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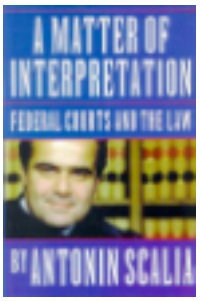
IN RE ANTONIN SCALIA

George Anastaplo

If [the] Declaration [of Independence] is not the truth, let us get the statute book in which we find it and tear it out!

—Abraham Lincoln (1858)

I.



In April 1997, Justice Antonin Scalia paid a well-received visit to the campuses of Loyola University of Chicago. His talks during the visit drew on his book *A Matter of Interpretation: Federal Courts and the Law*. [1]

Among the justice's public appearances was a convocation on 7 April 1997, which heard papers by three Loyola faculty members, including me, and his responses to those papers. The justice commented on my observations about the pervasiveness of his jurisprudence, about his opinions with respect to the Declaration of Independence, and about the constitutional status of capital punishment. I will briefly consider each of these topics in turn.

II.

Here is the way I come into the justice's response, as recorded in a transcript published in *Blackacre*, a law-student newspaper at Loyola: "Let me say a few words about Professor Anastaplo's remarks. Gee, I'm glad to know I'm in the mainstream, Professor Anastaplo; it really feels good. Although, of course, I'm still not in the mainstream of academia."[2] He then alluded to differences between us about whether homosexuals should be considered "a politically powerful minority" and whether affirmative action can ever be constitutionally permitted.

This was the justice's recognition, however brief, of what I had said in the opening and closing passages of the prepared remarks (*"On Justice Scalia's Constitutionalism"*) to which he was responding. (My complete remarks, which were published in *Blackacre* on 6 May 1997, are appended to this article.) Here is my opening passage:

> It is fortunate, considering how accommodating Justice Scalia has been as a much-prized guest of this university, that the questions I am now obliged to pose about the arguments he has made, both in his recently published book and in his talks here, have little to do with him personally. What I question is a school of thought of which he happens, for the moment, to be a particularly influential spokesman. The underlying problem here is with the legal education that has been available in this country since the Second World War. The more prestigious and hence the more sophisticated the law school

> one is associated with, the worse the legal training one is likely to receive in critical respects.
>
> The primary criticism I will be making on this occasion can be directed not only at Justice Scalia but also at his critics: both he and most of them are votaries one way or another of contemporary social science.

And here is the closing passage of my prepared remarks (app., par. 13):

> The critiques I have collected here are anything but new. This should again assure us that the reservations I have ventured to express about Justice Scalia's constitutionalism are directed not against him personally but rather against the dominant scholarly opinion today, a positivistic opinion which our esteemed guest shares in principle, however much he may dissent on secondary points which are not really as important as they may for the moment appear.

I will say more, further on, about how positivism bears on the status both of our constitutional documents and of the common law, topics on which positivists have had much to say for almost two centuries.

III.

That Justice Scalia is, in effect, a positivist and a legal realist he is not likely to deny, whatever aversion he may happen to have to the use of these terms. Mortimer Adler, in his book *Haves without Have-Nots*, suggests "that legal positivism places law on a plane apart from any moral norms. It regards all such norms as being subjective in nature; thus they cannot be treated as having objective validity. Positive law, however, in the sense that it is the law of the state, can be ascertained without regard to moral considerations."[3] The "most fundamental issue in the philosophy of law and justice," Adler suggests, "is the issue between the positivists and the naturalists"—between

> a. those who hold that positive or man-made laws are prior to and determine what is deemed to be just and unjust in any community at any time and place and who, accordingly, also hold that what is deemed just and unjust changes with changes in the positive laws and government of a given community; and

b. those who hold that there are principles of natural law, criteria of justice, and natural rights that enable us to determine whether laws and constitutions are just or unjust and, if unjust, in need of rectification and amendment. [4]

He then directs us to Plato *Republic*:

> There [we] find the sophist, Thrasymachus, arguing against Socrates, saying that "justice is nothing but the interest of the stronger" and Socrates trying to refute Thrasymachus by defining justice without any regard to the edicts or laws of those with the might to enforce them.
>
> According to Thrasymachus, those with the power to ordain and enforce the laws of the land call those who obey their laws just subjects, and those who disobey them unjust. The words "just" and "unjust" have no other meaning, certainly no meaning whereby a despotic tyrant or a tyrannical majority, ruling in self-interest, not for the good of the ruled, can be called unjust.
>
> With the statement that justice is nothing but the interest of the stronger, we have the origin of the doctrine that might is right, for those with the might to govern are the only ones who can determine what is right and wrong. [5]

