state constitutions, the U.S. Constitution does not even contain the word "education." Public schools are no different from any other public institution. They cannot discriminate on the basis of race. They can neither establish religion nor discriminate against religion.
>
> To be sure, many federal statutes govern educational institutions, but my job as a judge is to read and apply the text of the law, not allow my personal views on education to come in through the back door via dubious claims about statutory purpose or legislative intent. The method I employ to interpret the Constitution and federal laws contain no special provisions for educational institutions or issues. And they shouldn't. For that would suggest that I know more about education than school boards, legislators, governors, and school administrators. I don't, and no judge should assume he or she does.

In his many years on the Supreme Court, Justice Scalia wrote surprisingly few opinions on education. In desegregation cases, for example, he tended to join opinions written by Justice Thomas, not author his own. Even when he did write an opinion in an education case, he seldom mentioned education. Instead he focused on issues such as standing, the proper methods of statutory interpretation, the meaning of the Free Exercise and Establishment clauses of the First Amendment, or the importance of judicial restraint.

This set him apart from his more liberal colleagues, who view *Brown v. Board of Education*[1] not as a prohibition on the use of racial classifications in education, but as a mandate to courts to do whatever they can to promote "equal educational opportunity." Since this expansive understanding of the "the hope and the promise" of *Brown* (to use Justice Breyer's phrase[2]) applies not just to race, but also to gender, disability, language, and residence, judges who embrace it need to learn a great deal about the causes of educational inequality and how they can be cured. Or at least they need to listen to those who claim to be experts on these topics. In the process they will develop their own educational theories, which they will use to restructure local schools. But not Scalia,

whose jurisprudence left little room and had even less need for such non-legal musings. Rather than mandate "equal educational opportunity," his color-blind interpretation of the Equal Protection Clause merely "proscribes government discrimination on the basis of race, and state-provided education is no exception."[3]

Political Jurisprudence?

In the preceding essay, James Ryan (Dean of the Harvard Graduate School of Education, an institution that trains the sort of expert Justice Scalia often scorned) maintains that Scalia's defense of judicial deference is fraudulent: the Justice was "just as results-oriented and unprincipled as the judges and Justices whom Scalia liked to scold and ridicule."[4] Dean Ryan is hardly the only one to voice this criticism. Behind Scalia's "originalism" and "textualism," they claim, lies a political point of view that can only be described as conservative. The next section of this paper defends Justice Scalia against Ryan's criticisms regarding desegregation and the use of allegedly benign racial classifications. But in one key respect these critics are right—and Scalia would not have disagreed. His interpretive method *is* political in the sense that rests on an understanding of the proper operation of the political institutions of a liberal democracy. And it *is* conservative in the sense that he believed our public institutions (including our educational system) are basically sound, and should not be subjected to frequent rounds of reform by unelected judges and self-appointed experts. Perhaps because I am a political scientist rather than a law professor, I see no reason to use "political" as an epithet. The key question is the soundness of his political judgments.

It is fair to say that Justice Scalia was relatively content with the way we have traditionally organized education in this country—at least less critical of it than his more liberal brethren. Until relatively recently, most educational decisions and most funding have been local. This allows public control through school boards, mayors, school district meetings, and, to a lesser extent, state legislatures. Combined with the availability of private schools, especially relatively inexpensive religiously based schools, this promotes both choice and experimentation. The major flaw in this system—*de jure* racial segregation—has been ended. Critics rightfully note that this decentralization allows many forms of inequality to persist. But it is difficult to eliminate these inequalities without producing a stultifying uniformity and reducing citizens' control over education.

Justice Scalia was particularly skeptical of *judges'* ability to improve education. There are undoubtedly many ways our educational arrangements can be improved. But that is best handled by elected officials and administrators appointed by them, not judges. Given their limited capacity, judges should focus on establishing a few simple rules about what is legally permissible and forbidden. The rule of law, Justice Scalia emphasized, is the law of rules. Judges should therefore look for rules that curtail the worst abuses rather than engaging in multi-year institutional micromanagement in a futile effort to produce the best outcomes.

As Amy Wax's essay in this volume shows, Justice Scalia's commitment to judicial restraint was closely tied to his skeptical of those academic "experts" who claim to provide workable blueprints for top-down educational reform. Improving schools requires experience, practical judgment, and knowledge of local circumstances, not application of abstract theories. When judges rely on such self-proclaimed experts, the result is often disaster—as it was in Kansas City, a desegregation case he knew all too well because it came before the Supreme Court three times during his tenure.[5] In the *Parents Involved* case Justice Thomas warned, "If our history has taught us anything, it is to beware of experts bearing racial theories."[6] Justice Scalia's educational decisions contain this implicit warning: If the history of educational litigation has taught us anything, it is to beware of academic experts bearing educational theories.

Critics of Scalia's originalism frequently claim that this approach to constitutional interpretation seriously exaggerates the extent to which we can understand the intentions of those who wrote the original Constitution in 1789 or the Fourteenth Amendment in 1868. Originalism, Justice Brennan insisted, is "arrogance cloaked as humility": "It is arrogant to pretend that from our vantage we can gauge accurately the intentions of the Framers on applications of principle to specific contemporary questions."[7] Scalia recognized that "it is often exceedingly difficult to plumb the original understanding of an ancient text."[8] But for him that difficulty provides yet another argument for judicial restraint.

The primary purpose of originalism, Scalia argued, is to dissuade the judge from reading their personal understandings of what is fair, good, and just into the vague phrases of the Constitution. When the Constitution is clear—for example, when it says states can deprive a person of "life" so long as they provides "due process" or when it gives

those accused of crimes the right to "confront" their accusers—then judges need to follow those commands. But bringing public policies in line with "contemporary values" is a job better left to elected officials who at least can be removed if they misread public opinion. Where the Constitution is ambiguous, "This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected."[9] The contours of "unenumerated rights" are no better "known to the nine Justices of this Court" than to "nine people picked at random from the Kansas City phone book."[10]

Justice Scalia was never so naïve as to believe that either constitutional or statutory interpretation can be made easy and mechanical. They both require judgment. Reasonable people can disagree on the meaning of key terms. On top of that, two features of the post-1960 American political world make the job of Scalia-like judges even harder.

The first is that federal courts have devoted considerable energy (and in the process developed extensive precedent) to doing precisely what Justice Scalia believed they should *not* do. Unlike Justice Thomas, Justice Scalia did not believe that the Supreme Court should simply overturn decisions that have become deeply embedded in our law and practices, however mistaken those decisions may have been. "In its undiluted form it [originalism] is medicine that seems too strong to swallow. Thus almost every originalist would adulterate it with the doctrine of *stare decisis*."[11] Most importantly, he has accepted the Court's multi-year effort to incorporate (most of) the Bill of Rights into the Fourteenth Amendment. This has become such an "accepted and settled part of our current system" that "it would be quite a jolt to the existing system to suddenly discover that those series of protections against state actions do not exist."[12]

Thus, Scalia's approach looks not just to "text," but to "tradition" as well.[13] Tilting at windmills should be limited to those only recently constructed. What, then, should be done with mistakes with a longer lineage? That is the question Justice Scalia addressed in several cases dealing with school desegregation cases. His response will be examined at length below.

The second problem is that elected officials at the national level have imposed many mandates on state and local school systems, and have often delegated to federal judges the job of determining what these vague mandates should mean in practice. How can a judge like Scalia reconcile his respect for decisions made by elected officials with his

skepticism of the capacity of unelected judges? This issue might not seem as interesting to an academic audience as the status of precedent, but it is of even greater practical significance. This essay will consider how Justice Scalia's coped with this problem by focusing on his opinions interpreting Title IX of the Education Amendments of 1972.

Brown, Green, and Color-Blindness

For an originalist, *Brown v. Board of Education* presents a serious problem. On the one hand, it has become a fundamental element of our legal and political culture. No one can or should be appointed to the federal judiciary who disputes the authority of its central argument, namely, that "separate is inherently unequal." On the other hand, it is far from clear that those who wrote, defended, and voted for the Fourteenth Amendment believed that it prohibited school segregation. As one of our editors, Michael McConnell, has put it, "In the fractured discipline of constitutional law, there is something close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment."[14] To advocates of a "living constitution" *Brown*'s lack of clear grounding is liberating. Unconstrained by the language of the Fourteenth Amendment and any guidance from its authors, they considered themselves free to do anything they think appropriate for promoting equality of educational opportunity. For Justice Scalia, in contrast, the challenge was to provide a solid foundation for *Brown* without empowering judges to wield it as a mandate to remake schools according to contemporary educational theories.

On the few occasions Justice Scalia addressed the issue directly, he rejected the widely held belief that the history of the Fourteenth Amendment provides no support for school desegregation. In *Rutan v Republican Party*, he wrote,

> In my view, the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *unchallenged* validity did not exist with respect to the practice in *Brown*. To the contrary, in the nineteenth century, the principle of "separate-but-equal" had been vigorously opposed on constitutional

> grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices. *See Plessy v. Ferguson* (Harlan, J., dissenting).[15]

Scalia's originalism focuses not on the intentions of those who wrote the Fourteenth Amendment, but on the general understanding of the terms "equal protection of the laws," "due process of law," and "privileges and immunities" in the late 1860s. He obviously cannot show that there was a broad consensus at the time that the Civil War amendments prohibited *de jure* segregation. But he does show that there was a clear and vibrant tradition—stretching from congressional debates in the decade after the Civil War to the Supreme Court's 1879 decision in *Ex Parte Virginia*[16] to Harlan dissent in *Plessy v. Ferguson*[17] and eventually to the "suspect classification" framework enunciated in *Loving v. Virginia*[18]—that viewed the use of racial classifications by government as particularly pernicious.

In his most extended discussion of the issue, his 1989 concurring opinion in *City of Richmond v. Croson*,[19] Scalia quotes Alexander Bickel—ironically the first and most frequently cited authority for the argument that the history of the Fourteenth Amendment is "inconclusive"—who insisted that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[20] Justice Scalia added that the use of racial classifications by state and local governments is particularly dangerous because, as we learn from *Federalist* #10, they are so susceptible to the tyranny of majority faction. Professor McConnell's detailed examination of the debates and voting patterns of the Congresses that first employed the legislative powers authorized by the Civil War amendments take Bickel's argument back further. He shows that a large majority of those who voted for the Amendment believe that "equal protection" means not excluding any individual from a public facility on the basis of race.[21]

As Justice Thomas pointed out in his concurring opinion in *Parents Involved*, the NAACP lawyers who brought the long line of cases that culminated in *Brown* also fully endorsed the first Justice Harlan's interpretation of the Fourteenth Amendment. "That the Constitution is color blind is our dedicated belief," they wrote in their 1953 brief.[22] When arguing the NAACP's case before the Supreme Court in 1954, Thurgood Marshall maintained that the Fourteenth Amendment denies

states the authority "to make any racial classification in any government field."[23] He told the Court, "The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution to the problem to assign children on any reasonable basis they want to assign them on."[24] In conversations with his colleagues at the NAACP, Marshall referred to Justice Harlan's dissent in *Plessy* as the "Bible."[25] Justice Marshall later changed his mind on this. But if one is trying to understand what *Brown* meant to those who fought and voted for it, there can be little doubt that their goal was to eliminate the use of race in school assignments.

This was also the understanding of the Presidents who proposed the Civil Rights Act of 1964 and the members of Congress who voted for it. Title IV of that law authorizes the Attorney General to institute desegregation litigation and states unequivocally:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.[26]

As President Kennedy put it a few months before his death, "I think it would be a mistake to begin to assign quotas on the basis of religion, or race, or color, or nationality. I think we'd get into a good deal of trouble."[27] According to the noted civil rights historian Hugh Davis Graham, "the evidence suggests that the traditional liberalism shared by most of the civil rights establishment was philosophically offended by the notion of racial preference."[28]

For Scalia this combination of "text and tradition" culminates not in an open-ended invitation to judges to do whatever they can to promote educational equality, but in a simple rule: no governmental use of racial classifications except in the most extraordinary circumstances. In an important sense Dean Ryan is right to claim that Scalia's embrace of Harlan's color-blind interpretation of the equal protection clause is "results-oriented." Scalia was above all concerned with the political consequences of allowing public officials to use racial classifications. How can one avoid addressing a question of this magnitude without thinking about the long-term consequences of competing interpretations? Here again Scalia quotes Bickel:

> [A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.[29]

This is even more true in our increasingly multi-racial, multi-ethnic country. As Chief Justice Roberts pointed out in his opinion for the Court in *Parents Involved*, in this new context the use of racial quotas is especially arbitrary and susceptible to manipulation. According to the rules the Seattle School Board had established to promote "diversity" in its schools, "a school that is 50 percent white and 50 percent Asian-American… would qualify as diverse," but "a school that is 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white… under Seattle's definition would be racially concentrated."[30] In one instance Seattle used racial assignment of students to change a freshman class from 40% Asian-American, 30% African-American, 8% Latino, and 21% Caucasian to 30% Asian-American, 22% African-American, 7% Latino, and 41% Caucasian.[31] Unless one takes the preposterous view that Asian-Americans, African-Americans, and Latinos all learn more when white students are in their building, this shuffling of students on the basis of race reinforces racial thinking without providing any countervailing benefits. Especially at exam schools, boosting admissions for some groups comes at the expense of other groups (usually Asian-Americans) who have also faced harsh discrimination over the course of American history. In Kansas City African-American parents were justifiable irate when the federal court's integration plan denied their children access to the magnet schools of their choice because so many seats had been set aside for white children—who did not show up in sufficient numbers to fill those seats.[32] Assertions of "benign" intent hardly ensure that public policies will not have perverse consequences. Justice Scalia's position is that we should simply prevent public officials from using a tool that is so prone to abuse.

Until the early 1970s, no one other than segregationists challenged this color-blind interpretation of the equal protection clause and *Brown*. This changed in a flurry of Supreme Court decisions on school desegregation, most importantly *Green, Swann, and Keyes*.[33] All these decisions

required school districts to assign students to particular schools in order to produce racial balance—which usually meant having the racial composition of each school reflect the racial balance of the district as a whole. In other words, they rejected the contention that school officials must be "color blind." This remedy was ostensibly limited to instances of state-sponsored segregation. But the Court made it so easy to prove that a school district had engaged in and perpetuated illegal segregation that few large districts could escape the demand that they assign students on the basis of race and continue to rejigger race-based assignments as residential patterns shift.

In two education cases decided in 1992, *Freeman v. Pitt*[34] and *U.S. v. Fordice*,[35] Justice Scalia wrote extended opinions (one a concurrence, the other a dissent) addressing these desegregation cases. Here the key precedent was not *Brown*, but a case of another color, namely *Green*. Justice Brennan's beautifully written and deceptively argued opinion for a unanimous Court in *Green v. New Kent County* set the stage for large-scale busing. It required school districts that had previously created (or, according to later interpretations, in any way contributed to the creation of) a "dual" school system to take all steps necessary to convert it into a "unitary" school system—that is, one in which no schools are "racially identifiable."[36] In a "unitary" school system the enrollment of each school reflects the racial balance of the school district as a whole. District court judges took this to mean that desegregation orders must be revised on a regular basis to ensure racial balance. This practice continued not just for years, but for decades. Meanwhile, the number of white students in most of these districts continued to fall.

Justice Scalia tacitly conceded that *Green* might have been an appropriate weapon for bludgeoning recalcitrant segregationists into submission in 1968, but he sought to distinguish the extraordinary measures necessary for dismantling Jim Crow from the ordinary application of legal principles. His explanation of how the temporal and geographic expansion of *Green* should be cabined also illustrated his understanding of why judicial supervision should be limited. In his concurrence in *Freeman v. Pitt* Justice Scalia wrote,

> At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have

> an appreciable effect upon current operation of schools. We are close to that time. While we must continue to prohibit, without qualification, all racial discrimination in the operation of public schools, and to afford remedies that eliminate not only the discrimination but its identified consequences, we should consider laying aside the extraordinary, and increasingly counterfactual, presumption of *Green*. We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging equal protection violations must prove intent and causation and not merely the existence of racial disparity, that public schooling, even in the South, should be controlled by locally elected authorities acting in conjunction with parents, and that it is desirable to permit pupils to attend schools nearest their homes.[37]

In *Fordice* Scalia made a similar argument, this time explaining why *Green* should not be applied to higher education. In *Green* the Court had in effect viewed "freedom of choice" plans as little more than an end-run around *Brown*. But the entire American higher education system is based on such "freedom of choice": no one is assigned to a particular college; students decide where to apply; schools decide whom to accept; and the character of each school is shaped by the student body produced by these two sets of decisions. So long as schools do not engage in racial discrimination in admissions, he argued, there is nothing unconstitutional about black students continuing to prefer to attend historically black colleges and universities.[38] For Scalia, the proper response to a mistaken or outmoded precedent is not to overturn it, but to stop expanding it, narrow it whenever possible, and above all "revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition."

Dean Ryan and other defenders of "benign" racial sorting insist that the use of remedies originally available only to judges determined to overcome the legacy of decades of constitutional violations should also be available to public officials presiding over school systems that have not violated the Fourteenth Amendment. The fullest presentation of this point of view is Justice Breyer's long, impassioned dissent in *Parents Involved*. It is notable that Justice Breyer never refers to the words of *Brown*, but only to its "hope and promise." The main support for his position comes from two sources: academic studies and Chief Justice Burger's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*. Dean Ryan, too, places much weight on the *Swann* opinion.

That is a particularly strange choice given the fact that *Swann* is among the most poorly constructed, internally contradictory opinions ever to appear in the *Supreme Court Reports.* Describing Chief Justice Burger's opinion, federal judge Griffin Bell (later Attorney General of the U.S. under President Carter) remarked, "There is a lot of conflicting language here… It's almost as if there were two sets of views laid side by side."[39] Detailed investigation of the Court's internal negotiations by Bernard Schwartz and by Bob Woodward and Scott Armstrong show that Bell was right.[40] *Swann* was the product of a long, torturous, and even comical effort to extract a unanimous ruling from a deeply divided court. In the end not even Burger seemed to understand it. A few months later, acting in his capacity as supervising justice for the Fourth Circuit, he mailed to every lower court judge in the country an eleven-page opinion that seemed to contradict much of what he had said in *Swann*. One mark of the incoherence of *Swann* is the Chief Justice's famous declaration that "words are poor instruments to convey the sense of basic fairness inherent in equity." This is a strange claim for a Court that relies on words to provide guidance to the lower courts and everyone else expected to comply with its rulings. To paraphrase the BeeGees, "It's only words, but words are all we have to keep lower courts in line."

In the end Justice Breyer's argument boils down to the claim that by using potentially dangerous racial classifications we can produce racially integrated schools that improve the educational opportunity of minority students. How do we know this? The experts tell us so. Actually, as Justice Thomas pointed out, not all the experts, just those Justice Breyer chose to cite. Breyer, Thomas charged in his concurring opinion "unquestioningly" relied upon "certain social science research to support propositions that are hotly disputed among social scientists."[41]

Can *Brown* be reconciled with a full-throated, doctrinaire understanding of originalism? Probably not. For that reason no one endorsing that form of originalism has sat on the Supreme Court since 1954, and none are likely to be appointed in the future. But Antonin Scalia was only a "faint-hearted originalist" who saw *Brown* as part of a long and noble tradition that had been explicitly endorsed by Congress and the President in 1964 and has since become deeply embedded in our political culture. At its heart lies a simple rule—no use of racial classifications except to remedy specific constitutional violations—that does as much to

constrain as to empower judges. It might not lead us to the best possible educational outcomes, but it prevents the worst type of abuses. Having unwisely expanded exceptions to the color-blind rule, Justice Scalia argued, the Court should now return to the original understanding of *Brown*.

