

SCALIA FORUM 2019: PANEL DISCUSSION

Panelists: *Amy Coney Barrett**
David E. Bernstein†
Paul D. Clement‡
*Neomi Rao***
David R. Stras††

Judge Amy Coney Barrett: I could not agree more with Judge Pryor’s eloquent description of Justice Scalia’s commitment to democracy. He was an avid proponent of leaving the decision-making in the hands of the People. And the thing I wanted to comment on briefly is the criticism that Judge Pryor alluded to: that Justice Scalia used his commitment to originalism as a cover for imposing his private beliefs on the Constitution and, particularly, his private religious beliefs.

The irony is that this criticism is frequently leveled by those who are his intellectual opponents—the living constitutionalists—who expressly welcome moral and value-based decisions into constitutional interpretation. And I think he would have laughed at the irony of those who welcome such moral-based judgments lambasting him for making moral-based judgments.

I think one reason why Justice Scalia and those who defend originalism and their critics talk past each other is that originalism is such a fundamentally different view of constitutional decision-making. Critics almost cannot believe what he is saying is true. Because if you embrace a values-based approach to constitutional interpretation, and if you see judicial review as a mechanism for reasoning out moral judgments, it cannot be true that Justice Scalia was not doing the exact same thing.

* Circuit Judge on the U.S. Court of Appeals for the Seventh Circuit, appointed in November 2017. Before joining the bench, Judge Barrett served on the faculty of Notre Dame Law School, where she continues to teach. Judge Barrett clerked for Associate Justice Antonin Scalia on the Supreme Court from 1998 to 1999.

† University Professor and the Executive Director of the Law & Liberty Center at George Mason University’s Antonin Scalia Law School. Professor Bernstein has been a visiting professor at Georgetown University Law Center, University of Michigan School of Law, and William & Mary Law School.

‡ Partner in the Washington, D.C., office of Kirkland & Ellis LLP. Paul Clement served as the 43rd Solicitor General of the United States and has argued over 95 cases before the U.S. Supreme Court.

** Circuit Judge on the U.S. Court of Appeals for the D.C. Circuit, appointed in March 2019. Judge Rao is a graduate of Yale College and The University Chicago Law School, and she served as a law clerk for Justice Clarence Thomas. Prior to joining the bench, Judge Rao was the Administrator of the Office of Information and Regulatory Affairs. She was also previously a professor at the Antonin Scalia Law School at George Mason University, and the director and founder of the Center for the Study of the Administrative State.

†† Circuit Judge on the U.S. Court of Appeals for the Eighth Circuit, appointed in January 2018. Previously, Judge Stras was an Associate Justice of the Minnesota Supreme Court. Before then, Judge Stras was a member of the faculty of the University of Minnesota Law School from 2004 to 2010.

Of course, you might say that you are trying to follow the original public meaning, but, of course, if constitutional decision-making really is an enterprise about finding what our contemporary values are, you are just imposing your version of contemporary values on everyone else.

But, as Judge Pryor said, that is absolutely not what Justice Scalia was about. Nothing he said, either on or off the bench, seems to persuade his critics. But in this regard, one thing to point out is that someone who was committed to privileging religious believers in the public square would not really have identified *Employment Division v. Smith*¹ as his manifesto.

In conclusion, I think it is crucial in a pluralistic society for judges to let those value-based judgments be made by the People. We cannot function in a pluralistic society any other way. And Justice Scalia was a great advocate for that. He brought that idea out to popular audiences as well as to law schools. And I think those nine people from the Kansas City phonebook found that idea quite attractive.

Professor David Bernstein: That was a great talk by Judge Pryor. I agree with the thrust of what he said. But I want to emphasize that rather than supporting democracy as such, Justice Scalia believed in self-government and the sovereignty of the People. That includes not simply what the legislature has dictated but the Constitution itself, enacted by the sovereign American People.

While Scalia's perspective does not give the judiciary the right to read its own views into the Constitution or to take sides in the culture war, when the Constitution is clear about a matter—and Justice Scalia sometimes thought the Constitution *was* clear about a matter—he would enforce the Constitution at the expense of transient democratic majorities.

This was a very important issue for Justice Scalia and remains so for the country. When I started law school in 1988, people in Federalist Society-type circles were what I would call neo-Progressives in their attitudes toward the Constitution. They did not like what they saw as “activist” Warren Court and Burger Court decisions that ignored constitutional text and original meaning, so they looked for inspiration to earlier generations of progressives who had opposed what they saw as judicial activism—luminaries like Learned Hand, Oliver Wendell Holmes, and Louis Brandeis. That generation of conservatives even occasionally had a nice word for F.D.R. despite F.D.R.'s dismissal of the so-called horse-and-buggy Constitution, because he was (at least rhetorically) against judicial activism.

But unlike the Progressives whose opposition to what they considered judicial activism often arose from contempt for the written Constitution, Justice Scalia's opposition to judicial activism focused on originalism and enforcing the text as written.

¹ 485 U.S. 660 (1988).