Adler goes on to trace the opposition between Socrates and Thrasymachus down to our day in this fashion:

> The position taken by Thrasymachus is taken later by the Roman jurisconsult Ulpian for whom "whatever pleases the prince has the force of the law," and still later by Thomas Hobbes in his *Leviathan* where he declares that, in any community, what is just and unjust is wholly determined by the positive or man-made laws enacted by those with the power to ordain and enforce them. In the nineteenth century, the positivist view is advanced by Jeremy Bentham in his *Principles of Morals and Legislation*, and by John Austin in his *Province of Jurisprudence Determined*, and in the twentieth century it is advanced by professors in American law schools who call themselves legal realists.
>
> On the other side, the naturalist view initiated by Socrates in his dispute with Thrasymachus finds amplification in Aristotle's distinction between natural and legal justice; in Cicero's discussion of [the] natural; in Augustine's statement that "an unjust law is a law in name only" (repre-

> senting might without right, power without authority); in Aquinas's philosophy of law wherein principles of justice are antecedent to, independent of, and applicable to positive or man-made laws; and in the doctrine of modern philosophers, such as John Locke and Immanuel Kant, for whom natural rights preexist positive, man-made laws and become the basis for assessing their Justice and injustice. [6]

Adler, in his usual systematic fashion, spells out "the consequences that follow from embracing the positivist or the naturalist side of the issue." Thus he says:

> Justice Scalia does not seem to appreciate the constitutional system implicit in the Declaration of Independence.

If the positivist view of the relation between law and justice is correct, it follows:

1. that might is right;
2. that there can be no such thing as the tyranny of the majority;
3. that there are no criteria for judging laws or constitutions as unjust and in need of rectification or amendment;
4. that justice is local and transient, not universal and immutable, but different in different places and at different times;
5. that positive laws have force only, and no authority, eliciting obedience only through the fear of the punishment that accompanies getting caught in disobeying them; and
6. that there is no distinction between *mala prohibita* and *mala in se*, namely, between
   a. acts that are wrong simply because they are legally prohibited (such as breaches of traffic ordinances); and
   b. acts that are wrong in themselves, whether or not they are prohibited by positive law (such as murdering human beings or enslaving them). [7]

Adler then spells out, in opposition to each of these points, "the naturalist view of the relation between law and politics," beginning with the observation that "might is not right" and that "majorities can be tyrannical and unjust."

Justice Scalia evidently is not aware, by the way, of the extent to which legal positivism, with its tendency toward moral relativism and away from natural-law and natural-right doctrines, is discouraged by the Roman Catholicism to which he is known to be a devout adherent. We can be reminded here of how much one's religious allegiance is likely to be determined by circumstances.

Circumstances or accidents, such as temperament, career opportunities, and political associations, to say nothing of divine providence, may also have inclined Antonin Scalia to conservatism (just as most liberals may be shaped by *their* circumstances). It should at once be added that intellectuals, including some judges, are not as respectful of nature and justice as practicing politicians have to be. One can see, on studying Justice Scalia's arguments, why Harry Jaffa considers such people unreliable allies as conservatives. (Liberals can be unreliable in similar ways.) Indeed, Professor Jaffa can speak of "the mainstream" as a polluted stream.

IV.

I turn now to my differences with Justice Scalia with respect to the Declaration of Independence.

I said in my prepared remarks of 7 April 1997 that the legal realist cavalierly disavows the natural-right/natural law tradition vital to the Anglo-American constitutional system. I then observed (app., par. 6-7):

> If someone challenges the "wisdom" of our day about the common law—that common law upon which the Constitution rests—it need not be because he is being presumptuous. Rather, it can merely reflect the reluctance of a true conservative to repudiate the sensible teachings and steady practice by centuries of thoughtful jurists in the Anglo-American legal tradition, a tradition grounded in turn in the natural-right/natural-law tradition that the modern legal realist cavalierly disavows, thereby helping Rome to burn.
>
> This disavowal extends to ignoring the Declaration of Independence in constitutional interpretation, even though that document is identified in the first volume of the United States Statutes at Large as one of the organic laws of the United States. Symptomatic of this neglect is the failure of the United States Supreme Court in *Brown v. Board of Education* (1954) to refer to the Declaration of Independence, even though the ruling in that case redeemed the "created equal" language of the Declaration as it came to be applied in the Fourteenth Amendment. It will hardly do to say, as Justice Scalia with many others says, that the Constitution is not really "aspirational" in its terms and tone.