Interpreting Civil Rights Statutes: The Case of Title IX

Justice Scalia emphasized that education policy should be made by elected officials not judges. But what happens when our "democratic heritage" produces federal laws that require judges to revise our "educational traditions"? In the half century since enactment of the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965, the federal government has steadily increased its regulation of state and local school systems. Sometimes they have done so by empowering federal agencies, sometimes by empowering federal courts, and often by doing both at the same time. Federal courts have acquired a particularly large role in applying the vague mandates of three federal laws, the Individuals with Disabilities Education Act (which mandates that all children with disabilities be provided a "free and appropriate public education"), Title VI of the Civil Rights Act (which prohibits schools receiving federal funds from discriminating on the basis of race or national origin) and Title IX of the Education Amendments of 1972 (which prohibits schools receiving federal funds from discriminating on the basis sex). For decades, Congress has been happy to give federal judges and administrators broad discretion to interpret these mandates. It has rewritten the laws only to reprimand courts for being too timid in imposing federal restrictions on local school systems.

Understanding how Justice Scalia tried to negotiate this difficult terrain requires us to descend into the weeds of administrative law and statutory interpretation. Some of these cases directly involve education, others do not. But they all have shaped the way in which federal courts and federal agencies supervise local school systems.

Like Title VI, on which it was explicitly based, Title IX requires federal agencies to terminate funding to institutions that discriminates, and it authorizes them to write regulations explaining what those institutions

must do to comply with these mandates. The only provision for judicial review allows schools to challenge agency decisions to terminate funding. Like Title VI, Title IX was envisioned as a way to end discrimination quickly without going through long rounds of litigation.

It never worked out that way. Over the past 45 years the number of times federal funds have been terminated under Title IX is precisely zero. Not only are the procedures for terminating funds cumbersome, but cutting off federal money is politically dangerous and often hurts those who have been subject to discrimination. Before long courts were recognizing "implied private rights of action" to enforce Title IX through court action—initially injunctions, later the award of monetary damages—rather than administrative ruling. Their argument is that since Title IX is similar to Title VI and since a private right of action had already been recognized under Title VI, the same should apply to Title IX.

The problem, though, is that the laws were different in two crucial ways: first, Title VI provides an administrative remedy for practices that violate the Constitution as well as the Civil Rights Act; and second, other federal statutes already provide for private enforcement suits for such constitutional violations. Title IX, in contrast, prohibited conduct that does not necessarily violate the Constitution. Consequently, private rights of action must be "implied," that is, discovered in a law that did not explicitly mention them. In its 1979 *Cannon* decision a divided Supreme Court ruled that since so many courts had already relied on the Title VI analogy to authorize private suits, it was too late in the day to turn back.[42] As a result, contrary to initial expectations, Title IX (like Title VI) became a font of administrative rules enforced through court suits.[43]

During the 1980s and 1990s the Burger and Rehnquist Courts became more and more hostile to "implied" private rights of action, especially when the target was a state or local government. In several cases the Court explained "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Since private rights of action alter the federal balance, if Congress wants to allow suits against subnational governments, it must include in the statute a "clear statement" to that effect.[44]

In 1992 the Supreme Court addressed the question whether federal judges can assess monetary damages against a school system for violating Title IX. Given the Court's skepticism toward private rights of action

and its reluctance to drain resources from school systems, it was easy to guess that the answer would be "no." But it was not. In *Franklin v. Gwinnett County School Board* a unanimous Court ruled that when a student is subject to serious sexual misconduct by a teacher and the school district fails to take appropriate action, a federal court can award monetary damages to the mistreated student.[45] School districts must pay a price for turning a blind eye to such misconduct by their employees.

In a perplexing concurrence Justice Scalia wrote "we have abandoned the expansive rights-creating approach exemplified by *Cannon*—and perhaps ought to abandon the notion of implied causes of action entirely." Expanding the remedies available in "implied" private rights of action seemed to make a bad situation worse: "To require, with respect to a right that is not consciously and intentionally created, that any limitation of remedies must be express is to provide, in effect, that the most questionable of private rights will also be the most expansively remediable." But he concluded that "it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate." That is because one section of a 1986 statute provided "implicit acknowledgment that damages are available."[46] Perhaps he was convinced that Congress would quickly overturn a contrary ruling. Perhaps he was moved by the disturbing facts of this case. Most likely he really believed that Congress had decided the matter. Whatever the reason, Justice Scalia and his usual allies agreed to open the courthouse door to a growing number of damage suits against school districts.

The Supreme Court's *Franklin* decision did produce a surge of sexual harassment litigation against school districts, but not of the sort expected. Instead of cases involving abuse of authority by teachers, in most of these cases plaintiffs claimed that schools had violated Title IX by failing to take adequate measures to prevent *peer-on-peer* sexual misconduct. This set in motion a chain of events that culminated in the Office for Civil Rights' extensive and controversial guidelines and investigations of sexual harassment on college campuses.[47]

Current federal guidelines on sexual harassment target not just harassment of women by men, but also men by women, gay students by straight students, and transgender students by what are now called the "cisgendered." Title IX's ban on discrimination on the basis of "sex" has been expanded to include discrimination on the basis of "sexual orientation" and, more recently, "gender identity." Surely Justice Scalia would object to this! He saw this attack on traditional understandings

of gender coming, and he decried it. Yet the only Supreme Court decision addressing the extent to which Title IX covers discrimination on the basis of sexual orientation was authored by, you guessed it, Justice Scalia. His opinion in *Oncale v. Sundowner Offshore Services* forms the cornerstone of the argument presented in the transgender rights case now before the federal courts.[48]

To understand the significance of Justice Scalia's opinion for a unanimous court in *Oncale*, it is necessary to go back several years to the time he sat on the D.C. Circuit. In a case that eventually came to the Supreme Court under the name *Meritor Savings Bank v. Vinson*, the appeals court held that sexual harassment (either by a supervisor or by a fellow employee) constitutes sexual discrimination under Title VII of the 1964 Civil Rights Act.[49] Although many lower courts had so interpreted Title VII, those judges had had a hard time explaining why sexual *harassment* constitutes sexual *discrimination*. The leading justification, one presented by another panel of the D.C. Circuit, went like this: if a heterosexual male harasses a woman, it is because of her sex; similarly, if a heterosexual female harasses a man or a gay man harasses another gay man, it is because of the victim's sex. All these harassers exhibit discriminating tastes. But what of a bisexual without such discriminating tastes? The judges who made this argument admitted that such indiscriminant harassers do not violate Title VII or Title IX.[50] This led the humorist Art Buchwald to advise lecherous bosses to take along another man when they go out for a tryst with their secretary.

This odd argument drew a long rebuke from three prominent members of the D.C. Circuit panel: Robert Bork, Kenneth Starr, and Antonin Scalia. Judge Bork's dissenting opinion observed that much of the "doctrinal difficulty in this area" resulted from "the awkwardness of classifying sexual advances as 'discrimination.'" While harassment is "reprehensible," Title VII (like Title IX) "was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove." The "artificiality" of the courts' interpretation of these laws is apparent in the distinctions it makes among categories of perpetrators:

> It is "discrimination" if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does *not* prohibit sexual harassment by a "bisexual superior because the insistence upon sexual favors would apply to male and female employees alike."

> Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible.[51]

This "bizarre result," Bork concluded, indicates that Congress had not intended to address this issue when it passed Title VII: "Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks."

The oddity and awkwardness of the "discriminating harasser" became particularly apparent in 1998 when the Supreme Court decided *Oncale*. This case involved the verbal and physical abuse of a man working on an offshore oilrig. Oncale's co-workers engaged in gross gay-bashing, leaving him fearful that "if I didn't leave my job, then I would be raped." The Court made no effort to establish if Oncale's tormenters were gay or straight, whether they had been animated by animus, amour, or some strange combination of the two, or whether Oncale himself was gay or straight—matters that the courts' previously announced "bisexual harasser exception" had seemed to make important. To be blunt, what if men on an offshore oilrig, like those confined to prison, become so undiscriminating as to attack any creature with two or four legs?

Scalia's brief opinion stressed that Title VII protects men as well as women, and that it prohibits discrimination by males of other males and females of other females. Since dissecting motives in such cases is so difficult, it is enough to show that some sort of sexual conduct or language was involved: "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[52] Although Scalia noted that "state and federal courts have taken a bewildering variety of stances" on same-sex harassment, his opinion did little to bring order to the subject.

Justice Scalia acknowledged that this rather open-ended understanding of the type of sexual harassment prohibited by nondiscrimination statutes had the potential to "transform Title VII into a general civility code for the American workplace." To mitigate this danger he insisted that "the statute does not reach genuine but innocuous differences in the way men and women routinely interact with members of the same and of the opposite sex," but "forbids only behavior so *objectively offensive* as to alter the 'conditions' of the victim's employment." To violate Title VII,

conduct must be "*severe and pervasive* enough to create an *objectively* hostile or adversarial environment."[53]

After helping to open the door wider to sexual harassment suits, Justice Scalia was alarmed at what came marching through. In another 1998 Title VII case, he joined Justice Thomas in objecting to the complex liability rules announced by the Court. Their dissenting opinion described the Court's liability rules as "a product of willful policymaking pure and simple," a "whole-cloth creation that draws no support from the legal principles" it cited.[54] Writing for the majority in two closely related Title VII cases, Justices Kennedy and Souter made little effort to hide or deny their innovation, claiming "Congress has left it to the courts to determine controlling agency law principles in a new and difficult area of federal law."[55] They had a point: since the Court had invited so many suits into federal court, it had an obligation to explain how they should be handled. At the time the *New York Times*'s Linda Greenhouse wrote "Few Supreme Court decisions in recent memory have been received as enthusiastically across the spectrum of interested parties.… praised by women's rights leaders, the Chamber of Commerce, and federal trial judges alike for providing the first clear set of rules in this rapidly evolving area of employment law."[56] In retrospect it seems that their liability framework for Title VII has worked quite well—certainly much better than the framework devised by the Office for Civil Rights for Title IX.

A year later a divided Court decided another Title IX sexual harassment case, *Davis v. Monroe County School Board*.[57] Justice O'Connor's opinion for the five-member majority ruled that school districts could be held liable under Title IX for peer-on-peer harassment, but only if "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has *actual knowledge of, and is deliberately indifferent to*, the teacher's misconduct." Justice O'Connor attempted to make it hard for plaintiffs to prevail in peer harassment cases without keeping them out of court altogether.

Justices Scalia, Thomas, Kennedy, and Rehnquist disagreed, warning that "the majority's opinion purports to be narrow," but its "limiting principles it proposes are illusory." According to Justice Kennedy's dissenting opinion, "The fence the Court has built is made of little sticks, and it cannot contain the avalanche of liability now set in motion." The costs imposed on schools by the decisions "are so great that it is most unlikely Congress intended to inflict them." "The only certainty flowing from the majority's decision," Kennedy warned, "is that scarce resources

will be diverted from educating our children." School districts will be so "desperate to avoid Title IX peer harassment suits" that they "will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose on them." Over the long run, Kennedy accurately predicted, the effect will be to transform "Title IX into a Federal Student Civility Code" and to "justify a corps of federal administrators in writing regulations on student harassment."[58]

It would not be unfair to suggest that the Court's decisions in *Franklin* and *Oncale* unleashed litigational forces that Justice Scalia and his conservative allies on the Court tried unsuccessfully to curtail in later sexual harassment decisions. In 2001 Scalia wrote a feisty and controversial majority opinion seemed to take a much harder line against judicial and administrative expansion of federal regulation of subnational governments. *Alexander v. Sandoval* involved not a school, but the Alabama Department of Public Safety.[59] But the key issue—whether private suits could be used to enforce regulations issued by federal agencies under Titles VI and IX—had major implications for educational institutions. In effect, *Alexander v. Sandoval* overturned the Court's famous decision in *Lau v. Nichols*, which had both deferred to OCR's bilingual education guidelines and offered judicial assistance in enforcing them.[60]

In *Alexander*, the state of Alabama had refused to comply with Department of Justice rules requiring drivers' tests to be conducted in Spanish as well as English. The Department claimed that Alabama's English-only rule would have a disproportionate impact on those born outside the U.S., and therefore violated Title VI. Justice Scalia's opinion noted that the Court had repeatedly (but, it should be noted, inconsistently) held that Title VI prohibits only *intentional* discrimination. It does not, he claimed, incorporate a "disparate impact" test and "we will not allow agencies to impose a broader definition through the rulemaking process." Scalia's opinion did not, though, invalidate those regulations. Rather, he argued only that those regulations could not be enforced through private rights of action. In other word, when agencies seek to go beyond the Court's interpretation of Title VI, they are on their own in the enforcement process. They must invoke the awkward funding termination process rather than rely on court-based enforcement by private parties. But that they are extremely unlikely to do.

Alexander could be read simply as a "disparate impact" case: here the conservative majority insisted that proof of intentional discrimination is required under Title VI. But it also suggested that the Court might not

recognize private rights of action to enforce agency rules that go beyond the bare bones of the underlying statute. This in turn implies that courts should not defer to agency interpretations of these statutes, certainly an unusual position for Justice Scalia. This more sweeping interpretation of *Alexander v. Sandoval* would constitute a major change, one that would bring many forms of federal regulation of education to a screeching halt.

That was what most worried Justice Stevens, who wrote an impassioned defense of the regulatory scheme that had evolved over the preceding 30 years. His dissenting opinion included the following ode to the "integrated remedial scheme" that the courts, Congress, and agencies had developed under Title VI and Title IX:

> This legislative design reflects a reasonable – indeed inspired – model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether there is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.[61]

Justice Stevens argued that federal judges should welcome the opportunity to use private suits to enforce administrative guidelines since they represent "the considered judgment of the relevant agencies that discrimination on the basis of race, ethnicity, and national origin by federal contractees are significant social problem that might be remedied, or least ameliorated, by the application of a broad prophylactic rule." He bitterly (and accurately) complained that the majority opinion was "unfounded in our precedent and hostile to decades of settled expectations."[62]

Justice Scalia's opinion in *Alexander* contained some of the pungent and provocative language for which he was famous. He described the Court's previous practice of multiplying "private rights of action" as "the *ancien régime*" to which the Court should not return: "Having

sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."[63] Although courts should defer to reasonable administrative interpretations of statutes, this deference should not extend to agency's efforts to open the doors of the judiciary to private enforcement suits: "Agencies may play the sorcerer's apprentice but not the sorcerer himself."[64] This seemed to be a declaration of war against the peculiar manner in which courts had for many years been enforcing against schools and subnational governments an ever-expanding set of rules, guidelines, and regulations announced by federal agencies.

So far the effects of *Alexander v Sandoval* have not been nearly as great as Justice Stevens feared and Justice Scalia may have hoped. Lower court judges have continued to defer to agency regulations and interpretive guidelines in private enforcement cases. (In fact, they have bizarrely maintained that they owe even *more* deference to an agency's interpretations of its regulations—which do not go through notice-and-comment rulemaking—than to regulations produced through APA procedures.[65]) In effect, the holding of *Alexander v Sandoval* has been relegated to instances in which there is a clear conflict between judicial and administrative interpretations of a statute. As a result, schools are still subject to the sort of federal regulation and judicial second-guessing that clearly disturbed Justice Scalia. His effort to restrain federal regulation and constrain federal judges while at the same time respecting judicial precedent and congressional enactments has largely failed.

Conclusion

Justice Scalia was usually portrayed in the media (and in political science articles and the law reviews) as a hard-edged conservative who manipulated abstract legal doctrines (especially originalism and textualism) to achieve the policy goals to which he was most deeply committed. His opinions in the field of education offer little support for this caricature. Reconciling his multiple commitments—to "text and tradition, " to judicial modesty, and to respect for federalism, separation of powers, and political accountability—sometimes proved difficult, if not impossible, in practice. In deciding particular cases and controversies, he approved policies he never would have voted for if he had been a legislator or initiated had he been an administrator. Perhaps the best way to honor Justice Scalia is to understand how he wrestled with the serious governance

issues created by the modern American welfare, regulatory, and civil rights state without ever resolving them.

Notes

1. Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
2. Parents Involved in Community Schools v. Seattle, 551 U.S. 701 (2007) at 803–804 and 867–868 (Breyer dissenting).
3. Grutter v. Bollinger, 539 U.S. 306 (2003) at 349 (Scalia, J., concurring in part and dissenting in part).
4. James E. Ryan. Justice Scalia's Unoriginal Approach to Race and Gender in Education (2017), 29–42.
5. See Joshua M. Dunn, *Complex Justice: The Case of* Missouri v. Jenkins (Chapel Hill: University of North Carolina Press, 2008). The cases are Missouri v. Jenkins I, 491 U.S. 274 (1989); Missouri v. Jenkins II, 495 U.S. 33 (1990); Missouri v. Jenkins III, 515 U.S. 70 (1995).
6. Parents Involved in Community Schools, 551 U.S. at 780–781.
7. A transcript of Justice Brennan's 1985 Georgetown address is available at http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html.
8. Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57, no. 3 (1989): 856.
9. Romer v. Evans, 517 U.S. 620 (1996) at 636.
10. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) at 293.
11. Scalia, "Originalism," 861.
12. Scalia made this statement at the hearings on his nomination, quoted in Ralph Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* (Lawrence: University of Kansas Press, 2006), 33.
13. The fullest description of Scalia's text-and-tradition approach is Rossum, *Antonin Scalia's Jurisprudence.*
14. Michael W. McConnell, "Originalism and the Desegregation Decisions," *Virginia Law Review* 81, no. 4 (May 1995): 952.
15. Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) at 95 n.1 (emphasis in original).
16. Ex Parte Virginia, 100 U.S. 339 (1879).
17. Plessy v. Ferguson, 163 U.S. 537 (1896).
18. Loving v. Virginia, 388 U.S. 1 (1967).
19. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
20. Alexander Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 133, quoted in *City of Richmond* at 522.
21. McConnell, "Originalism and the Desegregation Decisions," 984 ff.

22. Quoted in Justice Thomas's concurring opinion in Parents Involved at 772–773.
23. Quoted in Leon Friedman, *Argument* (New York: Chelsea House, 1969), 14.
24. Quoted in Richard Kluger, *Simple Justice* (New York: Vintage, 1975), 571–572.
25. Quoted in Justice Thomas's concurring opinion in Parents Involved at 773.
26. Civil Rights Act of 1964, Section 401(b).
27. Quoted in Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York: Oxford University Press, 1990), 106.
28. Id., 120.
29. Bickel, *The Morality of Consent*, 133, quoted in *City of Richmond* at 527.
30. Parents Involved in Community Schools, 551 U.S. at 727.
31. Id. at 728.
32. Dunn, *Complex Justice*, 146.
33. Green v. County School Board, 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); and Keyes v. School District #1, Denver, 413 U.S. 189 (1973). Two later decisions followed this pattern: Dayton Board of Education v. Brinkman II, 443 U.S. 526 (1979) and Columbus Board of Education v. Penick, 443 U.S. 449 (1979).
34. Freeman v. Pitts, 503 U.S. 467 (1992).
35. United States v. Fordice, 505 U.S. 717 (1992).
36. Green v. County School Board of New Kent County, 391 U.S. 430 (1968) at 439–442.
37. Freeman, 503 U.S. at 606–607.
38. Fordice, 505 U.S. at 754–755.
39. Griffin Bell quoted in Bernard Schwartz, *Swann's Way: The School Busing Case and the Supreme Court* (New York: Oxford University Press, 1986), 186.
40. Schwartz, *Swann's Way*, Chaps. 6–12; Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 95–112.
41. Thomas concurring opinion in Parents Involved, 551 U.S. at 761.
42. Cannon v. University of Chicago, 441 U.S. 677 (1979).
43. I explain this in greater detail in "Courts and Agencies in the American Civil Rights State," *The Politics of Major Policy Reform in Postwar America*, ed. Jeffrey Jenkins and Sidney Milkis (New York: Cambridge University Press, 2014), 90–99.

44. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) at 99; Gregory v. Ashcroft, 501 U.S. 452 (1991); Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) at 374; Suter v. Artist M., 503 U.S. 347 (1992). I explore this issue more fully in "Deregulating the States: Federalism in the Rehnquist Court," in *Evolving Federalisms: Intergovernmental Balance of Power in America and Europe* (Syracuse: Maxwell School, 2003).
45. Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).
46. Id. at 77–78.
47. I explain these developments in greater detail in *The Transformation of Title IX: Regulating Gender Equality in Education* (Washington, DC: Brookings Institution Press, 2017), chapter 10.
48. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 73 (1998).
49. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
50. Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977); Bundy v. Jackson, 641 F. 2d 934 (D.C. Cir. 1981).
51. Meritor v. Taylor, 760 F.2d 1330 (1985), dissent from denial of hearing *en banc*.
52. Oncale, 523 U.S. at 80.
53. Id. at 81.
54. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) at 771–772.
55. Id. at 751. Justice Souter's majority opinion in the companion case, Faragher v. City of Boca Raton, 524 U.S. 775 (1998), reached a similar conclusion.
56. "Supreme Court Weaves Legal Principles from a Tangle of Litigation," *New York Times*, June 30, 1998, A20.
57. Davis v. Monroe Board of Education, 526 U.S. 629 (1999).
58. Id. at 657–658 and 684.
59. Alexander v. Sandoval, 532 U.S. 275 (2001).
60. Lau v. Nichols, 414 U.S. 563 (1974).
61. Alexander at 306 (Stevens dissenting).
62. Id. at 294.
63. Id. at 287.
64. Id. at 291.
65. See, for example, the Fourth Circuit's decision in G.G. v. Gloucester County School Board, http://www.ca4.uscourts.gov/opinions/published/152056.p.pdf. The key Supreme Court decision on deference to agency interpretations is Auer v. Robbins, 519 U.S. 452 (1997). Justice Scalia wrote that opinion for a unanimous court.

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CHAPTER 5

Scalia and the Secret History of School Choice

Michael W. McConnell

Abstract Beginning with the *Everson* decision in 1947, the Supreme Court based its Establishment Clause jurisprudence about public aid to private (often religious) schools on an interpretation of the Virginia Assessment Controversy in 1784–1785. But that interpretation was seriously flawed, and the analogy the Court drew to school aid was misleading. The Virginia proposal targeted funds to ministers and teachers, and no other private activities, and its express purpose was to support religion. State and federal aid programs addressed by the Court went to schools for the purpose of improving educational opportunities (and saving money for the public schools), and distributed funds on a neutral basis, neither favoring nor disfavoring religion. In the early nineteenth century, public funds supported a broad range of schools, most of them religious in character, and Congress followed the same approach in its first major aid-to-education program, the Freedmen's Bureau Act. Almost no one regarded these programs as raising a problem of church-state separation. These neutral programs came to an end only because of the rising tide of anti-Catholicism, which led many Americans to favor

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concentrating public funds on generically Protestant public schools. It is the public school monopoly on public support—not school choice—that genuinely resembles an establishment.

Keywords Antonin Scalia · School choice · Anti-Catholicism
Establishment of religion · Everson v. Board of Education

Among the many issues of constitutional law transformed by the vision of Justice Antonin Scalia, few featured so sharp a reversal, with such clear and salutary effects for ordinary citizens, as the issue of educational choice: whether it violates the Establishment Clause of the First Amendment for the state to fund all accredited schools, public and private, religious and secular, on a neutral basis. When Justice Scalia came to the Supreme Court, the Court had just held unconstitutional a part of Lyndon Johnson's Great Society program that sent public school remedial education specialists onto the premises of inner-city schools—including Catholic schools, on an equal basis with others—to assist educationally and economically deprived schoolchildren with reading and math. Why was this program unconstitutional? Due to the pervasive sectarian atmosphere of the school, these public school specialists might, even unconsciously, introduce some religious element into their remedial reading and math instruction.[1] By the time of Justice Scalia's untimely death, the Court had upheld a voucher program that enabled inner-city schoolchildren to attend private—including Catholic—schools, using public tax dollars, so long as the financial aid was extended on a neutral basis and the choice of schools was left to the family.[2] This was a 180° change. Not only did the Court's change of doctrine improve the educational prospects of some of the neediest children in America, but it enabled them to exercise the freedom of religious choice that previously had been enjoyed only by those wealthy enough to pay the tuition. Justice Scalia's indefatigable efforts to restore a true original understanding of the Establishment Clause were indispensable to this transformation.

The paper will address that transformation. In doing so, it will tell the almost unknown story of school choice in America, what I call its "secret history." This history has been hiding in plain view, but has never been mentioned in a Supreme Court opinion. Indeed, it is virtually the opposite of the historical account purveyed by the Court.

The United States Supreme Court heard its first case about educational choice, *Everson v. Board of Education*, in 1947. In *Everson*, the question was whether it violates the Establishment Clause of the First Amendment for New Jersey, or a particular New Jersey township, to reimburse parents for the cost of public transportation of their children to school—whether they attended public or private, secular or religious school. (The township happened to have only two schools: one public and one Catholic.) In a five-four decision upholding the New Jersey statute, both the majority opinion and the dissent extensively discussed history.[3] Specifically, they discussed a dispute that occurred from 1784–1786 in the Commonwealth of Virginia over a bill proposed by Patrick Henry, called "A Bill Establishing a Provision for Teachers of the Christian Religion," which would have required every person in Virginia to pay a religious tax to be used for the salaries of ministers or the upkeep of religious buildings. Taxpayers were able to choose which denomination they would support, thus allowing, for instance, Methodists to send their money to the Methodist Church and Episcopalians to the Episcopalian Church. Those who objected to giving their money to churches could have their money directed to the "public treasury" to be used for education.[4]

The proposed bill excited substantial support and even more substantial opposition. The opposition, led by James Madison, was ultimately successful in defeating Henry's bill and instead adopting Thomas Jefferson's "Bill for Establishing Religious Freedom."[5] Madison opposed Henry's bill via a petition he authored entitled *Memorial and Remonstrance Against Religious Assessments*.[6] This fascinating document is the deepest, most profound statement of what the Free Exercise and Establishment Clause meant to the founding generation. So it is not surprising that the Court in *Everson* would discuss the Virginia bill and the reactions to it. What is surprising is the parallel drawn between the New Jersey bill and Henry's Virginia bill. The majority, while finding that the New Jersey bill did not violate the Establishment Clause because it was administered on a neutral basis, suggested that the New Jersey Bill raised essentially the same issues as the Virginia one. The Court extracted the lesson from the Virginia controversy that the state may not "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[7] The dissent stated flatly that the New Jersey law "exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck."[8]

This is puzzling because the differences between the New Jersey and Virginia bills greatly outweigh any similarities. While the Virginia bill sent money directly to religious organizations to be spent on clergy salaries and church upkeep for the purpose of advancing religion, the New Jersey bill sent money to parents to pay for bus rides in order to support education and provide safe transportation.[9] The recipients were different; the purposes were different; the uses to which the funds were put were different. None of the Justices seemed to notice. And since the time of *Everson*, the jurisprudence of educational funding has been haunted by the idea that somehow, the Framing generation, meaning Madison and Jefferson, were opposed to anything like what we would now call school choice.

In actuality, the Virginia bill was not about educational funding. It was a religious tax for the support of religion. Why did the Court not refer to the historical record about educational funding in the early years of the Republic?

Educational Funding in the New Republic

The actual story of educational funding and choice in the United States significantly differs from what one might conclude from *Everson*. At the Founding, there were essentially no public schools in any states. Outside of New England, education was entirely private and almost all schools were religious schools. Parents would pay for whatever education their children received, with the government occasionally providing some financial support for the education of the poor.[10]

Prior to the nineteenth century, the local clergyman most often was also the schoolmaster. For instance, when Chief Justice John Marshall was a little boy, his father, not a particularly religious man, ran for and was elected to the vestry in his county, specifically because he wanted to be on the selection committee for the new minister. He wanted someone with the qualifications to be a good teacher for his bright young boy.[11] Education and religion were not separate, but rather were generally under the same hands and entirely private.

As the nineteenth century dawned, educational systems became somewhat more developed, especially in large cities, but they were still largely privately operated by religious groups. For instance, between 1800 and 1830, there were almost a dozen publicly-supported schools in New York City and all but one was operated by a specific religious

denomination. These publicly-supported schools included Presbyterian, Episcopalian, Methodist, Quaker, Dutch Reformed, Baptist, Lutheran, and even a Jewish school, along with a school for freedmen in New York City operated by the African Free Society. All these schools, although essentially private tuition-driven schools, received public funding through tuition support for families who could not otherwise afford it. Everyone else paid for their own children. Although the New York Constitution of 1777 had repudiated any kind of an establishment of religion, no one challenged the public support of religious schools as being a violation of the separation of church and state, and the practice was not even regarded as controversial. In fact, none of the states with state-level establishment clauses had any problem with similar systems of educational choice.[12] The Supreme Court has never referred to this history.

Although the Federal Government, to which the First Amendment's Establishment Clause applied, had little role in education in the states, it did support education in the territories, where Congress was the primary government, generally through the use of land grants. Such grants invariably supported both private and public schools, including religious schools, yet no one seemed to regard this practice as controversial. In the District of Columbia, where the Federal Government also was the primary government and the Establishment Clause applied, there were no fully public schools until the 1860s. From the founding of Washington through 1848, the system was one of private and semi-public schools, with some public subvention from Congress, which was given to all eligible schools, including denominational schools, without any objections that such a practice raised a constitutional problem.[13] The Supreme Court has never mentioned this history.

Even the founder most identified with separationism was not opposed to granting public funds to religious groups for educational purposes. In his only known statement on the subject of government aid to religious schools, Thomas Jefferson seemed to support it. After the Louisiana Purchase, the people of New Orleans were frightened of the consequences of being a Catholic enclave in Protestant America. Indeed 22 of the 26 priests fled the city upon learning of the Louisiana Purchase.[14] The Ursuline Sisters, who operated a school and an orphanage in New Orleans, sent a letter to President Jefferson inquiring about their fate in Protestant America. Jefferson replied to them,[15] first assuring them that they would be under the full protection of the American Constitution

and American laws, and second asserting that "whatever diversity of shades may appear in the religious opinions of our fellow citizens, the charitable objects of your institution can not be indifferent to any and its furtherance of the wholesome purposes of society by training up its younger members in the way they should go cannot fail to ensure to it the patronage of the government it is under." Jefferson thus promised not only the protection of the Sisters' institutions by the government, but also the government's "patronage"—indicating that the territorial government would help financially support the Sisters' institutions.

Even as late as the 1890s, the Supreme Court did not consider public support for religious social welfare organizations to raise a serious Establishment Clause issue. In *Bradfield v. Roberts*, a hospital in the District of Columbia operated by a Roman Catholic order of nuns and supported by taxpayer money was challenged under the Establishment Clause.[16] The Court unanimously found it "wholly immaterial"[17] that the hospital was under the auspices of a church when the state is supporting a legitimate social welfare function. In essence, a hospital is a hospital, whether under church or secular governance.

The 14th Amendment and Funding of Religious Schools

Application of the First Amendment to the actions of state governments comes through "incorporation" under the Fourteenth Amendment. Accordingly, one might wonder whether the issue changed in the Reconstruction Period. The evidence here is clear. The same Congress that passed the Fourteenth Amendment in 1866 also passed the Freedmen's Bureau Act,[18] which was the first major federal legislation supporting education in the states. The Freedmen's Bureau Act appropriated large sums of money for education of the newly freed slaves in the South. It gave preference to "benevolent associations," that is, private charitable groups, to operate the schools. Among such private charitable groups operating schools, the largest single contingent were missionary societies, some non-denominational but many of them denominational. Each of the major Protestant denominations of America operated missionary society schools and received government money from the same Congress that passed the Fourteenth Amendment.[19] This demonstrates that the application of the Establishment Clause to states was not understood to prohibit government aid to educational institutions operated by religious groups. Yet this important episode has never

been mentioned in any opinion of the Supreme Court. This truly is a "secret history."

The Purpose of the Establishment Clause

The historical ironies are even deeper. The issue goes to the true purpose of the Establishment Clause. In order to understand and appreciate what the Establishment Clause actually forbids, it is best to consider the reasons why those who advocated for the establishment of religion did so—both in America and in the centuries before. The modern assumption is that advocates of an established church must have wanted to advance religion. But this is mostly, if not entirely, wrong. The advocates of an establishment of religion did not tend to be particularly religious. Machiavelli, for example, in his *Discourses*, stated that wise rulers should support religion, "… even though they be convinced that it is quite fallacious."[20] Thomas Hobbes, who most historians believe was one of Europe's first important atheists and certainly not a religious man, has a whole chapter of the *Leviathan* on why the church needs to be under the control of the state.[21] His argument is quite simple and logical. The church is an important instrument for the inculcation of ideas and opinions and the state needs to be able to control it. People's behavior is shaped by the ideas and opinions they have about the good and ill which will come to them, especially the good and ill of eternity. Hobbes accurately points out that when people are brought up to believe that God requires them to rebel against the King, they proceed to rebel against the King. Hobbes, writing 11 years after Charles I was beheaded by the Puritan rebels in the English Civil War, thus argues that unless the Sovereign controls religions, there will always be danger of unrest, rebellion, and civil war. Rousseau, across the English Channel, essentially made the same argument, contending that control over civil religion is necessary in order to support the unity of the state.[22]

In thinking of an established church, our Founders had in mind the Church of England. Among the doctrines and tenets of that Church, reflected in the Thirty-Nine Articles of Faith, was a belief in the supremacy of the King or Queen over all matters spiritual and temporal.[23] Thus, obedience to monarchical authority was a dictate of religious faith as well as a requirement of civil law. Bolstering this, Church of England clerics were required to swear affirmance to the supremacy of the King and Queen of

England at the time of their ordination. We can thus deduce the primary purpose of the establishment: to ensure governmental control of this major institution for the inculcation of ideas, opinions, and values. The same spirit which led to the established church also led to the licensing of the press—another institution that influenced the ideas and opinions of the people. Even now, although pale shadows of what they used to be, the Church of England and the BBC are essentially embodiments of the same idea.

In the United States, we would not have a government-controlled press or church (unless one counts National Public Radio). The Framers of the Constitution even voted down the idea of a government-controlled national university. While we do not know with certainty why the founders voted down the national university, that decision is entirely congruent with their rejection of a government-controlled church and a government-controlled press. Government-controlled institutions for the dissemination and inculcation of ideas and opinions are contrary to this nation's disestablishmentarian heritage. In this country, ideas, opinions, and values would be shaped by institutions outside of government.

The Exception to Our Disestablishmentarian Tradition

Public education is the great exception. And public education was unknown to the Founding. No state had a comprehensive system of public education until the 1830s, when the first major public school system was instituted in Massachusetts. In one of those lovely coincidences of history, the public school system in Massachusetts was put into effect exactly as the established church in Massachusetts was brought to an end.[24] The public school system was not, however, the opposite of the established church; rather it was the continuation of the established church under a different guise. What does public education do? It gives government control over the training of children in opinions, values, and beliefs. Public education is not all about reading and writing. Reading, writing, and career preparation were low on Horace Mann's list of the purposes of education. Rather, for Mann, public education is about the formation of citizens. In the same vein, John Dewey later stated that public schools have "an ethical responsibility" to inculcate social values derived from scientific and democratic principles and to convert children away from the "superstitions of their families."[25] The Supreme Court has referred to the importance of public schools in "the preservation of the values in which our society rests"[26] and has indicated that one key

objective of public education is "to inculcate fundamental values necessary to the maintenance of a democratic system."[27] The true question of "establishment" is whether the government will have monopoly control over these institutions for the inculcation of values and opinions, as the government-established church had over religion, or whether families will have a choice, as they did when religion was disestablished.

The history of educational funding and choice in the early years of our Republic shows that there is not a scrap of evidence that anyone thought that educational choice, including the neutral funding of religious along with secular schools, violated the spirit or the legal substance of the Establishment Clause. But that is only half of the story. The common school system was a close cousin and successor to the established church. Both were instruments of government control over the formation of ideas and opinion. From this point of view, school choice is not a step toward establishment; it is an antidote to establishment—not necessarily of religion, but of governmentally controlled ideology. The founding generation rejected the licensing of the press and the established church because they did not want our government to be in control of the propagation of opinion, belief, and values. But the public schools are the great exception to our "disestablishmentarian tradition." The possibility of educational choice, allowing parents to choose for themselves the values, opinions, and principles that their children will be brought up in, is similar to allowing them to choose their own church. Instead of having one state-controlled church that everyone is required to support and attend, each individual family is able to choose for itself. Educational choice works the same way.

Anti-Catholicism and the de Facto Protestant Establishment

Why did the early Republic's pluralistic non-establishmentarian system of education become controversial? This is an important part of the secret history. The critical event was the immigration of Catholics to the United States in large numbers. The number of Catholics in the US increased from 30,000 at the time of the Revolution to 600,000 in 1830, and by 1850 it almost tripled to 1.5 million.[28] Yet all schools taught from the Bible in the Protestant King James Version, without commentary, which was anathema to Catholic doctrine. (An 1859 decision from a Massachusetts Court involved an 11-year-old Catholic boy who submitted to a vicious caning on the hands rather than read or recite from

the Protestant Bible.[29]) To escape this and other aspects of what they regarded as indoctrination, Roman Catholics asked to have their own school in New York. That request made government funding of religious educational institutions controversial for the first time. Roman Catholic schools would be "sectarian"! In response to Protestant outrage, the New York legislature prohibited funding to schools where "any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced."[30] That was the end of pluralism. The new policy did not interfere with Protestantism in the schools because interdenominational principles of Protestantism were not thought to be "sectarian." But it did lead to a system in which all publicly-supported schools came under the control of the state.

At the federal level, politicians sensed an opportunity to appeal to the Protestant majority. In 1875 President Ulysses Grant made a speech to the veterans of the Army of Tennessee where he contended that the divisions in the future are "not going to be based on Mason and Dixon's line"—the division between North and South—but "between patriotism and intelligence on the one side and superstition, ambition and ignorance on the other." Grant urged his listeners to resolve not to allow any public funds to "be appropriated to the support of any sectarian school."[31] It is important to understand what the word "sectarian" meant at the time. "Sectarian" meant the particular doctrines of a particular denomination, as opposed to a least-common-denominator form of Protestantism. The principal example of sectarianism was the Catholic Church.[32] "Superstition" and "ignorance" were code words in the Anti-Catholic lexicon.

Following Grant's suggestion, Republican legislators proposed a Constitutional amendment, called the Blaine Amendment, containing two features. The first feature was that no state financial support could be given to sectarian schools.[33] The other feature was to permit Bible reading without note or comment in the public schools.[34] The Amendment was thus intended to preserve the least-common-denominator form of Protestantism in schools, which Catholicism threatened. The legislative debates in Congress over the Blaine Amendment make clear that the perceived threat of Catholicism was at the heart of the issue. At a critical juncture in the debates, the leading Senate sponsors of the Blaine Amendment, Senator George Edmunds of Vermont and Senator Oliver Morton of Indiana, actually read at length from a recent papal encyclical, apparently thinking this would persuade their listeners that schools imparting this doctrine should not be supported by

the state.[35] Neither side of the debate advocated secular schools; such a proposal would have been opposed by Protestants and Catholics alike.[36] The real issue for the supporters of the Amendment was the "fear of an anti-democratic, autocratic Catholic Church which was seeking political power everywhere."[37] Of course, this focus on the perceived anti-republicanism of the Catholic Church was fueled by cruder forms of antipathy. Blaine himself was defeated for the presidency after a prominent supporter denounced the Democrats as the party of "Rum, Romanism, and Rebellion."[38] Although the Blaine Amendment was defeated, "little Blaine Amendments" passed in different states, and hostility to Catholic education became a powerful barrier to government aid to private schools in most states until after World War II.

When anti-Catholicism began to break down in some of the states of the Northeast, like New Jersey, legislatures began to extend funds on a non-discriminatory basis to assist students attending Catholic schools. Then, for the first time, organizations like Protestants and Other Americans United for Separation of Church and State, and Committee for Public Education and Religious Liberty, in cahoots with public school teachers unions, brought suits claiming that these new programs were an establishment of religion. The lawyers for these groups created a narrative comparing neutral support for education to the religious tax proposed by Patrick Henry in Virginia. The Supreme Court, unfamiliar with the history of educational funding in America, misled about the purposes of the Establishment Clause, and oblivious to the connection between these arguments and the Protestant hegemony over education, largely bought into this narrative. Had they known the real history, I like to think the Justices would have concluded that bills like the one in *Everson*, far from being an establishment of religion, were the first chinks in the disestablishment of religion in American education.