I still remember during my first year of law school when the flag-burning decision² came down. Justice Scalia was in the majority. He joined Justice Brennan's (!) opinion arguing that the First Amendment does not allow the government to ban the burning of the American flag because it is a matter of free speech protected by the First Amendment. And I remember there being some whispers: *Maybe we made the wrong move with this Scalia guy? Maybe he's a judicial activist?* But in fact, Scalia was simply enforcing a plausible, and I think the correct, interpretation of the First Amendment.

Later in his career, Justice Scalia became a great champion of the Confrontation Clause of the Sixth Amendment to the extent that—while the Court's decisions went back and forth five to four—if Justice Scalia's view had consistently won out in this regard, it really would have upended the criminal procedure system and the way criminal trials were run in basically every state in the union. But he was very much convinced that the explicit right to confront one's accusers needed to be strictly enforced. And if that would make life inconvenient for the prosecutors, that is too bad.

Justice Scalia early in his Supreme Court career called himself a faint-hearted originalist.³ He was concerned with precedent; he was concerned with the temptation to be a judicial activist. But over time, as originalist scholarship developed in large part because of his own influence, he became less of a faint-hearted originalist.⁴

In the written version of Judge Pryor's remarks, he references *Gonzales v. Raich*,⁵ the medical marijuana case that analyzed whether punishing someone for growing marijuana for medical use without any related commercial transactions fell within the Congress's Commerce Clause power. In that case, Justice Scalia wrote a concurring opinion in which he essentially reasserted the validity of *Wickard v. Filburn*.⁶ Yet, less than a decade later, in a book that he coauthored on judicial interpretation, he wrote that in *Wickard* the Supreme Court expanded the Commerce Clause "beyond all reason" by holding that a farmer's cultivation of wheat for his own consumption affected interstate commerce and thus could be regulated under the Commerce Clause.⁷

Justice Scalia had been more deferential to an assertion of the Commerce power in *Raich* than his later remarks about *Wickard* would suggest, but he explained that he knew there was some contradiction to what he said in his books and what he said earlier in his career and in some of his Supreme Court opinions. Some contradictions, he said, were explained by adherence

² *Texas v. Johnson*, 491 U.S. 397 (1989).

³ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁴ See Ilya Somin, *Justice Scalia Repudiates "Fainthearted Originalism"*, VOLOKH CONSPIRACY (Oct. 7, 2013, 11:20 AM), <http://volokh.com/2013/10/07/justice-scalia-repudiates-fainthearted-originalism/>.

⁵ 545 U.S. 1 (2005).

⁶ 317 U.S. 111 (1942).

⁷ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 406 (2012).

to stare decisis, while others, he wrote, were “because wisdom has come late.” So, another admirable thing about Justice Scalia is that he was willing to change his mind when he thought the evidence required it.

As originalist scholarship has developed, those on the conservative side have moved away from merely opposing judicial activism as such to figuring out how judges can properly interpret the Constitution according to its original meaning. This evolution includes Justice Scalia, who was increasingly willing to invalidate legislation (though not engage in what he thought of as “activism”) when he thought enforcing the correct interpretation of the Constitution so required. He was, for example, willing to vote with the majority on the Commerce issue in *NFIB v. Sebelius*,⁸ which, if he had his druthers, would have invalidated a very significant piece of legislation.

Thus, while Judge Pryor is right that Justice Scalia believed in constitutional self-government and self-determination, we must keep in mind that his ultimate loyalty was to the Constitution and, as he understood it, to a constitutional republic, and not to democracy, as such.

Paul Clement: Judge Pryor, thank you for that wonderful speech. I thought it was terrific. There is in my view just one problem with the speech. And that is that way too many of the decisions of Justice Scalia that you were referring to and were citing were dissents. And what that means is that his commitment and his vision of the judicial role as being consistent with democracy and reflecting a commitment to democracy were not shared in many of the very important cases by a majority of his colleagues. And, of course, that has consequences for the judiciary and, in particular, for the confirmation process.

There are many ways in which the Justices who have already been confirmed can insulate themselves from the democratic process. And they can decide major social issues even when the Constitution does not speak directly to those issues. But there is one place where the Supreme Court cannot avoid touching democracy, and that is the Senate confirmation process.

I do not think it is a surprise that in the one place where the Supreme Court touches the democratic process, it ends up being like grabbing the third rail. And, of course, none of this was lost on Justice Scalia. He alluded to this in a number of dissenting opinions—probably most expressly in his dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁹

After criticizing what judicial confirmation hearings had become, Justice Scalia ended up sort of *not* criticizing them because he said, “Look, if this is the way that the Court is going to go about interpreting the Constitution in a very antidemocratic fashion, then the Senate confirmation process should be a mess.” He particularly said that it should be a process where the democratically elected Senators ask a variety of questions about every social issue

⁸ 567 U.S. 519 (2012).

⁹ 502 U.S. 1056 (1992).

that matters to them and matters to their constituents and try to get commitments on the record from the Justices about how they are going to vote.