Justice Scalia, very much the legal realist, does have quite a different view of this matter:

> I don't think the Declaration of Independence is part of our law. It was drafted before the federal government even existed. The Declaration of Independence, unlike the Constitution, unlike the Bill of Rights, is an aspirational document! That's where you hear such wonderful stuff [about] life, liberty, and the pursuit of happiness. . . .
>
> The Declaration of Independence is aspirational. That's something you inspire people with, it's not something you go to a law court with. [8]

He startled several in his Loyola audience when he went on to insist that he as a judge should have nothing to do with the Declaration of Independence:

> The Bill of Rights, on the other hand, has none of *that philosophical poppycock* in it. It's quite precise. "Trial by jury in all civil matters involving more than $20"—that's not the French Declaration of the Universal Rights of Man. It's not aspirational, it's law! The Declaration of Independence was not law, so I do not apply it in my opinions. [9]

Any comment that I might make here about this kind of dismissal of the Declaration of Independence is anticipated in the following comment by Mortimer Adler:

> Only on the naturalist view does the great second paragraph of the Declaration of Independence proclaim self-evident truths. On the positivist view, it is, as Jeremy Bentham claimed at the time, a piece of flamboyant rhetoric, aimed at winning converts to the cause of the rebellion, but without an ounce of truth in its pious proclamations about unalienable rights and how governments, which derive their just powers from the consent of the governed, are formed to make preexisting natural rights more secure. [10]

"Philosophical poppycock" may be a shorthand way of summing up Bentham's "flamboyant rhetoric . . . without an ounce of truth in its pious proclamations." Justice Scalia does not seem to appreciate the constitutional system implicit in the Declaration of Independence. In addition, he has a limited view of what law is—and what it rests upon. The Declaration of Independence, we must remember, does not purport to create or lay down the law, but rather to reveal and reaffirm it— and it is this that provides the grounding for the Constitution of 1787 and for repeated efforts to improve the Constitution since its ratification.

V.

Of course, Justice Scalia, like most of us, is derivative: He is not a primary source of the arguments he makes. Perhaps the most important immediate influences on him are Oliver Wendell Holmes Jr. and his disciples, with the Holmes influence (which can be traced back at least to Thomas Hobbes) transmitted through people such as Felix Frankfurter and Edward H. Levi, and to a lesser extent through Learned Hand and Louis Brandeis. The following has been said of Justice Holmes:

> [In] an era that was anxious to perpetuate the illusion that judicial decision making was somehow different from other kinds of official decision making, since judges merely "found" or "declared" law, Holmes demonstrated that judging was inescapably an exercise in policymaking. This insight was a breath of fresh air in a stale jurisprudential climate. Against the ponderous intonations of other judges that they were "making no laws, deciding no policy, [and] never entering into the domain of public action," Holmes offered the theory that they were doing all those things. American jurisprudence was never the same again. [11]

This recognizes Holmes's contribution to legal realism, an approach that is evident in the opening paragraph of his famous book *The Common Law*:

> The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. *The life of the law has not been logic: it has been experience*. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient: but its form and machin-

> ery, and the degree to which it is able to work out desired results, depend very much upon its past. [12]

The emphasis on experience and history in the Holmes book is, in effect, an emphasis on chance, unless there is something to which human beings and their communities look in determining what experiences to have and how to deal with them. Vital here is the status of nature and a prudence-guided natural right (or natural law) in the Holmes scheme of things, a status that is much lowered, if not virtually eliminated, when that scheme is compared with those left us by, say, Cicero and Thomas Aquinas.

It is instructive to try to work out what it means to say, as Holmes does, that *logic* is to be replaced by *experience* in accounting for what the law is and does. Is the disparagement of logic in effect a turning away from reasoning about nature as the source of guidance about how we should act? Much is made in Holmes *Common Law* of expediency and policy; little, if anything, of justice and the common good. Again, we are being asked to be realistic. And again, Mortimer Adler is useful, reminding us of what Justice Holmes, "the founding father of the school of legal realists," defines law to be. Here is a passage taken by Adler from a Holmes talk:

> What constitutes the law? You will find some text writers telling you that . . . it is a system of reason, that it is a deduction from principles of ethics or admitted axioms, or what not, which may or may not coincide with the decisions [of courts]. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. [13]

This is the sort of approach, seeing law as very much dependent on calculation, which Justice Scalia and others of his disposition have picked up. One consequence is an often exaggerated reliance on economic analysis for an understanding of the law and of what judges do.

VI.