Justice Antonin Scalia and the Return to the Original Understanding

The Supreme Court's jurisprudence of public funding of non-public schools was heavily influenced by the false historical narrative just described. Unaware of the real history of educational choice in America, the Justices imagined that their approach of no-aid separationism was a faithful rendition of the founders' vision of church and state, when its actual provenance was closer the ugly history of nineteenth-century

anti-Catholicism.[39] No one was more instrumental in the Court's correction of these mistakes than Justice Antonin Scalia. Scalia based his interpretation of the Constitution on its text understood in light of its authentic original public meaning and supplemented by longstanding custom and practice. He had no patience for fake history.

The Supreme Court's attack on educational choice programs reached its height in its 1971 decision, *Lemon v. Kurtzman*.[40] According to *Lemon*, if public money went to religious schools, the state had to be "certain" that it was not used for communication of religious teachings—and, at the same time, the Court held that state efforts to enforce this requirement were an intrusive "entanglement" between church and state. That "Catch-22"—a pejorative used by the Court itself in later cases to describe *Lemon*'s two-pronged whammy of effects and entanglement[41]—precluded all but the most indirect forms of assistance (bus transportation, school lunches, and standardized tests).

Justice Scalia was a relentless critic of the "*Lemon* test." He lambasted the test as ahistorical, internally inconsistent, and one-sidedly secularistic. It needlessly created a clash between the two co-equal halves of the First Amendment Religion Clause. In recent decades, the Court has mostly ceased to employ the "*Lemon* test," but it has never formally overruled *Lemon*, and sometimes comes back to it. This inconsistency inspired one of Justice Scalia's most famous flights of rhetoric:

> I join the Court's conclusion [but not its invocation of the *Lemon* test]. Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart[,] and a sixth has joined an opinion doing so.…
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, see, e.g., *Aguilar v. Felton*; when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh*

> *v. Chambers*. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[42]

Only in the later years of Justice Scalia's service on the Court was this "ghoul" put out of its misery, at least long enough to lift the cloud of Establishment Clause challenge from programs that provide governmental assistance to education—even religious education—on the basis of neutral criteria and individual choice. The Court's new approach is to return to the principles of the founding, which are the lodestar of Justice Scalia's constitutional jurisprudence. As applied to school funding questions, the new approach removes arbitrary and benighted obstacles to the ability of educationally and economically disadvantaged families in our inner cities to seek out better schools than those provided by the government—and even, if they wish, to exercise the right wealthier families always have had to the free exercise of religion in these matters.

Notes

1. Aguilar v. Felton, 473 U.S. 402 (1985).
2. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
3. Everson v. Board of Education, 330 U.S. 1 (1947).
4. Patrick Henry, "A Bill Establishing a Provision for Teachers of the Christian Religion," in *Religion and the Constitution*, ed. Michael W. McConnell, John H. Garvey, and Thomas C. Berg (Frederick, MD: Wolters Kluwer Law & Business, 2011), 368 [hereafter cited as McConnell, *Religion Casebook*].
5. Thomas Jefferson, "A Bill for Establishing Religious Freedom," in McConnell, *Religion Casebook*, 56–57.
6. James Madison, "Memorial and Remonstrance Against Religious Assessments," in McConnell, *Religion Casebook*, 51–55.
7. *Everson*, 330 U.S. at 16.
8. Id. at 46 (Rutledge, J., dissenting). Also see McConnell, *Religion Casebook*, 374.
9. McConnell, Garvey, and Berg, McConnell, *Religion Casebook*, 379. Highlights the differences between the Virginia and New Jersey bills.
10. Michael W. McConnell, "Education Disestablishment: Why Democratic Values Are Ill-Served By Democratic Control of Schooling," in *Moral and Political Education*, ed. Stephen Macedo and Yael Tamir, (New York:

New York University Press, 2002), 87, 95 [hereafter cited as McConnell, *Education Disestablishment*].

11. Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Co., 1996), 30–31.
12. See Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780–1860* (New York: Hill and Wang, 1983), 57, 166–167. Lloyd P. Jorgenson, *The State and the Non-Public School* (Columbia: University of Missouri Press, 1987), 1–19. Diane Ravitch, *The Great School Wars, New York City 1805–1973: A History of the Public Schools as Battlefield of Social Change* (New York: Basic Books, 1974), 6–7.
13. Richard J. Gabel, *Public Funds for Church and Private Schools* (Washington, DC: The Catholic University of America Press, 1937), 147–170.
14. Michael W. McConnell, "The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic," *Tulsa Law Review* 37 (2001): 36, citing *New Advent Catholic Encyclopedia Online*, s.v. "New Orleans", http://www.newadvent.org/cathen/11005b.htm.
15. *New Advent Catholic Encyclopedia Online*, s.v. "New Orleans," at 10.
16. Bradfield v. Roberts, 175 U.S. 291 (1899).
17. Id. at 298.
18. Freedmen's Bureau Act of July 16, 1866, Chap. 200, § 13, 14 Stat. 173, 176 (1866).
19. Ronald E. Butchart, *Northern Schools, Southern Blacks, and Reconstruction: Freedmen's Education, 1862–1875* (Ann Arbor: University of Michigan Press, 1980), 4–9, 33–52; Ward McAfee, *Religion, Race, and Reconstruction: The Public Schools in the Politics of the 1870s* (Albany: SUNY Press, 1998).
20. Niccolo Machiavelli, *The Discourses*, trans., Bernard R. Crick and Leslie J. Walker (London: Penguin, 1970) 139, 143, cited in Michael W. McConnell, "Establishment and Disestablishment at the Founding," *William & Mary Law Review,* 44 (2003): 2182 [hereafter cited as McConnell, *Establishment and Disestablishment*].
21. Thomas Hobbes, *Leviathan* (Menston, United Kingdom: Scolar Press, 1969), 305–365, quoted in McConnell, *Establishment and Disestablishment*, 2182–2183.
22. Jean-Jacques Rousseau, *The Social Contract*, trans., Maurice Cranston, (London: Penguin, 1968), 179–181. cited in Michael W. McConnell, "Why Is Religious Liberty the "First Freedom?", *Cardozo Law Review* 21, no. 4, (2000): 1249.
23. F.L. Cross and E.A. Livingstone, eds., *The Oxford Dictionary of the Christian Church, 3rd ed.,* (Oxford: Oxford University Press, 1997).

24. The public education system in Massachusetts "was established in the same year (1834) that the old system of religious taxes was abolished." See McConnell, *Religion Casebook*, 386.
25. John Dewey, *Moral Principles in Education* (Boston: Houghton Mifflin Company, 1909), 7–10.
26. Ambach v. Norwick, 441 U.S. 68 (1979) at 76.
27. Bethel School District. v. Fraser, 478 U.S. 675 (1986) at 681–83.
28. John C. Jeffries, Jr. and James E. Ryan, "A Political History of the Establishment Clause," *Michigan Law Review* 100 (2001): 299.
29. Commonwealth v. Cooke, *American Law Register* 7 (1859): 417 (Police Court of Massachusetts, 1859).
30. *Commonwealth* at 301.
31. Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* (New York: Harper & Row, 1964) 272.
32. See Jeffries and Ryan, "A Political History of the Establishment Clause," 279. McConnell, *Religion Casebook*, 385.
33. McConnell, *Religion Casebook*, 389.
34. See generally Steven K. Green, "The Blaine Amendment Reconsidered," *American Journal of Legal History*, 36 (1992): 38.
35. 4 Cong. Rec. 5587–88, 5591 (1876).
36. Id.
37. Marc D. Stern, "Blaine Amendments, Anti-Catholicism, and Anti-Catholic Dogma," *First Amendment Law Review* 2 (2003): 153, 176.
38. Mark Wahlgren Summers, *Rum, Romanism, and Rebellion: The Making of a President, 1884* (Chapel Hill: University of North Carolina Press, 2000).
39. Thomas C. Berg, "Anti-Catholicism and Modern Church-State Relations," *Loyola University of Chicago Law Journal*, 33 (2001): 121.
40. Lemon v. Kurtzman, 403 U.S. 602 (1971).
41. Bowen v. Kendrick, 487 U.S. 589 (1988) at 615.
42. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

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PART II

Scalia, the Educator

CHAPTER 6

Beyond Original Meaning: The Task of Interpretation

Mark Blitz

Abstract I discuss Scalia and education under three rubrics: first, what his opinions in cases relevant to education tell us about his views of democratic self-government, educational choice, and religion; second, what his opinions in these cases teach us about his view of constitutional interpretation; and third, what his understanding of constitutional interpretation teaches us about the task of interpretation itself. My overall point is that Scalia's education opinions are consistent with his "originalism," and that originalism is a sensible but ultimately limited mode of constitutional interpretation.

Keywords Antonin Scalia · Constitutional interpretation
Self-government · Educational choice · Originalism

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Education and Democracy

On the whole, Scalia's opinions in cases that are relevant to education make clear that he wishes to allow a wide sphere of self-government and substantial federalism, with constitutional limits to the people's actions visible and settled.

"The virtue of a democratic system with a First Amendment," he writes in *U.S. v. Virginia*, "is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution… [that] our ancestors…left us free to change." He goes on to say that "the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees…[W]hatever abstract tests we may choose to devise, they cannot supersede–and indeed ought to be crafted so as to reflect–those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[1] "A state is in compliance with *Brown I*," he writes in *U.S. v. Fordice*, "once it establishes that it has dismantled all discriminatory barriers to its public universities. Having done that, a State is free to govern its public institutions of higher learning as it will, unless it is convicted of discriminating anew—which requires both discriminatory intent and discriminatory causation."[2]

Education and Choice

It is also clear that Scalia defends and perhaps prefers educational breadth, or choice. "The censorship of creation science," Scalia writes in *Edwards v Aguillard*, "deprives students of knowledge of one of the two scientific explanations for the origin of life, and leads them to believe that evolution is proven fact."[3] "And where the goal is diversity in a free market for services," he writes in *U.S. v. Virginia*, "that tends to be achieved even by autonomous actors who act out of entirely selfish interests and make no effort to cooperate. Each Virginia institution… has a natural incentive to make itself distinctive in order to attract a particular segment of student applicants."[4] As he writes in *U.S. v. Fordice*, "if no [state]

authority exists to deny [the student] the right to attend the institution of his choice, he is done a severe disservice by remedies which, in seeking to maximize integration, minimize diversity and vitiate his choices. There is nothing unconstitutional about…a school that, as a consequence of private choice in residence or in school selection, contains, and has long contained, a large black majority."[5]

Educational breadth or choice, moreover, also involves academic freedom, and what this means is not, or not only, academics' freedom to write or say more or less what they please, but students' freedom to hear both sides. As he writes in *Edwards*, "the Louisiana Legislature explicitly set forth its secular purpose ("protecting academic freedom") in the very text of the Act…academic freedom meant: students' freedom from indoctrination." "The people of Louisiana," he goes on to say, "are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it."[6]

Further, all-male military academies are appropriate given the historical practice and common sense that justifies them and the availability of choice in schooling. As he writes in *Freeman v. Pitts*, "an observer unfamiliar with the history surrounding this issue might suggest that we avoid the problem by requiring only that the school authorities establish a regime in which parents are free to disregard neighborhood school assignment, and to send their children (with transportation paid) to whichever school they choose. So long as there is free choice, he would say, there is no reason to require that the schools be made identical. The constitutional right is equal racial access to schools, not access to racially equal schools; whatever racial imbalances such a free choice system might produce would be the product of private forces."[7] Scholarships (which are an element of choice), he argues in *Locke v Davey*, should not discriminate among students on arbitrary grounds.[8]

Education and Religion

Scalia's interpretations of the establishment and free exercise clauses, as relevant to education, have the effect of aiding or, at least, of not constricting, religious activity. "Justice Souter's steamrolling of the difference between civil authority held by a church, and civil authority held by *members* of a church," he writes in *Kiryas Joel*, "is breathtaking. To accept it, one must believe that large portions of the civil authority

exercised during most of our history were unconstitutional…The history of the populating of North America is in no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities."[9] "When the State withholds ["a public benefit generally available"] from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."[10] "The establishment clause" does not prohibit[s] formally established 'state' churches and nothing more," he writes in *Kiryas Joel*. "I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion [including 'secular humanism'] over others."[11]

Interpreting Law and the Constitution in the Education Cases

It is well known that Scalia professes attachment to the *original* meaning of the text of a law, or of the Constitution, as the guide to interpreting its meaning. We can distinguish this view from being guided by current rather than original meaning; from being guided by the expressed or unexpressed intent of the original lawmakers (or even of current lawmakers); or from being guided by what the law plausibly might or should be. Original intent, together with [some] attachment to precedent and to common and continued practice in considering the law's proper scope, is, for Scalia, the proper guide to judicial decisions.

We discover original meaning, on Scalia's view, by considering common usage at the time of enactment, supplemented by mechanisms to discover and employ context and purpose when necessary, and by several other devices one can use to limit ambiguity.[12] This focus obviously differs from interpretation based on current public meaning, dominant law school meaning, private judicial meaning (if in Kennedy-world each of us is allowed our own conception of existence and meaning, why not be allowed such paltry baubles as one's own interpretations?), good outcomes, bad outcomes, and the like.[13] It less obviously differs from original lawmakers' intent and from mechanisms such as legislative history, and letters and speeches one uses to uncover original intent. The difficulty with intent, however, is that laws have scores or hundreds of parents—they have no single or singly discernable intention of the sort we might ascribe to Plato when he writes his *Laws*. Legislative "history"

can be and often is produced after the fact (in Kennedy-world why should time travel not be possible?), and involves only the few who participate in making or agreeing to it. Original intent, moreover, also requires that we understand original meaning, for otherwise it would be incomprehensible.

I will discuss the considerable strengths and occasional weaknesses of this view in due course. But I will first consider whether Scalia's opinions in the education cases we are exploring follow from or, at least, do not counter, his professed attachment to original meaning.

Much of what he does and claims is indeed quite consistent with his professed attachment to this view, leaving aside the question of whether he employs his practice properly. "This Court," he tells us in *Zuni*, "charged with interpreting, among other things, the Internal Revenue Code, the Employee Retirement Income Security Act of 1974, and the Clean Air Act, confronts technical language all the time, but we never see fit to pronounce upon what we think Congress meant a statute to say, and what we think sound policy would counsel it to say, before considering what it does say."[14] "When a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."[15] "The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment."[16] While "it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here)," he tells us in *Edwards*, "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."[17]

Some of what Scalia concludes in these cases, however, does not stem directly from the original meaning of the Constitution, but from a view of law and democracy. His view of democracy, or of self-government, can perhaps be constructed from the original meaning of the powers that the Constitution gives its branches, and apparently reserves to the states, and to the interplay among them. It is less clear, however, that Scalia's view of law, however sensible, is something other than his (and others') view of how law should function, or function in a liberal

democracy, but without any explicit Constitutional statement about the meaning of law on which the view rests. "The cardinal principle of statutory construction," he tells us in *Edwards*, "is to save, and not to destroy. We have repeatedly held that, as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."[18] "Our task," he writes in *U.S. v. Virginia*, "is to clarify the law–not to muddy the waters, and not to exact over compliance by intimidation. The States and the Federal Government are entitled to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek a boo." "The Supreme Court of the United States," he goes on to say, "does not sit to announce 'unique' dispositions. Its principal function is to establish *precedent*–that is, to set forth principles of law that every court in America must follow."[19]

We cannot defend these views, however worthy, by locating them in the Constitution's original meaning. We must therefore consider more completely the strengths and limits of Scalia's practice of trying to uncover original meaning, and then following it. Because Scalia's defense of original meaning is (at present) his chief legacy to legal education, moreover, we should discuss it in any exploration of Scalia and education. To do so we begin by turning to the general question of interpretation.

Do Principles of Interpretation Matter?

We have seen that Scalia seeks to limit the dominance of judges' personal views, or the views of one generation of elites, in determining what the Constitution requires. Scalia believes his understanding of interpretation would control or end this dominance, were it followed: certain notions of interpretation permit judges to legislate their own views while claiming that they are merely interpreting what the Constitution requires. In my judgment, however, justices' views of interpretation do not by and large cause their opinions or the license they take: they follow from this license more than they determine it. Because so many now believe that judges' opinions in constitutional cases are merely long-winded justifications for views reached on other grounds, moreover, they believe this to be true of Scalia too: although his principles of interpretation would apparently require fealty to something other than his own judgments,

they in fact almost always permit him to reach the result he otherwise desires. (The exceptions—criminal cases—are limited, and are not clearly exceptions in any event.) I believe it is unfair to say that Scalia's can stretch his principles to cover whatever he chooses. It is nonetheless correct that the Constitution's original meaning, on which Scalia's views purportedly rest (as well as, in my judgment, the Founders' original intention), is more favorable to sound government than are later views. To bow more frequently to original rigor might at least begin to alter the liberal vices of which interpretive license is only one symptom or result.

Can There Be a Final Meaning?

One might claim that it is impossible to reign in interpretation because of the nature of interpretation itself, and not only because judges seek to institute their preferences. It is not only that those who impress their views will always find some excuse for their license, interpretive or otherwise. Rather, even a good faith effort to find interpretive principles or even guidelines will always fail, for interpretation is always fluid and never fixed. Scalia's counter to this view is an opportunity to reflect on interpretation.

The openness of interpretation arises from the fact that meaning seems to have no simple endpoint, or no endpoint at all. Interpretation is about the meaning or intelligibility of words and things, and, therefore, about the existence or absence of ultimate intelligibles, and our ability to see them. One way to see this intellectually is to reflect on Plato's procedure in many dialogues. A statement of opinion about what courage is opens to the issues of the justice of war, endurance, risk, and oaths before the gods. Opinions about justice open to the variety of regimes that try to embody justice, and to the question of the good as such that causes or is connected to the many good things that different regimes distribute differently. Anything less than an understanding that is based on what is finally intelligible about justice, what is good, virtue, forms of government, and the like is a haze of more or less foggy opinion, and an attempt to do more than rest on some half-grasped view becomes a search that does not cease: if one does not know everything, one does not know anything. Just to say what a painted bed or couch is, to take another example, leads to the problem of the 'idea' of the couch, the use of things, the gods, and the relative status of philosophy and poetry.[20] Each of these steps arises (in Plato and generally) from questioning

interlocutors' statements and what they are assuming. Ultimately, one cannot say what a courageous action or just law is without taking for granted what courage or justice is, and one can bring into question each step in the process by which one tries to clarify what one presumes. There is an extremism or madness of a sort in theoretical reflection that is at odds with the sobriety of good practice. But, this extremism seems to be in accord with the nature of things.

The problem of interpretive openness is even more obvious, if less reasonably indicated than through Plato, in the issues raised over the past century or more that stem from Heidegger and those such as Derrida whom he influences. These issues reach back at least to Dilthey and Nietzsche. It is because of such thought that one discusses the so-called hermeneutic circle or, if one likes, the interpretive noose.[21]

In this view, interpretation is thought always to be arbitrary not because final intelligibles are difficult to discover, or to deal with practically, but because there are no such things. Any interpretation begins from terms whose meaning depends on a context that we can never fully clarify. We begin from and can never escape the interpretation of possibilities—law, philosophy, the arts, etc.—of our time, our place, our preferences, our privilege and power, or some combination of these. (A mild version of this openness today is journalists' and others' pervasive babbling about "narratives," as if things have meaning only in terms of a narrative that we can change or ignore at will, if we are loud or powerful enough.) This openness is true not just of practical activities, moreover, but of art, science, and philosophy. At the least, these activities make presumptions that in the end cut them off from the others, and choosing any one is arbitrary. Moreover, in any activity one takes for granted the meaning of time, space, and function that is implicated in the mode of activity one engages in: making and using tools, understanding matters theoretically or artistically, and so on. So, in one way or another one can never escape the world into which one is thrown, the possibilities that one inherits, or the meaning and direction of the kind of activities in which one engages. Meaning is always fluid because it rests ultimately on the arbitrary, accidental, or imposed.

