

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-author⁴; (2) a collection of his dissents⁵; (3) his Tanner lectures delivered at Princeton University⁶;

(4) an extended exegesis on textualism by Scalia and a co-author⁷; 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.

The papers were presented at a conference in December 2016 hosted by the Harvard Program on Education Policy and Governance in the Taubman Center on State and Local Government at the Harvard

Kennedy School. We thank the Charles Koch Foundation, the Searle Freedom Trust, the William Simon Foundation, and the Walton Family Foundation for support for conference activities and the preparation of this volume. We are also grateful for valuable assistance provided by Antonio Wendland, Amanda Olberg, and Michael Poor.

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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.



<http://www.springer.com/978-3-319-58930-5>

Scalia's Constitution

Essays on Law and Education

Peterson, P.E.; McConnell, M.W. (Eds.)

2018, XII, 151 p., Hardcover

ISBN: 978-3-319-58930-5