Among the other consequences of this approach is failure to appreciate the extent to which the Tenth Amendment is merely declaratory. Related to this is the failure to appreciate what the Ninth Amendment says, in effect, about the enduring authority (independent of the Constitution) of all, or almost all, of the rights

found in the Constitution and the Bill of Rights, (All this is aside from the problem of the extent and consequences of judicial review. The Ninth Amendment seems to indicate that the rights it saves are to be respected in much the same way as the rights "enumerated" in the Constitution.)

Legal positivism tends to lead to an insensitive reading of the Constitution and, depending on the temperament and political inclinations of the interpreter, to an unreliable assessment of the powers of the government of the United States. The Anti-Federalists were correct in noticing in 1787-89 that the scope of the powers available to the proposed national government was virtually unlimited, something that the more astute nationalists also recognized from the beginning. Recent cases such as *National League of Cities v. Usery*, [14] *United States v. Lopez*, [15] and *Printz v. United States* [16] can be little more than temporary obstacles in the way of exercising the considerable national power required in contemporary circumstances.

More serious are such cases as *Erie Railroad Company v. Tompkins*, [17] which ratify and reinforce an abandonment of an understanding of the common law that is grounded in nature. *Erie*, I have suggested, "exhibits a curious form of judicial suicide" (app., par. 5). It remains to be appreciated how much Justice Holmes shot down with his notorious attack on his "brooding omnipresence in the sky."

VII.

The third matter that Justice Scalia challenged in my remarks of 7 April 1997 was the issue of capital punishment. Here is what I had said in my prepared remarks (app., par. 9):

> The way that Justice Scalia reads and uses the Declaration of Independence, the Constitution, and the Fourteenth Amendment (which does include a much-neglected Privileges and Immunities Clause) is far too mechanical. But, then, he can be rather mechanical in questioning such constitutional challenges as those made to capital punishment today. Is it not possible that radical changes in sensibilities, practices, or penology since 1791 have made capital punishment seem "cruel and unusual," however much the Framers of the Constitution took capital punishment for granted? Also relevant here is whether death sentences are now distributed in such a way as to be either arbitrary or racially discriminatory, which would pose special problems under the Fifth and Fourteenth Amendments. Terms such

> as "unreasonable" in the Fourth Amendment and "cruel and unusual" in the Eighth Amendment do have to be seen somewhat in the light of the circumstances and experiences of one's day. (All this is related to how the common law should be regarded and developed.)

And here is the justice's response, which left me (as does his essay in *A Matter of Interpretation* on this point) somewhat confused as to both its meaning and its practical implications:

> Professor Anastaplo thinks "cruel and unusual" may not mean the same today as it did before. Well, I suppose we may not think it cruel today when they may have before. Why does it have to be a one-way street? Do you think that maybe the framers had it in their minds to really oppose cruel and unusual punishments—not any particular ones, we just don't want punishments to be cruel and unusual, whatever that might mean? If a future generation might think that thumbscrews are not cruel and unusual, and we think they are, then that's okay. The only thing we're really against is cruel and unusual, in the abstract. That's surely not what they meant. They meant to stop those things that they found abhorrent in the future, not just an invitation to the courts to make up the rules from age to age. [18]

How *is* the language of 1787 to be read? Constitutional terms such as *Commerce* and *Army and Navy* now have a much broader scope, in a sense, than they did two centuries ago. They, and other terms, do depend somewhat on circumstances. This includes the vital terms in the due process clauses: The *process* that is *due* may depend on legislation as well as on changing customs. Should we be surprised by the argument that the Framers expected that what was considered cruel might change with the times? Certainly this assessment had changed in the Framers' own lifetimes. Certainly, also, when *unusual* is spoken of, that does seem to suggest that bearings might properly be taken by what was usual— and might that not change from time to time?

The Framers might even have found relevant, in considering what is indeed *cruel and unusual* (and hence questionable) here, what is done around the world about capital punishment. The more civilized countries of the West seem to have abandoned it, by and large (except, of course, the United States), while the most extensive tyranny on earth today is steadily increasing the number of its executions (some six thousand last year). That there are serious prob-

lems with how we mete out capital punishment is suggested not only by the recent American Bar Association call for a moratorium on executions in this country but also by the reservations that have been expressed in Illinois by experienced lawyers, including respected former prosecutors.

VIII.

One concern I have is that Justice Scalia and his cohorts may give what is now called "originalism" a bad name, just as early in this century other so-called conservatives gave "natural law" a bad name. [19] At the heart of the problem is the fact that the best things are not being read by these "conservative" polemicists. Nor do they really study the Constitution. The most that they might rely on is the *Federalist*-but that is a tricky set of essays to work with, however instructive they can be for someone who studies them properly in their New York political context.