These views of interpretive openness can and do lead to practical difficulties, and not only of the contemporary Kennedy and Douglas judicial variety.[22] One might also consider, for example, remarks Socrates makes in Plato's dialogues that could lead one to believe that everything wrong is done involuntarily and, therefore, that punishment is unjust.[23]

Moreover, the half-truth or more of views of interpretive openness leads to a half bad-conscience or more in simply denying them, or in pretending that a true interpretation is unwavering and not too difficult to uncover.

The Common Sense Reply to This Excess

We can contrast these views with common sense. To ask endlessly about the meaning of food would be to starve. To defend the permanent truth or necessary unavoidability of the hermeneutic circle would be to contradict oneself. One might suggest that action and understanding involves drawing a narrow circle or placing a barrier around the practice in which one engages, even if that circle is to a degree genuinely open or permeable. This drawing is usually implicit but may sometimes need to become explicit.[24] The reason one wants to sit, for example, puts a practical end, most of the time, to the issue of what a chair is, or even a good chair. In interpreting a request to buy a cowboy hat, the varieties of hats, coverings, stores, and types of religious reverence are rarely relevant, and easy enough to deal with if an element in this variety does become relevant. In a criminal context we can narrow the thorny philosophical question of free will to the usual expectations that we have of voluntary and responsible behavior. We are judging within a realm of specific actions, and it is in this context that we discuss why choice seems more difficult or less voluntary for some, rather than claiming that scientific determinism makes choice impossible for all, yet still asking me, as judge or jury, to change my own mind and be lenient with others. Why one might raise the question of voluntary action practically, and, therefore, what it means in a practical context, given a practical purpose, is central.[25]

Common Sense and Law

There are two virtues, from this standpoint, of Scalia's view of constitutional interpretation. First, it puts the question of interpretation within the rubric of ordinary law, where the need for (and possibility of) common sense closure of conceivably endless interpretive openness is manifest. When you are punished for running a red light, "red" does not mean what legislators, some of whom may be color blind and never see red precisely, others of whom may be decorators for whom there are a thousand reds, and still others vampires, for whom only one red matters,

mean by red. It is what the usual driver to whom the law is addressed means. Ignoring a stop sign does not raise the surprisingly deep question of the many types of ends or conclusions that "stop" signs might suggest.[26] In order to understand and obey this injunction, and surely to issue it intelligently, one might need to grasp explicitly the place of stop signs and red lights within the system of traffic. But this context or system is usually implicit, and legislators' action is within this implicitness—that is, the meaning of the stop sign in relation to traffic and its flow tells you what the injunction to stop means here and why you might institute it.[27] This reason may or may not be stated by lawmakers but even a statement of purpose cannot itself give the full purpose, because this involves the rest of the context or system.

Much leeway as even this example apparently leaves in principle (how close to unmoving does "stop" mean?) it leaves little in fact because what stopping an automobile and reading the sign are is clear in most instances. Even the exceptions (say, rolling in emergencies or being blinded by the sun) are meaningful in terms of stopping when you see the sign. The range of the meaning is controlled by the activity to which it belongs, including its purpose, which does not exist (only) in legislative heads, or in any head. This comprehension of context, of purpose, activity, connections, and order also largely tells us what we need to know about where we should place the stop sign in new situations, and how to obey it if it is electrical, digital, and so on. Stopping and red do not change although the mechanism that tells me when to stop might change.[28]

The point, then, is that the understanding of injunctions can be limited or closed off by what the injunctions mean—what the words and phenomena mean—as addressed to the enjoined audience, and to the lawmakers as part of this. Whatever one says about the inadequacy of this view, it is the most sensible and indeed necessary starting point. What it is to stop at a red light, moreover, is not in principle different from other injunctions. The combined factors involved in an injunction reinforce each other, and the factors are co-interpreted, through the situation at issue.

What all this suggests is that the purpose, context, and audience for a law are central in setting the boundaries around interpreting its meaning—its common sense purpose, context, and audience. The context of trust or reliable expectation forms the order in which things happen, and the goal or purpose as commonly understood in this activity, rather than

legislators' intentions apart from this, is what gives meaning and allows judgment.

Original Meaning: Its Good Sense and Its Limits

This discussion suggests that original meaning makes sense as a guide to interpretation. How could one obey law if it is subject to hazy, multiple, intentions and meanings? One obeys laws, after all, not legislative records. So, it seems to me prudent for Scalia to take the direction that he has, and his arguments have forced all but the most unbound to contain their interpretive exuberance. One can deal with interpretive difficulties that might still remain, moreover, by considering the long list of basic grammatical, logical, and other interpretive rules that he and Garner discuss in *Reading Law*.

This approach has limits, however, and they are perhaps most obvious or difficult in constitutional interpretation. For one, Scalia, and perhaps any interpreter of law must rely on some view of the purpose, desirability, and characteristics of law, or law in American liberal democracy. Regularity, predictability, and equality before the law are fundamental to our justice. But, it is unclear to what degree these elements, and especially the first two, are found or described in the Constitution as such. This unclarity also seems to me to be true of the scope of the judicial activity itself.

Similarly, law should properly be obeyed only if it is made by the proper authority. But, if one considers the various original assignments of authority to and within the federal government, and the limits to federal lawmaking that the constitution seems to suggest, it is unclear how far original meaning takes one today in assigning authority properly. For, precedent—as, for example in treating the Bill of Rights as limiting the states, as vastly expanding the plausibly understood original scope of government, and as discovering a right of privacy—often seems much more decisive today in guiding us. We might, for our purposes, think of concrete precedents as congealed meanings, if we wish to rely on meaning and not on some vague but not constitutionally discussed notion of following precedent. Original meaning, however, cannot as such be much of a guide to determining when congealed meaning should be overturned, although it may help in setting its direction and limiting its spread. Moreover, the Constitution's breadth sometimes makes it difficult to say what practices exemplify its prohibitions (or even its

commands)—say, what constitutes a "search,"—although the problem posed in this regard by new *mechanisms*, say, new listening devices seems to me to be overstated. Moreover, I believe that Scalia is correct to think that a practice considered constitutional when constitutional provisions were enacted, or for years thereafter, cannot be constitutionally prohibited under original meaning, although it can of course be dealt with legislatively.

There are also cases where constitutional ambiguity, or clashes among the Constitution's provisions when applied, limits the utility of original meaning. I say limits and not dissolves because one still relies to begin with on the original meaning of each of the conflicting provisions, and one should not be certain in advance that what seems ambiguous is insoluble. To take an example from the education cases, the injunctions against establishing religion and restricting its free exercise seem sometimes to clash. Yet, it may well be that these clashes are quite few once one understands unconstitutional establishment in the way Scalia does, as favoring one religion over another.

Beyond Original Meaning? Original Meaning as Originally Understandable

How should we decide once we see that original meaning is insufficient—when, to use my examples, congealed precedent or "tradition" might properly be loosened, when original meaning might not help us understand how to interpret a law's possible new scope, when we need to consider what a system of liberal democratic "laws" justly requires, and when we must consider the limits of judicial action itself?[29] Generally, we can understand a failure or ambiguity in the way that original meaning can give practical guidance as potentially resolvable by moving to the next broader or wider level of interpretation, as one moves from law to the Constitution seen as basic law. I suggested that one closes off the endlessness of interpretation by drawing a circle around the practice in which one is engaged. This limit makes, say, a particular law meaningful as something one could follow or consider enacting in the first place. Precisely because of interpretation's seeming endlessness, this drawing is imperfect, but it can be sufficient. One can therefore go to the next level or wider circle when there are important ambiguities within the circle's own terms. For constitutional matters,

this next level means clarifying the thinking behind the Constitution, as we can understand it coherently: hence the importance of the *Federalist* and Montesquieu and, more basically, the *Declaration of Independence*, and, beyond this, the understanding of rights on which it relies. It is reasonable to suggest that these backward glances should not override the actual meaning of the Constitution when we can discover it. Scalia is too cavalier about the *Declaration* (and, to a lesser degree the *Federalist*), however, from the standpoint of interpretation where original constitutional meaning falls short, and, also, from the standpoint of constitutional education, where one attempts to clarify why the Constitution is desirable, and how it informs the liberal democratic way of life. Concerns that glancing behind original constitutional meaning opens the door to interpretive license are real, but they are misplaced, today, when the door already has been opened by other means. Original constitutional meaning needs to be supplemented by an intelligent understanding of the central documents that explain the public direction of the way of life that the Constitution is meant to serve, and I have mentioned several general areas where this is necessary. This education is not only central for judges once law and the Constitution give them insufficient guidance, of course, but for legislators and citizens too. I will close by saying that this education is also necessary to deal properly with the difficulties connected to the Constitution and its permission, and then end, of slavery.

Notes

1. United States v. Virginia, 518 U.S. 515 (1996).
2. United States v. Fordice, 505 U.S. 717 (1992).
3. Edwards v. Aguillard, 482 U.S. 578 (1987).
4. *United States*, 518 U.S.
5. *United States*, 505 U.S.
6. *Edwards*, 482 U.S.
7. *Freeman v. Pitts*, 503 U.S. 467 (1992).
8. *Locke v. Davey*, 540 U.S. 712 (2004).
9. Board of Education or Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994), emphasis added.
10. *Locke*, 540 U.S.
11. *Kiryas Joel Village School District*, 512 U.S.
12. Consider Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, MN: Thomson West, 2012).

See also Antonin Scalia, *A Matter of Interpretation*, ed. Amy Guttman, with commentary by Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin (Princeton: Princeton University Press, 1997).

13. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
14. Zuni Public School Dist. No. 89 v. Department of Education, 550 U.S. 81 (2007).
15. *United States*, 518 U.S.
16. *Id.*, quoting from his dissent in Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).
17. Edwards v. Aguillard, 482 U.S. 578 (1987).
18. *Edwards*, 482 U.S.
19. *United States*, 518 U.S.
20. See Plato's *Republic* X.
21. See Dworkin's remark in *A Matter of Interpretation*, 115.
22. *Planned Parenthood*, 505 U.S.; Griswold v. Connecticut 381 U.S. 479 (1965).
23. This does not mean that attempts to improve those who act unjustly are unwarranted, however, because the reason they involuntarily act unjustly or evilly is that they do not know what is just or good. Indeed, attempts to improve the miscreants might strike them as punishments.
24. Consider Mark Blitz, *Conserving Liberty* (Stanford: Hoover Institution Press, 2011), 102–111, and Mark Blitz, "The Common Sense of Practical Knowledge," *Journal of Law and Economic Policy* 4, no. 1 (fall 2007): 177–189.
25. Consider Aristotle's *Ethics* in relation to the possibility of practical choice as differentiated from (unbridled) intellectual inquiry.
26. Consider Martin Heidegger's discussion of this issue in *Being and Time*.
27. We might differentiate the stop enjoined by a stop sign from a 'stop' as an endpoint of full completion, as when you may stop grilling a steak, which could suggest that you allow your Ferrari to reach its 'end' by going as fast as it can, and barrel through mere stop signs.
28. Do the greater complications of technical and administrative law change matters? It may be that in technical matters imprecision in legislation is especially confusing. But courts should then treat matters as they are meant and let the legislature clean things up.
29. Moreover, interpretation based on original meaning cannot itself be directly constitutionally defended or condemned.

Author Biography

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CHAPTER 7

Trust Me, I'm an Expert: Scientific and Legal Expertise in Scalia's Jurisprudence

Amy L. Wax

[T]he English or American man of the law in a way resembles the priests of Egypt; like them, he is the sole interpreter of an occult science… [Such men] are masters of a necessary science, the knowledge of which is not widespread.
Alexis de Tocqueville, *Democracy in America*.
……

Abstract An enduring theme of conservative thought is mistrust towards claims of special expertise, grounded in technical knowledge and methods, as applied to policy, politics, and the organization of human affairs. Justice Scalia's judicial opinions on education as well as in other areas reflect this stance, especially as applied to behavioral sciences and the law itself. Like science, the law is entrusted to an elite cadre of experts armed with specialized knowledge and training. Those experts purport to rely on determinate, neutral, objective principles in making decisions affecting society as a whole. Scalia is wary of this depiction of the law and its potential misuse, especially for questions of governance and social regulation. For Scalia, the exercise of legal and

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scientific expertise masks partisan preferences. Claims of specialized knowledge, both legal and scientific, enable a small, unrepresentative elite of government officials and judges to impose a progressive cultural and policy agenda on the nation as a whole. Too often these operate in derogation of democratically enacted rules and the traditional understandings and practices favored by ordinary people.

Keywords Antonin Scalia · Expertise · School desegregation · Science education · Social order · Administrative state

William F. Buckley once famously said that he would rather entrust the government of the United States to the first 400 people listed in the Boston telephone directory than to the faculty of Harvard University. In that statement, Buckley sounded a theme that has been an enduring feature of generations of conservative thought: a cautious wariness toward claims of special expertise, grounded in technical knowledge and methods, as applied to policy, politics, and the organization of human affairs. It is telling that this mistrust of specialized expertise in the understanding of society's workings has not itself been developed into a full-blown, systematized theory. As the twentieth century conservative commentator James Burnham has noted, conservativism (unlike, for example, left-leaning progressivism) does not comprise a comprehensive ideology but rather a set of attitudes and contextual predispositions.[1] That predisposition often takes the form of explaining why scientific or technical knowledge is being misapplied or invoked beyond its proper realm, and why it fails to illuminate matters related to social regulation, policy or politics.

As a conservative jurist, Justice Scalia shares this tendency to view claims of expertise skeptically. The statements revealing his distrust, which are scattered throughout his decisions on education and other matters, evinces an attitude rather than a well-developed philosophy. But his pronouncements are not less useful or revealing for that. Although Scalia does have something to say about the misuse of science, and most especially the human or social sciences, in shaping social policy, he is mainly preoccupied with a specialized body of knowledge he knows best, which is the law. Like science, legal materials and methods of analysis are believed to be the purview of initiated specialists, with knowledge and training superior to that of ordinary persons. Like

science, the law aspires to represent a determinate, impartial, objective, neutral, apolitical set of principles, independent of ideology and interest, for deciding questions of governance and social regulation. Like many with conservative leanings, Scalia regards claims of legal neutrality, like the claims of objectivity made for social science, as often overdrawn. Both law and science, and especially the so-called social sciences as applied to human affairs, can be used to mask partisan judgments and obscure political motives, and to lend these unwarranted "objective" authority. Moreover, the acquisition of legal knowledge, like the mastery of science, is largely the purview of the educated classes, led, in the present climate, by a tightly knit elite of influential graduates from prestigious institutions who share a common outlook, tastes, and political beliefs and attitudes about the proper conduct of society. The ever-present danger is that these elites will use their claims of special expertise and superior knowledge to impose their favored vision of society on the rest of us.

Moreover, as both conservative theorists and Justice Scalia have recognized, the vision that increasingly dominates among legal elites, as well as governing elites generally, tends to be a left-leaning progressivism. This outlook, which is committed to an optimistic vision of limitless human possibility, favors the growth of centralized government power. It sees social practices as amenable to improvement through rational methods and manipulations, with no inherent limitations. Progressive experts, including activist lawyers, are particularly concerned with achieving uplift and opportunity for all, equality and fairness along the lines of race, gender, and group identity, the banishment of invidious discrimination and distinctions, and, more broadly, the redistribution of material privileges and resources regardless of contribution or effort.

Arenas, pertinent here, in which scientifically directed, meliorist social reforms have gained ground are education and human capital development generally. Notions about how people's capacities and abilities are best fostered, backed up by an array of social-scientific findings on such phenomena as stereotype threat, "grit," the psychology of success, pedagogical methods, school organization, and disciplinary practices, have shaped educational policy for decades. Attempts to improve education for the disadvantaged and to close achievement gaps by race and class have become an intense preoccupation, with approaches such as income integration and high intensity "no excuses" charter schools drawing strength

from social-scientific evidence concerning their efficacy. Another growth area is the application of neuroscience to various areas of social practice, including policies for aiding the disadvantaged and for addressing community violence and criminality. The Institute of Medicine, for instance, issued a comprehensive report in 2000 that purports to apply neuroscience to the crafting of policies aimed at improving the well-being, behavior, and cognitive performance of poor children.[2] Most recently, in 2016, the American Academy of Pediatrics devoted an issue of their journal to discussing how neuroscientific studies can inform pediatric practice and government policy designed to foster healthy development and child well-being.[3] The premise of these materials, and the studies reported in them, is that growing up under deprived circumstances compromises the structure and the functioning of the brain. This understanding, it is claimed, can be used to devise methods for preventing or correcting observed deficits. Likewise, neuroscience insights have been brought to bear on efforts to prevent gun violence. The Harvard Center for Law, Brain, and Behavior has sponsored research on how neuroscience can "support public policy to prevent community violence" by showing, for example, how to deflect violent encounters and promote non-violent dispute resolution.[4]

Although favored by political progressives, these initiatives have not been met with unalloyed enthusiasm. Skepticism about the power of scientific insights to inform and effect social improvements has long been a staple of conservative thought. Thinkers like Friedrich Hayek, Alasdair MacIntyre, Michael Oakeshott, Richard Weaver, James Burnham, Robert Scott, and James Bowman, among others, have addressed the place of rationalized systems of knowledge, and especially the so-called "human sciences," in politics and social organization generally, and the attitudes of experts who invoke these systematized bodies of knowledge. These theorists tend to express concern about the way in which scientifically trained experts tend to denigrate traditional, decentralized, ad hoc, on-the-ground approaches to social life. Such experts regard custom, settled practices, traditional folkways, and the prejudices and preferences of ordinary people as outmoded features of social life that stand in the way of realizing progressive goals.

In the same vein, these conservative writers are wary of the modern rise of centralized, managerial, top-down, government-sponsored bureaucracies, and the growing dominance of the progressive, bureaucratic class of knowledge elites, who are charged with manipulating,

recasting, and "improving" virtually every aspect of social life. They recognize that the authority of these elites, and their power to advance a progressive vision of society in derogation of settled practices and common understandings, depends on their claimed status as experts armed with special knowledge not accessible to ordinary people.

In understanding the stance of conservative skeptics toward claims of expertise and scientific validation, it is important to realize that their stance is grounded in concerns about the misuse and abuse of scientific knowledge rather than any categorical antipathy toward the development and selective application of reason in politics and human affairs. It is thus a mistake to regard conservatives as reflexively hostile to scientific inquiry, or of failing to appreciate the need for specialized knowledge in a well-functioning society. Rather, they insist upon confining technical insights to their proper sphere, and on preserving a place for intuitive, informal, experience-based, and traditional sources of wisdom and understanding. They are skeptical of bringing rigid methods and abstract thinking to bear on matters of human behavior and human relations, and decry the dismissive attitudes and technocratic trends that often accompany this exercise.

Conservatives are especially chary of efforts to denigrate conventional, age-old, and time-tested insights about how behavior is best influenced and improved. Encouraging virtue, building good habits, fostering a moral sense, and promoting the development of natural talents and abilities—what used to be termed "character formation"—have long been accomplished through the accumulated folk wisdom of families, communities, and religious and civic organizations. According to this conventional approach, creating exemplary people does not require a technocratic set of interventions shaped, informed, and "improved" by social-scientific knowledge. Nor is it a project accomplished by centralized managers and bureaucrats engaged in crafting broad, top-down social policies. Rather it is a task that is best performed, and indeed one that can only be effectively performed, through the decentralized offices of parents, mentors, teachers, and small-bore community institutions acting on age-old precepts and following time-tested practices, to which social science has little or nothing to add.

For instance, in his essay *The Uses of Knowledge*, Friedrich Hayek[5] warns of the modern dangers posed by managerial experts exerting authority through distant administrative centers of power. He expresses reservations about those experts' undue focus on forms of knowledge

that are regarded as "scientific" as opposed to practical and experiential, and denies that "human problems will be solved by … a central board which, after integrating all knowledge, issues its orders."[6] He opines that bureaucratic managers will generally have insufficient information to direct social life effectively, especially from their perches remote from day-to-day realities. Because "a valuable … asset in all walks of life is knowledge of people, of local conditions, and special circumstances," many social dilemmas are best handled "by some form of decentralization."[7] The inadequacy of remote mechanisms that ignore the nuances of practical knowledge "applies to most of our cultural inheritance" and indeed is the "central theoretical problem of all social science."[8]

In the same vein Alasdair MacIntyre, in *After Virtue*, is critical of the pretensions and authority of the burgeoning managerial class and of its claims to manage and govern based on superior insights into human nature and behavior. As McIntyre notes that "[t]he major justification advanced for the intervention of government in society is the contention that government has resources of competence which most citizens do not possess."[9] Thus "authority, power and money" flow from "invoking … competence as scientific managers of social change,"[10] with special, superior expertise to shape social life.

It is just such expertise that MacIntyre rejects. Although recognizing the appropriate role of "genuine experts in many areas," he asserts that it is "specifically and only managerial and bureaucratic expertise that I am going to put in question."[11] He concludes that the practice of using the "scientific method" to gain insights into human behavior rests on a "moral fiction because the kind of knowledge which would be required to sustain it does not exist."[12] For MacIntyre, the signal failure of social science is the inability to discover "any law-like generalizations whatsoever."[13] That failure is in large part a product of the sheer complexity of human behavior and social life. He observes that human conduct is the outgrowth of manifold choices and interactions in vast range of settings. These are too complex, numerous, and unpredictable to be canvassed by human observers. Social life thus eludes the comprehensible regularity upon which sound scientific practices rely. It follows that the predictions of those who purport "to possess a stock of knowledge by means of which organizations and social structures can be molded … cannot be made good."[14]

An important, related insight is that claims to possessing a scientific account of human affairs are easily abused, because they give rise to false

pretentions of impartiality. "The manager's claim to moral neutrality, which is itself an important part of the way the manager presents himself and functions in the social and moral world, is thus parallel to the claims to moral neutrality made by many physical scientists."[15] For MacIntyre, those "neutrality" claims are mostly bogus, or at least exaggerated. These defects can have important consequences for social practice and the exercise of governmental power. The veneer of legitimacy that flows from these claims can easily underwrite the advancement of partial, normative, and ideologically informed visions under the guise of neutral "expertise."

Michael Oakeshott, in *Rationalism in Politics*, also observes that the "scientific" approach to social dilemmas tends to promote a progressive mindset that is hostile to "any authority save the authority of 'reason'." The rationalist is thereby "the enemy of authority, of prejudice, of the merely traditional, customary or habitual."[16] Under the scrutiny of rigorous analytic methods and demands for proof, settled practices must give way to reforms structured along rule-like, systematic lines, with the ultimate goal of imposing "a uniform condition of perfection upon human conduct."[17] Oakeshott contrasts this perfectionist impetus with the insights of practical, everyday experience, noting that "it is a characteristic of practical knowledge that it is not susceptible of formulation of this kind."[18] According to Oakeshott, modern political conditions are increasingly the product of the unfortunate and procrustean incursions of pure rationalism into politics and social life. "How deeply the rationalist disposition of mind has invaded our political thought and practice is illustrated by the extent to which traditions of behavior have given place to ideologies, [and] the consciously planned and deliberately executed [are]considered (for that reason) better than what has grown up and established itself unselfconsciously over a period of time."[19]

James Burnham, in *The Suicide of the West*, sounds similar themes. Burnham is concerned that the rise of "expertise" has become a fertile source of untoward claims to superiority and authority. Central to that authority is a "scientific" outlook that denigrates longstanding traditions and customs and rejects the wisdom derived "from the practical experience itself" and the "slow molding of time."[20] According to the modern technocratic view, custom and tradition are oppressive yokes from which society must be emancipated. "Prejudice," intuition, and settled practices are burdens from which we must all seek liberation in the name of individual and social betterment. And such improvement is, of course, possible without limit. Human nature contains no innate obstacles to

attainment of the good because human beings are not "fixed, but plastic and changing, with no preset limits to potential development"[21] through the offices of the scientific method. The progressive expert is thus "confident that reason and rational science, without appeal to revelation, faith, custom or intuition, can both comprehend the world and solve its problems."[22]

Richard Weaver, writing around the same time as Burnham, echoes Burnham's observations. In *The Ethics of Rhetoric*, he notes that the social sciences have developed a pronounced "melioristic bias,"[23] which has come to influence every aspect of the administrative state. According to one commentator, Weaver is wary of a growing managerial class, in charge of the state-sponsored administrative apparatus, whose faith resides in "their abilities to find solutions to human problems that will *make things better*."[24] By "operating on the underlying assumption that [the government] *can* ameliorate social dislocations,"[25] these managers have a free hand to bring about social reform through scientifically informed, rational efforts at social engineering.

In the same vein, Steven Hayward, in a recent essay in *The Weekly Standard* entitled "Crisis of the Conservative House Divided," explores the ways in which a class of administrative experts, which is necessarily populated by elites, has extended its control into the realm of ideology and political opinion. The view endorsed "by Woodrow Wilson and other Progressive-era theorists," notes Hayward, is that "*experts* should rule in a new administrative form largely sealed off from political influence, i.e., sealed off from the people."[26] That insularity creates a secure bastion of power and authority for a new, progressive political class from which it can promote its favored views. This accelerates the trend toward public opinion shaped by "a national elite [of] the very few." According to Hayward, the "combination of administrative sovereignty and authoritative public opinion has taken a menacing turn with liberalism's full embrace of political correctness."[27] From their perch within government and a host of powerful private institutions, including academia, big business, and non-profits, the left-leaning elite exerts ever more effective and strict control over respectable thought and opinion.

This phenomenon is exemplified by the recent push by civil servants and professional government employees, who are disproportionately left-leaning and well-educated (compared with the general population) to resist and subvert the policies of the new president. As reported by Mathew Continetti, in National Review Online, "civil servants at the

EPA are lobbying Congress to reject Donald Trump's nominee to run the agency."[28] The reason is not his lack of qualifications or ethical compromise, but because "Pruitt is a critic of the way the EPA was run during the presidency of Barack Obama. He has a policy difference with the men and women who are soon to be his employees."[29] As Continetti notes, "the normal course of action" should be "for civil servants to follow the direction of the political appointees who serve as proxies for the elected president." But the bureaucrats at the EPA have taken it upon themselves to challenge and resist a change in policy that comes with a new regime—a constitutive "risk of democratic politics." Continetti points out that the decisions of executive branch employees are not autonomous, but properly subject to direction from above, in response to political forces. Such overt resistance to the bureaucratic subordination to political will is unprecedented, as well as dangerous. As a professor of government told the New York Times, "I can't think of any other time when people in the bureaucracy have done this."[30]

Although not setting out any of these themes systematically, Scalia's opinions, including in cases addressing educational issues, touch on many of them. First, Scalia repeatedly expresses a wariness, whether directly or implicitly, toward ideologies, often left-leaning, that march under the banner of superior knowledge and expertise, with a particular focus on the purported application of "neutral," non-partisan, objective legal findings and principles to advance the progressive cause. Second, he defends traditional and customary understandings, and ordinary people's practices and sentiments, against attempts to impose enlightened ideas, superior knowledge, and results informed by supposedly neutral, rational methodologies. Third, his opinions reveal a view of the federal judiciary as controlled by a like-minded, influential, privileged, highly educated elite that, on many issues, is out of step with ordinary citizens. Finally, his opinions are critical of what he perceives to be this elites' use, and abuse, of supposedly objective analyses and specialized knowledge, legal and otherwise, to impose partisan, ideologically favored outcomes on the nation as a whole. For him, claims by judges and other experts to the exercise of non-partisan authority in law and science (including social science) should be sharply questioned; too often they serve as a device for foisting on the polity the cultural and political preferences of a powerful, insular minority at odds with the citizenry as a whole.

One opinion in which some of these ideas find expression is Justice Scalia's dissent in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

There he responds to Justice O'Connor's majority opinion upholding the University of Michigan law school's use of race in admissions. O'Connor asserts that educational administrators and professors advocating for a racially conscious admission system deserve deference on their judgment that racial diversity is vital to the law school's educational mission and pedagogical effectiveness, and that racial preferences are necessary to achieve the degree of diversity that will deliver those benefits. As her opinion states,

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[31]

In his dissent, Justice Scalia casts aspersions on the deference to the university's "academic decisions"[32] and judgments that O'Connor advocates. He denies that university officials deserve the status of technical experts endowed with superior, specialized insights into how law students are best educated, and expresses doubts about the payoffs claimed to flow from diversity, including the promotion of "cross-racial understanding" and the "better prepar[ation of] students for an increasingly diverse workforce and society."[33] Noting that racial understanding is best regarded as an element of "good citizenship," he denies that fostering such understandings is "uniquely relevant to law school."[34] He also expresses doubts that they are "uniquely 'teachable' in a formal educational setting" (as revealed by the fact that these "understandings" are not formally assessed or assigned any grade).[35] Rather, the understandings claimed to come from diversity are "a lesson of life rather than law" better directed at young children (in kindergarten or, presumably, in families) or through "institutions" such as "Boy Scout troops."[36] In other words, formal institutions of higher learning are neither necessary nor optimal settings for the imparting or acquisition of basic lessons of citizenship and character. Rather, implies Scalia, traditional modes of cultural transmission and inculcation are more effective and trustworthy

methods for their development. None of these require intervention by formal "experts" to whom citizens or courts should ordinarily defer.

Relatedly, argues Scalia, the goals articulated by the defendant law school here could be invoked by any person or entity in society, and thus used to validate almost any form of race-based affirmative action by anyone anywhere. For Scalia, there is no reason to limit the acquisition of "generic lessons in socialization and good citizenship" to institutions of higher education with supposed "experts" at the helm.[37] Such lessons should also be pushed by "the civil service system of the State of Michigan," and, for that matter, by private employers "through a patriotic, all-American system of racial discrimination in hiring."[38] In other words, the rationale provided by university "experts" need not, and cannot, be confined to the educational sphere, but would justify "deference" to those claiming any kind of special expertise, or none at all.[39]

Finally, Scalia questions the defendant law school's reliance on the concept of a "critical mass" of minorities which it deems necessary to realizing the pedagogical benefits of a diverse student population.[40] (Scalia's mistrust of the vague notion of a "critical mass," and his skepticism toward the non-specific, ill-defined, and unproven claims of the pedagogical payoffs from diversity, are themes carried forward by Justice Alito in his dissent in the second installment of *Fisher v. University of Texas*, 579 U.S.—(2016), decided a few months after Justice Scalia's death.) Scalia's *Grutter* dissent suggests that the "educational benefits" that administrators and officials claim emanate from the "fabled 'critical mass'" of minorities are so vague and ill-defined as to easily function as pretext for other university priorities, such as "maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities."[41] He disparages the importance of this "prestige" project and denigrates its constitutional status: if maintaining academic standards is "a compelling state interest" then "everything is."[42] The implication is that the asserted expert-approved priorities are a convenient but bogus excuse for enshrining the preferred vision of an elite cadre of education officials, under the guise of a Constitutionally valid "compelling interest," of how a public law school should be run and its student body selected.

Scalia's opinion in *United States v. Virginia*, 518 U.S. 515 (1996), prefigures some of the themes in his *Grutter* dissent, but with interesting twists. There the Court ruled that Virginia Military Institute (VMI), a state-sponsored secondary military academy, was required by the

federal Constitution to offer admission to women as well as men. In dissent, Scalia criticizes the majority for applying a novel and ungrounded legal "intermediate scrutiny" test to invalidate a long-standing practice, rooted in tradition, of state-sponsored, "adversative" single-sex military training. He denigrates the Court's use of "tiers" of scrutiny under the Equal Protection Clause for false exactitude, claiming that this method is no more precise and "no more scientific than their names suggest," with a "further element of randomness … added by the fact that it is largely up to us which test will be applied in each case."[43] With a pretense of legal precision, and purporting to use impersonal, objective standards, asserts Scalia, the Court's analysis enables it to "embark[s] on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter majoritarian preferences of the society's law trained elite)"[44] into social practice. Under the banner of neutral principles and special expertise, the Court thus "forces change" on the entire population—a cardinal example, Scalia maintains, of politics "smuggled into law."[45]

Yet Scalia is not above conscripting social science to his cause in the VMI case by citing the testimony of numerous experts below that "substantial educational benefits flow from a single gender environment, be it male or female, *that cannot be replicated in a coeducational setting*,"[46] and that an all-male institution is especially well-suited to the type of "adversative" educational experience that VMI provides. His point, however, is that the reliance on social science amounts to cherry-picking. He notes that the Court chose selectively to discount this evidence in favor of imputing a "base motive to VMI's Mission Study Committee" including preserving an all-male VMI as a "pretext for discriminating against women" or for other "misogynistic reason[s]."[47] This further buttresses his observation that "objective" social science and legal standards, which are supposed bastions of impersonal neutrality, are too often neither objective nor impersonal, but are easily manipulated for partisan purposes. In a paean to tradition, Scalia closes his dissent with a resounding tribute to the "gentlemanly code" to which all VMI cadets are bound. These precepts, which are peculiarly appropriate to and directed at men, are meant not only to highlight the gender specific customs and presuppositions that underwrite VMI as a single-sex institution, but also to represent a distinctly "anti-modern" notion of how to best develop men's character and capacities. This mindset is in tension with abstract principles of gender equality that the law, through legal "experts," has

come to embrace, and which are claimed to serve VMI's stated goals as well, or better, than maintaining a single-sex program. In VMI, according to Scalia, both traditional understandings and a fair and balanced assessment of the social science evidence undermine those assertions.

Scalia also pits common-sense perceptions and traditional priorities against a purportedly more sophisticated analysis in *Freeman v. Pitts*, 503 U.S. 467 (1992). There the Court held that the DeKalb County, Georgia school district, which had previously been found to have engaged in unconstitutional racial segregation, could partly be relieved of judicial supervision of its schools. Affirming the lower court's findings that the county had largely complied with the court-ordered remedial desegregation plan, the Court nonetheless remanded the case specifically to determine whether the county could re-exert control over student assignments on the ground that further racial integration was neither achievable nor required (because, inter alia, the racial segregation remaining in the district was not causally related to the school district's past Constitutional violation).

Justice Scalia's concurrence, in specifically addressing the causation issue, offers a general critique of the federal courts' methodology in desegregation cases, and faults many of the far-reaching, intrusive remedies the courts have imposed in those cases as unjustified by the facts. He observes that the Court has never developed a reliable and precise formula for determining whether "the imbalances in student assignment" observed in a school district at any point can be traced to past unconstitutional school district or officials actions as opposed to "private demographic shifts." Nor has the Court ever issued tractable guidance on "how one identifies a condition as the effluent of a violation, or how a 'vestige' or a 'remnant' of past discrimination is to be recognized."[48] Indeed, he complains that the Court has "not even betrayed an awareness that these tasks are considerably more difficult than calculating the amount of taxes unconstitutionally paid."[49] He thus doubts that judges are equipped to make reliable findings as to the link between past official discrimination and present segregation, or accurate determinations as to whether the present racial makeup of schools stems from public or private sources, especially when (as is increasingly the case) *de jure* segregation has receded into the remote past. The consequences of this failure and the hand-waving that accompanies it, suggests Scalia, is that the courts are effectively licensed to slight or even ignore growing evidence that school segregation is the product of a "multitude of private factors"

that have "shaped school systems in the years after abandonment of de jure segregation—normal migration, population growth (as in this case), 'white flight' from the inner cities, increases in the costs of new facilities"[50] as well as the widespread desire of parents and schools boards to have children "attend schools in their own neighborhood."[51] Given the strength of those preferences, and the lapse of time since official segregation was abolished, asserts Scalia, it is overwhelmingly probable that "the principal cause of racial and ethnic imbalance in … public schools across the country—North and South—is the imbalance in residential patterns," motivated by private choices informed by "economic considerations," and "a desire to reside near people of one's own race or ethnic background,"[52] and not any official, constitutionally correctable action on the part of the public schools. At worst, the facts support the conclusion that racially imbalanced schools are "the product of a blend of public and private actions." In light of the uncertainties, asserts Scalia, "any assessment that [the schools] would not be segregated, or would not be as segregated in the absence of a particular one of those factors is guesswork."[53]

This exposition sounds a familiar theme: under the pretext of the applying supposedly objective data, recondite, specialized knowledge, and rigorous legal analysis, judges have considerable leeway to pursue their vision for how schools should be run. The imprecision of the criteria for causation, and the court's lack of rigor in approaching them, enables courts to meddle in student assignment and other aspects of school administration to achieve what judges consider a desirable degree of racial mixing. The regime imposed is often at odds with what the parents of the children attending these schools prefer, which is to send their children to neighborhood schools, managed according to locally determined priorities. Under the guise of "objective" findings and "neutral" legal precepts, judges' preferences are allowed to override these priorities.

Claims to objective knowledge win out over local officials' judgments in yet another education case, *Edwards v. Aguillard*, 482 U.S. 578 (1987). There Scalia, in dissent, attacks the Court's decision to strike down a Louisiana law, the Balanced Treatment for Creation-Science and Evolution-Science Act, which mandates the teaching of "creation science" in conjunction with the presentation of biological evolution in public schools. Under the long-standing *Lemon* framework for assessing violations of the First Amendment Establishment clause, the Court was asked to choose between two characterizations of "what creation

science consists of"—whether "a collection of educationally valuable scientific data that has been censored from classrooms by an embarrassed scientific establishment," or a body of materials that is "not science at all, but thinly veiled religious doctrine."[54] As in VMI, Scalia was not above pointing to testimony by defense experts, who opined that creation science qualified as a bona fide scientific theory with real evidence behind it,[55] and also that "the Balanced Treatment Act does not require the presentation of religious doctrine."[56] According to Scalia, the Court improperly discounted this testimony to reach its conclusion that the law was enacted primarily to advance religion and was therefore invalid under the "intent" prong of *Lemon*.

Scalia's characterization of the *Lemon* test in *Aguillard* as vague and indeterminate, and therefore manipulable, serves as the occasion for a broader indictment of the abuses threatened by dubious or false claims of rigor in the law. The *Lemon* analysis, Scalia suggests, frees courts to engage in selective readings of the evidence, statutory text, and legislative history, to achieve judges' desired result. In the context of this case, *Lemon* gave the Justices leeway to indulge their elite partiality toward evolutionary theory as against challenges to that theory, and to unduly favor secular priorities over religious ones. As he explains, the Court's "unprecedented readiness" to ignore the "secular purpose set forth in the Act itself," and to "conclude[e] that [the law] is a sham" for advancing religion, can only be attributed "to an intellectual predisposition … and an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression."[57] In other words, Establishment clause analysis here serves as a convenient cover for enshrining the elite and parochial opinions of the judiciary in derogation of the equally worthy beliefs, sentiments, and priorities of people who don't share their opinions.

Concerns about judges advancing tendentious views by wielding ostensibly impartial methods find expression also in Scalia's opinions outside the educational sphere. In *Lawrence v. Texas*, 539 U.S. 558 (2003), Scalia accuses his fellow Justices of invoking the faux rigor of Constitutional analysis to mask their embrace of a "gay agenda." In defending the constitutionality of Texas's anti-sodomy law, he throws his weight behind traditional conceptions of the social order, and derogates the legal protocols that enable educated elites to ignore or override common moral sentiments. Similarly, in dissenting from the decision

in *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Court extended a federal testimonial privilege to social workers functioning as therapists, Scalia asks whether "a social worker bring[s] to bear at least a significantly heightened degree of skill—more than a minister or rabbi, for example[.]"[58] Scalia expresses skepticism about social workers' claims to special expertise in psychological counseling. Comparing the benefits from consulting a trained social worker to the wise advice available from family, friends, or religious advisors, he observes that "for most of history, men and women have worked out their difficulties by talking to, *inter alios,* parents, siblings, best friends and bartenders—.… Yet there is no mother child privilege." Through these comparisons, Scalia implicitly denigrates as dubious or unsubstantiated the claims of superior expertise in therapeutic counseling that come from the scientifically informed professional training that social workers receive. He can find no reason to regard educated "experts" as better equipped to give advice and counsel than persons with accumulated life experience or personal ties who have been traditionally entrusted with that role.