The grounding of Justice Scalia's polemics sometimes seems to be a determined individualism. This may be seen in the example that he can resort to in describing where *he* draws a line against government interference (though not a line he would draw in the capacity of judge):

> Do I believe that there are other rights besides those listed in the Bill of Rights? You bet I do. And I will take to the barricades if somebody tries to take away some of those rights.
>
> For example, the right to have my children educated according to my wishes, to have the values I want imparted to them, and not those of Big Brother. And if the government tries to take that away from me, I will take up arms against it if I have any arms left. [20]

One could well begin a critique here by considering the use of terms such as *values* and *Big Brother*. Underlying the radical individualism reflected in this passage is a disregard for what the community should do in shaping the morals of its citizens, including those of one's own children. A good deal can be said, that is, for the legislation of morality. The Scalia declaration of independence may be unduly self-centered as well as ultimately destructive of an ethical community. For example, his declaration fails to recognize such factors as the role of the community in establishing "values" and even in determining who one's children are for various purposes. In this failing Justice Scalia can be likened to the more extreme "pro-choice" advocates.

IX.

Antonin Scalia is considered a Republican; a few even speak of him as a serious political candidate for the party. But I am amazed by how little he has been influenced by the greatest Republican of them all, Abraham Lincoln. Lincoln would stoutly resist the kind of talk we have heard disparaging the Declaration of Independence, and the talk we have heard about a separation, in effect, of law from morality. Thus he observed, in his message to Congress on 4 July 1861, that "nothing should ever be implied as law which leads to unjust or absurd consequences."

But then Oliver Wendell Holmes, who served gallantly during the Civil War—and on the right side—was himself curiously unaffected by the best of Abraham Lincoln's thought. How this "tone deafness," in Justice Holmes and his disciples down to our day, is to be understood remains a mystery that might well be investigated on another occasion. [21]

ENDNOTES

1. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton, N.J.: Princeton University Press. 1997).

2. "Scalia Answers Critics of Originalism," *Blackacre*, 22 April 1997 , 2.

3. Mortimer Adler, *Haves without Have-Nots* (New York: Macmillan. 1991), 190.

4. Ibid., 195.

5. Ibid., 195-96.

6. Ibid., 196.

7. Ibid., 197.

8. "Scalia Answers Critics of Originalism," 2.

9. Ibid. Emphasis added.

10. Adler, *Haves without Have-Nots*, 198.

11. *Encyclopedia of the American Constitution*, s.v. "Holmes, Oliver Wendell,"

12. Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881), 1.

13. Quoted in Adler, *Haves without Have-Nots*, 212.

14. 426 U.S. 833 (1976).

15. 514 U.S. 549 (1995).

16. 117 S. Ct. 2365 (1997).

17. 304 U.S. 64 (1938)

18. "Scalia Answers Critics of Originalism,"2.

19. The following writings of mine bear on the subjects discussed here: My argument on how to read the Constitution may be found in *The Constitutionalist: Notes on the First Amendment* (Dallas: Southern Methodist University Press, 1971); *The Constitution of 1787: A Commentary* (Baltimore: Johns Hopkins University Press, 1989); and *The Amendments to the Constitution: A Commentary* (Baltimore: Johns Hopkins University Press, 1995). See also "Don Quixote and the Constitution," in *The Supreme Court and American Constitutionalism*, ed. Bradford P. Wilson and Ken Masugi (Lanham, Md.: Rowman and Littlefield, 1998). On natural law and natural right, see "Natural Law and Natural Right?" *38 Loyola of New Orleans Last Review 915* (1993); "Rome, Piety, and Law," *39 Loyola of New Orleans Law Review 1* (1993); "Teaching, Nature, and the Moral Virtues," *The Great Ideas Today*, vol. 1997, p. 2 (1997); "One Beginnings," *The Great Ideas Today*, vol. 1998, p. 138 (1998); and *The American Moralist* (Athens: Ohio University Press, 1992). (The last includes a discussion of capital punishment.) On racism and "political correctness," see my collections of documents in volumes 42 and 43 of the *South Dakota Law Review* (1997, 1998). Perhaps the foundation of all such reflections and arguments is the Platonic doctrine of the Ideas, examined in my book *The Thinker as Artist* (Athens: Ohio University Press, 1997).

20. "Scalia Answers Critics of Originalism," 5.

21. See, for example, Anastaplo, *Thoughts on Abraham Lincoln* (Lanham, Md.: Rowman and Littlefield, forthcoming).

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