Finally, in *Kansas v. Crane*, 534 U.S. 407 (2002) Scalia finds fault with the Court's conclusion that, under the Constitutional substantive due process standard, a mentally ill sexual predator subject to indefinite civil confinement under the Kansas Sexually Violent Predator Act (SVPA) must be found "unable to control his violent behavior," rather than just "likely to engage in repeat acts of sexual violence."[59] In both denying a legal basis for the "control" test and denigrating the coherence of distinguishing among "volitional, emotional, and cognitive impairments,"[60] Scalia casts aspersions on the coherence and legal tractability of the standard the Court adopts. Once again, he implies, the Court has adopted a rule that, although pretending to scientific precision, is muzzy, ill-defined, subjective, and open to arbitrary and erratic application. Although possessing the veneer of objectivity, the "control" test enshrines a false exactitude that is subject to easy manipulation and outcome-driven abuse.

In sum, Justice Scalia's opinions in education cases as well as others contain ideas that are familiar to conservatives. In the modern world, claims of special expertise and a superior understanding of the dynamics of social life are used by an educated elite to justify the discretionary imposition of progressive policies, intrusive social engineering projects, and ideologically favored legal reforms. Like the expertise claimed by managerial elites in government, the universities, and other

power centers, legal expertise is a source of authority. Armed with a set of abstruse methods inaccessible to ordinary people, and purporting to objectivity and neutrality, lawyers and judges are given leeway to advance partisan outcomes and to sweep away the traditional underpinnings of existing legal rules and structures. Legal actors, as well as the people themselves, should be vigilant against such overreaching, and act to curb it.

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38. Id.
39. Id.
40. Id. at 349.
41. Id. at 347.
42. Id.
43. United States v. Virginia, 518 U.S. 567 (Scalia, J., dissenting).
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45. Id. at 569.
46. Id. at 598.
47. Id. at 580.
48. Freeman v. Pitts, 503 U.S. 467 (1992) at 501–502 (Scalia, J., concurring).
49. Id. at 502.
50. Id. at 506.
51. Id. at 502.

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53. Id. at 503.
54. Edwards v. Aguillard, 482 U.S. 578 (1987) at 611–612 (Scalia, J., dissenting).
55. Id. at 623–624. ("The body of scientific evidence supporting creation science is as strong as that supporting evolution, [and, at the very least] creation science is educationally valuable.")
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CHAPTER 8

Scalia's Teaching Methods and Message

Adam J. White

Abstract As a judge, Justice Scalia famously adhered to a textualist and originalist approach in service of republican constitutionalism. As an educator, he criticized dominant trends in legal education. The inter-related nature of those two arguments and the deeper roots of his constitutionalism are best stated in a largely forgotten lecture that Scalia delivered to a Catholic audience in late 1986, just months after his appointment to the Supreme Court. The themes presented in that lecture—to which Justice Scalia returned in his last public speech, nearly three decades later—illuminate points he pressed in some of his judicial opinions on issues of education law.

Keywords Antonin Scalia · Legal education · Catholicism · Textualism Originalism

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Who do you think I write my dissents for?

Justice Antonin Scalia posed the question, rhetorically, to a reporter from *New York Magazine*.[1] In the course of a surprisingly candid 2013 interview, she had asked Scalia about the sharp tone of his judicial opinions, pressing him on the effect that his opinions might have on his colleagues. But Scalia pressed the reporter, in turn, to look beyond the Court for his true audience:

> "Who do you think I write my dissents for?"
>
> "Law students," the reporter answered.
>
> "Exactly," he replied. "And they will read dissents that are breezy and have some thrust to them. That's who I write for."[2]

Justice Scalia was reiterating a point that he made on many occasions, before many audiences. "He used to say that students were one of his target audiences," Justice Elena Kagan recalled in her contribution to the *Harvard Law Review*'s remembrance of her late colleague and friend. "[A]nd, if my hours teaching administrative law are in any way typical, he had an unerring instinct for what would persuade them or, at the very least, make them think harder. Justice Scalia's opinions mesmerize law students."[3]

In a lifetime of educating American lawyers—in judicial opinions, articles, and lectures—Scalia often spoke directly to the state of American legal education itself. On some occasions, he reached these issues expressly and bluntly, and there is much to learn from those particular writings.

But elsewhere his criticism of modern legal education was subtler, and it went beyond matters of mere judicial methodology. As important as originalism and textualism are, Scalia was pressing a much more profound truth: namely, of the fundamental importance of religious faith and civic virtue in a republic, and the dangers of stripping that moral foundation away from the education of all citizens—especially lawyers.

Our "Failed" Model for Legal Education

In a career marked by famous dissenting opinions, one of Justice Scalia's most famous dissents was his departure from modern conventional wisdom in legal education. And, as with so many of his dissents, he reveled in the act. "I go to law schools just to make trouble," he once told an academic audience in Brazil. "I give lectures and stir up the students. It takes several weeks for their professors to put them back on track."[4] ("Actually, several weeks were rarely enough," Justice Elena Kagan would add, in recounting his quip.[5])

As it happens, I experienced his enthusiastic disruption firsthand. In 2003, I took a break between summer law firm jobs to travel to Colorado, where I attended the Federalist Society's biennial course that Scalia taught with Professor John Baker. In a group comprised mainly of practicing lawyers, Justice Scalia took special care to interact with the scattered law students. A few months later, when I saw him at another event, he recognized me and asked if I had brought my new knowledge of constitutional separation of powers back to my law professors. "Yes," I told him, "but I have bad news. The professors overruled you unanimously." He laughed—not because he was surprised, of course, but because he wasn't surprised at all.

Justice Scalia's criticism of modern legal education was well-known and well-founded. In *A Matter of Interpretation* (1997), he began a defense of textualism by diagnosing why too many judges and lawyers pay too little attention to the words of written laws: "The overwhelming majority of the courses taught in that first year, and surely the ones that have the most profound effect, teach the substance, and the methodology, of the common law … American lawyers cut their teeth upon the common law."[6]

To be clear, in critiquing "common law," Scalia had in mind not the classical common law of Blackstone, but rather the modern "realist" reconceptualization of common law, made famous by Oliver Wendell Holmes, Jr.—a distinction that Scalia would sometimes highlight in judicial opinions. "At the time of the framing," Scalia observed in a 2001 opinion, "common-law jurists believed (in the words of Sir Francis Bacon) that the judge's 'office is *jus dicere* and not *jus dare*; to *interpret* law, and not to *make* law, or *give* law.' … Or, as described by Blackstone, whose Commentaries were widely read and accepted by the founding generation as the most satisfactory exposition of the common

law of England … 'judicial decisions are the principal and most authoritative *evidence*, that can be given, of the existence of such a custom as shall form a part of the common law.'"[7] Even if, as Scalia added elsewhere, classical common-law judges were aware "that judges in a real sense 'make' law," those judges, Scalia emphasized, would still "make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."[8] In the aftermath of Holmes's "hyperbolic" critique of that approach, however, self-styled "realists" on the bench would approach common-law judging from precisely the opposite mindset, such that common law would be "self-consciously 'made' rather than 'discovered.'"[9]

"This is the image of the law"—the modern common law, as "made" by willful Holmesian judges—"to which an aspiring lawyer is first exposed," Scalia observed in *A Matter of Interpretation*. And this approach, he urged, is hardly conducive to the education of American lawyers who will interpret the written laws of statutes, regulations, and, of course, the Constitution. The American law student "learns the law, not by reading statutes that promulgate it or treatises that summarize it, but rather by studying the judicial opinions that invented it."[10]

In those casebooks, students see judges—and envision themselves—working not only to apply the law to facts, but also (as Scalia emphasized) "to *make* the law."[11] Indeed, law schools present the judge as not just making law, but as making "the 'best' legal rule" among many possibilities,[12] and among many seemingly relevant but conflicting precedents. "Hence the technique—or the art, or the game—of 'distinguishing' earlier cases,"[13] which is best compared a football player "running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law."[14]

This sporting metaphor, the halfback's "broken-field running,"[15] depicts vividly the law-school realist's notion of a judge as effectively unconstrained—or, that is, a judge constrained only by those who might wrestle him to the intellectual ground. Scalia warned that while the allure of this vision is obvious, less obvious are its lamentable ramifications:

> What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting! And no wonder so many law students, having drunk at this intoxicating well, aspire for the rest of their lives to be judges![16]

Justice Scalia pressed this criticism throughout his career; indeed, when he and Bryan Garner published *Reading Law* (2012) 15 years later, he once again introduced the subject of textual methodology with the same indictment of legal education. "Besides giving students the wrong impression about what makes an excellent judge in a modern, democratic, text-based legal system, this training fails to inculcate the skills of textual interpretation."[17]

And while this was Scalia's primary criticism of legal education, it was not his only one. In speeches, such as the William & Mary Law School's 2014 commencement, he decried the entropy of modern law-school curricula, where professors' pursuit of scattered, esoteric, sometimes eccentric research agendas translates into courses that "offer a student the chance to study whatever strikes his or her fancy—so long as there is a professor who has the same fancy."[18]

He urged schools to turn back from the proliferation of a "*Law and* …" courses, to reaffirm that students' degrees reflect their "sustained three-year study of *law*. The mastery of *that* subject is what turns the student into a legal *professional*," he emphasized.[19] Only by returning to a core curriculum would students understand the law as "a more cohesive whole, instead of a series of separate fiefdoms."[20] Ultimately, "it is good to be learned in the law because that is what makes you members of a profession rather than a trade."[21]

Such were his two main lines of criticism of legal education: law students are too often taught by "academics who have little regard for text and tradition," as he observed in a 2004 tribute a friend,[22] and who also have little interest in teaching American law as a coherent whole.

Ultimately, the model of legal education established by Harvard's Christopher Columbus Langdell nearly one and a half centuries ago had reached a point of exhaustion. "In the 140 or so years that have passed since Langdell come onto the scene," Scalia told the University of New Hampshire in 2013, "the practical virtue of American law schools as a device for the teaching of law has failed."[23] American law schools are

now mainly in the business of producing lawyers and judges who neither comprehend the law's fullness nor feel genuinely constrained by its specifics.

Scalia's Alternative—At First Glance

Justice Scalia's critique of legal education is familiar; so too is the immediate motivation for that critique. He embraced originalism and textualism because he believed them to be to most reliable means of judicial self-restraint; and judicial self-restraint, in turn, he saw as necessary to ensure the citizenry's continued willingness to respect judicial independence. "[O]riginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system," he explained in "Originalism: The Lesser Evil."[24] "A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values.' Elections take care of that quite well."[25]

He expanded on this argument elsewhere. In his dissent from the Court's decision in *Planned Parenthood v. Casey* (1992), for example, he warned that if the Court's "pronouncement of constitutional law rests primarily on value judgments," rather than on the mere interpretation of written legal terms, "then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the 'liberties' protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours."[26]

Textualism largely avoids that outcome, Scalia argued, because it establishes a relatively stable set of rules, departures from which will be detected by the public, or at least by the judge's brethren. "Willful judges might use textualism to achieve the ends they desire," he wrote in *Reading Law*, "[b]ut in a textualist culture, the distortion of the willful judge is much more transparent, and the dutiful judge is never *invited* to pursue the purposes and consequences that he desires."[27]

Some critics—even some of Scalia's libertarians friends—might contest Scalia's belief that his textualist approach truly is the best means of ensuring limited, republican, constitutional government.[28] No one, however, can contest that Scalia genuinely held this belief.

But why did Scalia support America's limited, republican, constitutional government in the first place? Here I think Justice Scalia's approach does reflect, at least in part, more fundamental commitments drawn from his own religious faith. And the best evidence of this might be found in a largely forgotten lecture published shortly after he was appointed to the Supreme Court. In that 1986 lecture, we find Scalia's most stirring arguments in support of both constitutional government and legal education. Those arguments put the rest of his thought in much better context.

Scalia's Lost Lecture: "Teaching About the Law"

Before his appointment to the Supreme Court, then-Judge Scalia committed to delivering the fourth annual Seton-Neumann Lecture, a short-lived series sponsored by the United States Catholic Conference. (It had previously featured Senator Moynihan, and it would later feature Russell and Annette Kirk.[29]) Despite the demands of his new job, he made good on his pre-Court commitment, delivering the lecture at the Catholic University of America in December 1986, just 3 months after joining the Court. He titled his lecture, "Teaching About the Law."

The address was reported by the National Catholic News Service, and thus was mentioned in at least some Catholic diocese newspapers (including at least one published months after the lecture occurred, southeast Massachusetts's *The Anchor*).[30] But beyond Catholic newspapers, Scalia's lecture seems to have had very little impact: "As an unpublished college lecture," the *Christian Legal Society Quarterly* later remarked, "it ha[d] not reached a vast audience."[31] And so the *CLS Quarterly* published Scalia's lecture nearly a year after he delivered it, in the journal's Fall 1987 issue.[32]

Publication in the *Quarterly* did not save Scalia's lecture from obscurity. Today, nearly three decades later, this lecture by one of the twentieth century's most significant justices has been cited by only *five* law review articles, according to Westlaw. And four of those—three by the same author—were in "alternative dispute resolution" journals, citing Scalia's lecture for his limited point on virtue of avoiding litigation[33] (His lecture fared no better in books, where I have found it cited only twice: in a book on avoiding personal conflict, and in a book of evangelical religious affirmations.[34])

The effective disappearance of this lecture for nearly three decades was an immense loss to the American legal community. For, in that lecture, Justice Scalia traced the roots of his constitutionalism directly to the Bible's New Testament.

But, one should note from the outset, the religious influence is not the one for which he is usually accused. Throughout his career, critics such as Geoffrey Stone, Linda Greenhouse, and Dahlia Lithwick have asserted or implied that Scalia's views on specific legal issues were dictated by his Catholicism.[35] Scalia rebutted such accusations roundly, often citing examples of decisions (including *Employment Division v. Smith*) that cut against the interests of the Church. "[T]here's no such thing as … a Catholic interpretation of a text," he told the Hoover Institution's Peter Robinson in a 2009 interview.[36] "Why, what's a Catholic interpretation of a text? The text says what it says."[37] Or, as he remarked more categorically at a Pew Forum conference in 2002, "the only one of my religious views that has anything to do with my job as a judge is the seventh commandment—thou shalt not lie. I try to observe that faithfully, but other than that I don't think any of my religious views have anything to do with how I do my job as a judge."[38]

But his 2002 statement was too categorical. For while Scalia's approach to judicial *interpretation* was not directly controlled by Catholicism, his 1986 Seton-Neumann lecture spelled out the profound way in which his faith undergirded his view of the law more generally.

"The New Testament contains some important passages that address the attitude Christians should have towards the law," Scalia observed in his lecture. "The most significant and the best known is the passage from St. Paul's letter to the Romans." This letter is most often quoted for St. Paul's admonition against vengeance; but, as Scalia explained, the far-less-quoted lines that follow that discussion are "essential to the whole picture." He quoted the key lines in full, beginning with: "Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves."[39]

After those lines and the several lines that followed, Scalia offered a caveat that the passage "must be read to refer to lawful authority, although there is plenty of room to argue that some authorities are not lawful ones." Beyond that caveat, then, Scalia turned to "the central

proposition that, for Christians, lawful civil authority must be obeyed not merely out of fear but, as St. Paul says, for conscience's sake."[40]

In modern times, he said, "we have lost the perception, expressed in that passage from St. Paul, that the laws have a moral claim to our obedience." And this, Scalia noted, "is the first and most important Christian truth to be taught about the law, because it is truth greatly obscured in an age of democratic government," where civil government inspires too little confidence. "As Americans, it is particularly hard for us to have the proper Christian attitude toward lawful civil authority," because "our political tradition carries a deep strain of the notion that government is, at best, a necessary evil."[41]

Scalia then offered his most important instruction to his Catholic University audience:

> But no society, least of all a democracy, can long survive on that philosophy. It is fine to believe that good government is limited government, but it is disabling—and, I suggest, contrary to long and sound Christian teaching—to believe that all government is bad. As teachers, I hope, then, you can teach your students that those who hold high office are, in their human nature and dignity, no better than the least of those whom they govern; that government by men and women is, of necessity, an imperfect enterprise; that power tends to corrupt; that a free society must be ever vigilant against abuse of governmental authority; and that institutional checks and balances against unbridled power are essential to preserve democracy. In addition to these secular truths, I hope that you will teach that just government has a *moral* claim, that is, a divinely prescribed claim, to our obedience.[42]

Near the end of his lecture, invoking *Federalist 51*'s recognition that government's necessity reflects man's decidedly unangelic nature, Scalia added a final emphatic observation: law's importance grows in inverse proportion to the stock of republican virtue, for "[l]aw steps in, *and will inevitably step in*, when the virtue or prudence of the society itself is inadequate to produce the needed result.… I suggest, in other words, that it is by teaching your students virtue and responsibility—much more than by teaching them the contents of their legal 'rights'—you preserve the foundations of our freedoms."[43]

In just those few paragraphs, one finds several distinct themes that informed Justice Scalia's constitutionalism, and his views of education, throughout his career.

1. Government is, at best, a necessary evil, and thus law is an exercise in second-bests. In a *Harvard Law Review* memoriam, Chief Justice Roberts reflected on the late Justice Scalia, beginning with Scalia's own hero, St. Thomas More. In More's *Utopia*, "Antonin Scalia's greatest gift—his judicial acumen—would have gone to waste," because there "the laws were few." But "[o]ur American democracy," by contrast, "is no legal Utopia. Our laws are many; they are often complex and produce stormy debate." And "[w]hen disputes arise, our citizens must look to the courts to discern and apply the rules without fear or favor."[44]

The Chief Justice was right to credit Justice Scalia for executing faithfully the duties of his judicial office. But the *premise* of Roberts's praise was no less central to Scalia's approach: we live in a fallen world, and our need for legal constraints is inherently an exercise in second bests. We rely on law not to achieve perfect outcomes, but to accomplish the best that we can realistically hope for.

In this respect, the title of one of Scalia's seminal essays is telling: "Originalism: The Lesser Evil."[45] Scalia applied originalism not because it would reliably achieve good and just results, but rather because he saw it to be less corrupted than the alternatives. (And, as he said to Peter Robinson in 2009, the goal of a judge to pursue perfection beyond the limits of law is, indeed, a "temptation."[46])

Scalia pressed this point often in his defenses of originalism, including a 2012 address to the Cambridge Union. Responding to a student's question of how to square notions of judicial restraint with the "sweeping" decision of *Brown v. Board of Education*, Scalia answered first that *Brown* result was eminently defensible on originalist grounds, before adding that the "more important answer" is that "you can do wonderful stuff by letting courts run the show, just as you can do wonderful stuff by letting a king run the show," but "you can't judge the totality of the system on the basis of whether now and then it produces a result that you like."[47] The work of a judge, then, should not be defined by its ability to reach the "best" result in a particular case.

Or, as he said more bluntly to Peter Robinson in 2009, "look, I do not propose or suggest that originalism is perfect and provides easy answers for everything. But that's not my burden; my burden is just to show that it's better than anything else."[48]

This, then, shows an important premise of Scalia's criticism of legal education and the common-law method. Lawyering and judging is not an exercise in dashing about in pursuit of an ideal result—equal parts

Walter Payton and Solomon. Perfection is unattainable, and judges are no more angelic in nature than the men whom they sit in judgment of.

2. Just government—even democratic government—has a moral claim to our obedience. As Justice Scalia keenly observed, we Americans are less inclined to respect—let alone venerate—the institutions of our government, because our government is a democratic one. This, as much as anything, would seem to animate the tendency of law professors, law students, lawyers, and judges to prize individual rights above democratic self-governance. But Scalia urges us to resist that instinct—or, more accurately, to temper those instincts appropriately—with the recognition that government has a moral claim to our obedience, for the reasons explained by St. Paul.

This is a point that Scalia stressed years later, in a much more prominent essay: his reflections on the death penalty in *First Things*, titled "God's Justice and Ours." There he paraphrased the lengthier discussion of "Teaching About the Law," quoting St. Paul's letter (though this time the King James translation, not the New International Version), admonishing that "[y]e must needs be subject" to lawful government, "not only for wrath, but also for conscience sake." Scalia repeated the last words for emphasis: "For conscience sake."[49]

And he added that Americans try to overcome our democratic suspicions "by preserving in our public life many visible reminders that—in the words of a Supreme Court opinion from the 1940s—'we are a religious people, whose institutions presuppose a Supreme Being.'" Such reminders, Scalia noted, include "In God we trust" on our coins; "one nation, under God" in our Pledge of Allegiance; the prayers that open our legislative sessions; and the plea that "God save the United States and this Honorable Court" at the outset of each session of the Supreme Court.[50]

This, too, provides context for much of Scalia's criticism of legal education—namely, for his comfort with the more democratic institutions of our government, not courts, providing the legitimate source of law and the proper forum for changing those laws. Scalia did not see the republican government as regrettable, let alone illegitimate. While he would not say *vox populi, vox Dei*, he was much more content (to say the least) to let God work his mysterious ways through the imperfect vessels of democratic government, rather than commit such questions exclusively to purported high priests in the federal judicial judiciary.

3. By teaching your students virtue and responsibility, you preserve the foundations of our freedoms. Scalia's remarks on the importance of civic virtue are perhaps the subtlest part of "Teaching About the Law," and they are also the part most directly connected to Scalia's views in the Court's education cases. As noted above, Scalia urged that the doctrinal content of legal education is no more important than the moral and ethical content of that education: "it is by teaching your students virtue and responsibility—much more than by teaching them the contents of their legal 'rights'—you preserve the foundations of our freedoms," lest the decline of virtue force the expansion of legal imposition.[51]

On this point, Scalia invoked Madison's *Federalist 51*.[52] But he might have done well to quote *Federalist 55*, too, where Madison stresses that despite the unangelic qualities of our nature, "there are other qualities in human nature which justify a certain portion of esteem and confidence"; and, crucially, that "[r]epublican governance presupposes the existence of these qualities in a higher degree than any other form."

In any event, Scalia's focus on the importance of civic virtue closely resembles the thought of one of his most prominent colleagues and friends dating back to his late 1970s days at the American Enterprise Institute: Walter Berns, a scholar of the framers, and of republican virtue more generally. Berns's later masterpiece, *Making Patriots* (2001) strikes very similar notes as Scalia's "Teaching About the Law," on the subject of religion and civic virtue. Where Scalia examines Chap. 13 of St. Paul's letter to the Romans (on submitting to the earthly government), Berns begins with Chap. 12 (on why the people of a community must think of themselves as members of one body),[53] before considering Tocqueville, who observed:

> Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of free institutions. … I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions.[54]

While I have not found an example of Scalia going so far as to quote the same passage from Tocqueville (or any example of Scalia quoting Tocqueville, for that matter), Scalia's and Berns's common reference to St. Paul's Letter to the Romans is interesting. (While one should not

speculate too much, I can't help but humor the thought that this may well have been one of the many subjects that they discussed with their friends Laurence Silberman and Irving Kristol, in the brown-bag lunches that Kristol describes in his own recollection of their AEI days—lunches where, according to Kristol, one of the two "main topics for discussion" was "religion."[55])

In any event, one can draw a direct line between this aspect of Scalia's thought and his opinions in the Supreme Court's education cases. Time and again, Scalia criticized efforts by the courts and others to strip the fostering of virtue—civic or otherwise—from the schools. In *Lee v. Weisman*, for example, Scalia goes out of his way in dissent to "add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the [graduation] prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally."[56]

Or, in *Lamb's Chapel*, where he closed his concurrence by rejecting the New York attorney general's argument that religious advocacy "serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." *Nonsense*, Scalia replied: "That was *not* the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good."[57] He quoted the Northwest Ordinance of 1787, which announced: "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged."[58]

Or perhaps most famously, his emphatic dissent in the VMI case, *United States v. Virginia*, which he closed with an extended quotation from VMI's "The Code of a Gentleman." After quoting the Code's maxims, Scalia observed, "I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction."[59]

In these cases, and surely elsewhere, Scalia view of constitutional rights in the educational context took due consideration of the need for the inculcation of virtue, not just for the sake of individual students, but

for the sake of our republican government in general. Like Mary Ann Glendon in *Rights Talk*, Scalia saw the trends in education, and in modern constitutional law, that promoted (in Glendon's words) "relentless individualism" that, "[i]n its neglect of civil society … undermines the principal seedbeds of civic and personal virtue."[60] Trends that, in so doing, undermine our capacity for limited, republican government.

This was a point that Scalia pressed in one of his last public speeches: a June 2015 commencement address at Maryland's Stone Ridge School of the Sacred Heart, where his granddaughter was among the graduates.[61] Challenging the platitude that "we are the greatest [nation] because we are the freest," Scalia argued that "precisely the opposite is true: we are the freest because we have those qualities that make us the greatest. For freedom is a luxury that can be afforded only by the good society. When civic virtue diminishes, freedom will inevitably diminish as well."[62]

In making this point at Stone Ridge's commencement, Justice Scalia came full circle, echoing precisely the same point that he had made in the Seton-Neumann lecture at the very outset of his career on the Court. Indeed, he used almost the exact words that he had used in his 1986 lecture. Paraphrasing Lord Acton (as he did in 1986), Scalia told the graduates, "that society is the freest which is the most responsible. The reason is quite simple and quite inexorable: Legal constraint, the opposite of freedom, is in most of its manifestations a cure for irresponsibility."[63] Scalia then pointed the students (as he did in 1986) to Madison's discussion of government as necessary for unangelic societies.[64]

And then Scalia added words drawn virtually verbatim from his 1986 lecture: "Law steps in, *and will inevitably step in*, when the virtue and prudence of the society itself is inadequate to produce the needed result."[65]

Education for the Legal *Profession*

All of the foregoing helps to explain Justice Scalia's view of legal education, quoted near the outset of this essay, as "preparing men and women not for a trade but for a profession—the *profession* of law."[66]

We so often hear the work of lawyers and judges described in terms of *craft*—Justice Souter employed the term, as did Chief Justice Rehnquist. A half-century ago, Learned Hand closed his famous Holmes Lectures with a tribute to his own teachers: "From them I learned that it is as craftsmen that we get our satisfactions and our pay."[67] While

such descriptions of judicial "craft" are no doubt well-intentioned, they unintentionally reflect a risk of lawyering and judging with too myopic a vision of the task at hand. Excessive focus on the virtues of "craftsmanship" risks distracting us from the concomitant vices. As Richard Sennett writes in *The Craftsman* (2008), "[t]he craftsman's desire for quality poses a motivational danger: the obsession with getting things perfectly right may deform the work itself."[68] (Judge Hand himself personified such a danger: the 1958 lectures in which he offered his ode to "craftsmanship" were the same lectures in which he infamously condemned *Brown v. Board of Education*.[69])

That is the risk that Justice Scalia warned against in his 2014 commencement address at William & Mary. In urging law schools to teach students not a "trade" in the law but a "*profession*," he highlights a crucial distinction. A trade, or a craft, is undertaken just with an aim toward technical perfection. A *profession*, by contrast, is informed and limited by larger considerations—our larger civic, ethical, and moral responsibilities. Thus Scalia's goal of lawyers becoming not just skilled in particular subjects, but "learned in the law." Because only in learning the law broadly, putting each specific subject in the context of the rest, and putting the law as a whole in the context of republican government (and, ideally, under God), can lawyers fully appreciate the limits of the law.

This is, I think, one of the important lessons that Justice Scalia drew from his hero, St. Thomas More, as described in Scalia's occasional remarks on "the Two Thomases," Thomas Jefferson and St. Thomas More.[70]

By Scalia's description, Jefferson was a "lawyer who was something of a universal man." In Jefferson's case, Scalia meant a man unashamed even to blue-pencil the Bible's New Testament Gospel in order to make it (in Scalia's words) "a Gospel fit for the Age of Reason." Jefferson, so focused on what he saw to be a rational escape from superstition, truncated his intellectual field of vision to preclude anything smacking of the supernatural.

Another Thomas, St. Thomas More, was in his own time "one of the great men of his age: lawyer, scholar, humanist, philosopher, statesman—a towering figure not just in his own country of England but throughout Renaissance Europe," Scalia added. But unlike Jefferson, More recognized the limits of his lawyers and intellectual tools, even when so few others did not—indeed, even when his own wife did not. Quoting Robert Bolt's *A Man for All Seasons* (1960), Scalia tells the story of

More's decision to resign his chancellorship, where More asks his wife, Alice, to help him remove the chain of office. "She says: 'Sun and moon, Master More, you're taken for a wise man! Is this wisdom—to betray your ability, abandon practice, forget your station and your duty to your kin and behave like a printed book!" Later, More's friend tells him, "You're behaving like a fool. You're behaving like a crank. You're not behaving like a gentleman."

"But of course," Scalia observes, "More was not seeing with the eyes of men, but with the eyes of faith." (And thus, Scalia observes in this talk and others, More exemplified St. Paul's injunction that all Christians must allow themselves to be seen as "fools for Christ's sake," and thus "to suffer the contempt of the sophisticated world for these seeming failings of ours."[71]) To state the point more broadly (if less religiously), More was recognizing the limits of the lawyerly craft. He recognized that his work as a lawyer under the King was itself circumscribed by larger commitments, commitments that cannot be found within the four corners of legal doctrine, but which are no less important to the ultimate work of lawyers and judges, rightly understood.

And thus, while law schools need not become religious institutions (though it wouldn't hurt if the religious ones stayed religious), they fail their students when they neglect to inculcate virtues necessary to sustain our republican government.

* * *

As I noted earlier, Justice Scalia often expressed his views of originalism, of republican government, and of legal education without reference to his Catholic faith. Indeed, the fact that Scalia's religious faith informed his constitutional and political principles does not mean that those principles can *only* be informed by religious faith.

Still, in trying to understand Scalia's own thought, his forgotten "Teaching About the Law" essay is indispensable, for placing Scalia's own thought in its proper context. While his Catholic faith did not dictate his interpretations of laws, it did undergird his approach in general.

On that point, it is impossible to improve upon the words of Fr. Paul Scalia, in the homily at his father's funeral service:

> God blessed Dad, as is well known, with a love for his country. He knew well what a close-run thing the founding of our nation was. And he saw in that founding, as did the founders themselves, a blessing. A blessing

> quickly lost when faith is banned from the public square, or when we refuse to bring it there. So he understood that there is no conflict between loving God and loving one's country, between one's faith and one's public service. Dad understood that the deeper he went in his Catholic faith, the better a citizen and a public servant he became. God blessed him with a desire to be the country's good servant, *because* he was God's first.[72]

To that same end, Justice Scalia resisted attempts by judges and others to impair today's students from coming to understand these same truths. And in his 1986 Seton-Neumann lecture, he implored legal educators to truly do justice to the task at hand.

Notes

1. Jennifer Senior, "In Conversation: Antonin Scalia," *New York Magazine*, October 6, 2013.
2. Ibid.
3. Elena Kagan, "In Memoriam: Justice Antonin Scalia," in *Harvard Law Review* 130, no. 1 (2016): 7.
4. Caio F. Rodriguez, et al., "Teorias Contemporâneas da Interpretação Constitucional: Entrevista com o Ministro Antonin Scalia, da Suprema Corte dos EUA," *Revista de Direito Administrativo* 250 (2009): 25, as quoted in Martha Minow, "In Memoriam: Justice Antonin Scalia," *Harvard Law Review* 130, no. 1 (2016): 21.
5. "Elena Kagan Remarks at Antonin Scalia Law School Dedication," last modified October 6, 2016, https://www.youtube.com/watch?v=D44_k82pzLY.
6. 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,* ed. Amy Gutman (Princeton: Princeton University Press, 1989), 3–4.
7. Rogers v. Tennessee, 532 U.S. 451 (2001) at 472 (Scalia, J., dissenting). Quotation marks, citations, and brackets omitted; emphasis added. Quoting Bacon and Blackstone.
8. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) at 549 (Scalia, J., concurring in judgment).
9. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) at 741 (Scalia, J., concurring in part and concurring in judgment).
10. Scalia, "Common-Law Courts in a Civil-Law System", 4.
11. Ibid., 6.
12. Ibid., 7.

13. Ibid., 8.
14. Ibid., 9.
15. Ibid.
16. Ibid., 7.
17. Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, MN: Thomson West, 2012), 7.
18. Antonin Scalia, "Reflections on the Future of the Legal Academy" (commencement address delivered at William & Mary Law School, Williamsburg, VA, May 11, 2014), 4: https://law.wm.edu/news/stories/2014/documents-2014/2014WMCommencementSpeech.pdf.
19. Ibid., 2 (emphasis in original).
20. Ibid., 6.
21. Ibid.
22. Antonin Scalia, "To an Honest Hand," *Tulane Law Review* 78, no. 3 (2004): 508.
23. Gretyl Macalaster, "In NH Visit, Scalia Critiques Legal Education," *New Hampshire Union Leader*, March 23, 2013.
24. Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57, no. 3 (1989): 862.
25. Ibid.
26. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) at 1000–1001.
27. Scalia and Garner, *Reading Law*, 17.
28. Richard Epstein, "Beyond Textualism: Why Originalist Theory Must Apply Beyond General Principles of Interpretation to Constitutional Law," *Harvard Journal of Law & Public Policy* 37, no. 3 (2014): 719 ("The basic task of constitutional interpretation, then, must of necessity go far beyond textualism in order, ironically, to be faithful to the text.")
29. Moynihan's 1984 lecture was titled "Catholic Tradition & Social Change." See 146 Cong. Rec. H7733 (Sept. 19, 2000). The Kirks' 1989 lecture was "Purifying the Dialect of the Tribe." See Russell Kirk, *The Sword of Imagination: Memoirs of a Half-Century of Literary Conflict* (Grand Rapids: William B Eerdmans Publishing Company, 1995), 460.
30. "Chief [*sic*] Justice says good Christians should be 'slow to sue'," *The Voice*, Dec. 26, 1986, 2; "Good Christians should be slow to sue, he says," *The Anchor*, Feb. 6. 1987, 15.
31. Antonin Scalia, "Teaching About the Law," *Christian Legal Society Quarterly*, 8, no. 4 (fall 1987): 6.
32. Ibid.
33. Richard M. Calkins, "Caucus Mediation—Putting Conciliation Back Into the Process: the Peacemaking Approach to Resolution, Peace, and Healing," *Drake Law Review* 54 (2006): 261; Paul R. Baier,

"The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect," *Louisiana Law Review* 67 (2007): 521; Matthias Prause, "The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.," *Harvard Negotiation Law Review*, 13 (winter 2008): 156; Richard M. Calkins, "Mediation: The Radical Change from Courtroom to Conference Table," *Drake Law Review* 58 (2010): 361–362; Richard M. Calkins, "Mediation: A Revolutionary Process That Is Replacing the American Judicial System," *Cardozo Journal of Conflict Resolution* 13 (fall 2011): 8.

34. Kenneth S. Kantzer and Carl F.H. Henry, *Evangelical Affirmations* (Grand Rapids: Zondervan, 1990); Ken Sande, *The Peace Maker* (Grand Rapids: Baker Books, 1991; 3d ed. 2004).
35. See, e.g., Geoffrey R. Stone, "Our Faith-Based Justices," *The Huffington Post*, April 20, 2007 (last updated May 25, 2011), http://www.huffingtonpost.com/geoffrey-r-stone/our-faithbased-justices_b_46398.html; Linda Greenhouse, interviewed by Bill Moyers on *Moyers & Company*, PBS, July 11, 2014, http://billmoyers.com/episode/is-the-supreme-court-out-of-order/ ("I think they're coming from, you know, a narrow worldview. I mean, you know, let's be impolite and point out that all five of them are Roman Catholic and in service of an agenda by a couple of presidents who were elected on a party, Republican Party platform that called for picking judges who would overturn Roe against Wade. And you know, being Catholic is a fair proxy for that in the minds of judge pickers."); Dahlia Lithwick, "Scalia vs. Scalia," *The Atlantic* (June 2014): 48.
36. The Hoover Institution, *Law and Justice with Antonin Scalia* (March 16, 2009), http://www.hoover.org/research/law-and-justice-antonin-scalia.
37. Ibid.
38. Pew Research Center, "A Call for Reckoning: Religion and the Death Penalty—Session Three: Religion, Politics, and the Death Penalty," (Jan. 25. 2002), http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/.
39. Scalia, "Teaching About the Law," 7.
40. Ibid., 7.
41. Ibid., 7–8.
42. Ibid., 8 (emphasis in original).
43. Ibid., 10.
44. Chief Justice John G. Roberts, Jr., "In Memoriam: Justice Antonin Scalia," *Harvard Law Review* 130, no. 1 (2016): 1.
45. Scalia, "Originalism," 849.
46. Hoover, *Law and Justice with Antonin Scalia*.

47. Antonin Scalia, "Mullahs of the West: Judges as Moral Arbiters," (address to the Cambridge Union, University of Cambridge, Cambridge, England, March 9, 2012), https://www.youtube.com/watch?v=TRS-jdgHok4 (posted August 19, 2012).
48. Hoover, *Law and Justice with Antonin Scalia*.
49. Antonin Scalia, "God's Justice and Ours," *First Things* (May 2002), https://www.firstthings.com/article/2002/05/gods-justice-and-ours.
50. Ibid.
51. Scalia, "Teaching About the Law," 10.
52. Ibid.
53. Walter Berns, *Making Patriots* (Chicago: University of Chicago Press, 2001), 39–40.
54. Ibid., 43 (quoting Alexis de Tocqueville, *Democracy in America* (1835), bk. I, Chap. 13).
55. Irving Kristol, "An Autobiographical Memoir," in *The Neoconservative Persuasion* (New York: Basic Books, 2011), 344. ("[T]he men I formed the closest ties with [in a 1976–1977 stint at AEI] were three newly unemployed lawyers—Robert Bork, Antonin Scalia, and Laurence Silberman—who have remained close friends to this day. AEI had no lunchroom at that time, and so we 'brown bagged it' every day, munching on our hamburgers or sandwiches while talking about everything but law[.]").
56. Lee v. Weisman, 505 U.S. 577 (1992) at 638 (emphasis omitted).
57. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) at 400 (emphasis added).
58. Ibid. (quoting "An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (1787)".)
59. *United States v. Virginia*, 518 U.S. 515 (1996), 602–603.
60. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1993), 14.
61. Antonin Scalia, "Commencement Address at Stone Ridge," June 4, 2015, https://www.youtube.com/watch?v=YJSOOYx6wYM (last updated June 5, 2015). The text of a similar 2010 commencement address was republished as "Examine the Platitudes" in a 2015 collection of commencement addresses: Zev Chafets, *Remembering Who We Are: A Treasury of Conservative Commencement Addresses* (New York: Sentinel, 2015), 209.
62. Ibid.
63. Cf. *Selected Writings of Lord Acton*, vol. 3 (Carmel, IN: Liberty Fund, 1988), 490 ("Liberty enables us to do our duty unhindered by the state, by society, by ignorance and error. We are free in proportion as we are safe from these impediments to fight the battle of life and the conflict with temptation, with nature—the enemy within.")

64. Scalia, "Commencement Address at Stone Ridge".
65. Ibid. See also Scalia, "Teaching About the Law," 10. It was only "virtually" verbatim because Scalia changed an "or" to an "and."
66. Scalia, "Reflections on the Future of the Legal Academy," 2 (emphasis in original).
67. Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958), 77.
68. Richard Sennett, *The Craftsman* (Hartford: Yale University Press, 2008), 11.
69. Hand, *The Bill of Rights*, 54–55.
70. I thank the Scalia family for allowing me to review the unpublished text of a 2010 version of this talk, from which the remainder of my essay draws quotes.
71. 1 Corinthians 4: 10.
72. Fr. Paul Scalia, "Funeral Homily for Justice Antonin Scalia," *First Things* (Feb. 22, 2016), https://www.firstthings.com/web-exclusives/2016/02/funeral-homily-for-justice-antonin-scalia.

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