If you look at the most recent Supreme Court confirmation process, it is very easy to criticize some of the members of the Senate Judiciary Committee for the process, and there is certainly plenty of criticism to go around. But I do think, consistent with the thrust of Judge Pryor's speech, that Justice Scalia would also point the finger of blame at the Justices in the majority of many of those opinions given the very antidemocratic way in which they have interpreted the Constitution. And I think he would have less criticism, frankly, for some of the members of the Senate Judiciary Committee than a lot of Republicans watching the most recent confirmation process. That is the first point I wanted to make. And it is obviously a point that Justice Scalia made.

The second point I wanted to make is that, not only was Justice Scalia committed to the democratic process, but he was committed to a no-holds-barred, take-off-the-gloves process of democracy that included a very robust role for parties and partisanship. And you really saw this strain in two kinds of cases.

One is the patronage series of cases,¹⁰ wherein the Supreme Court said that there was a First Amendment problem with a new mayor or a new governor coming in and replacing a large number of civil servants with people who agree with the new governor or the new mayor. Maybe it was his growing up in New York or spending time in Chicago, but Justice Scalia had no sympathy for the idea that there was anything unconstitutional about that process. It might have been unwholesome, but it was not unconstitutional in his view.

The other place where you really see this strain in his jurisprudence is in the partisan gerrymandering cases. One of Justice Scalia's great, but underappreciated, opinions was his plurality opinion in *Vieth v. Jubelirer*,¹¹ where he really took down the arguments against partisan gerrymandering.

To put these two thoughts together: I do think that if there is one thing that the Supreme Court could do to make the Senate confirmation process even worse, it would be to not accept Justice Scalia's view in *Vieth* and decide that partisan gerrymandering claims are justiciable.

Judge Neomi Rao: It is great to be back at the Law School and wonderful to be on this panel talking about Judge Pryor's speech with so many great people. I want to highlight two points in my remarks. First, I want to address the question of democracy that Judge Pryor raised. Judge Pryor emphasized that Justice Scalia was committed to our very particular form of constitutional democracy. I do not think Justice Scalia was committed to democratic outcomes categorically, and I do not think he was committed to a limited judiciary generally. But rather, Justice Scalia's commitment was to the

¹⁰ *E.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

¹¹ 539 U.S. 957 (2003).

Constitution and a form of “just-right” judiciary—one that would respect the limits of courts, but also enforce constitutional limits on the political branches.

It is this particular form of constitutional democracy, *our* constitutional democracy, that Justice Scalia was committed to. This is important to highlight because there are many competing theories of legal interpretation that also reference democracy. For example, Justice Stephen Breyer in his book *Active Liberty* discusses how interpreting statutes in light of their purposes can serve democracy.¹² He notes that judges are part of the democratic process, furthering the purposes of statutes. Similarly, Bill Eskridge has propounded a theory of “dynamic statutory interpretation.”¹³ He justifies his theory, in part, with reference to democratic norms. He believes that a judge should interpret statutes dynamically and use evolving public values to understand the meaning of statutes. Justice Breyer and Professor Eskridge both rely on democracy, but their theories defend very different methods of statutory and constitutional interpretation from Justice Scalia.

Justice Scalia did not think judges should take an active role in democracy, but rather, he favored certain methods of interpretation such as textualism and originalism that would ensure that judges stuck to the judicial role and not the legislative role. Thus, he did not advocate for judges’ decisions to reflect democratic preferences or outcomes that change over time, but rather for judges to respect the *law*, that is the results of the democratic process found in the text of statutes that went through bicameralism and presentment and the meaning of the Constitution as originally enacted by the People.

For my second point, I briefly want to consider an area not addressed by Judge Pryor’s speech: administrative law. In this area, it is harder to see the same commitment to our constitutional democracy in some of the Court’s precedents. And I think Justice Scalia was very faithful to the Supreme Court’s precedents in this area. These precedents, however, have had the effect over time of transferring power from Congress, our representative branch, to the executive branch.

For example, with respect to the nondelegation doctrine, Justice Scalia consistently emphasized just how important the nondelegation principle was to the separation of powers.¹⁴ Of course, the Constitution vests all legislative

¹² STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85–101 (2005).

¹³ WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 120–38, 151–61 (1994).

¹⁴ See *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) (urging the Court to interpret SORNA narrowly to avoid “sailing close to the wind with regard to the principle that legislative powers are nondelegable”); *Whitman v. American Trucking*, 531 U.S. 457, 472–73 (2001) (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.”); see also C. Boyden Gray, *The Nondelegation Canon’s Neglected History and Underestimated Legacy*, 22 *GEO. MASON L. REV.* 619, 645 (2015) (“Justice

power in Congress,¹⁵ and Justice Scalia maintained that Congress could never delegate its truly legislative power.¹⁶ But despite the importance of this principle, Justice Scalia also argued that this was not a line that courts could draw—that the nondelegation principle was not easily susceptible to judicial enforcement.¹⁷ Justice Scalia found it hard to find a rule, a line, that courts could draw between permissible and impermissible delegations.

This is an important form of judicial restraint. Yet it is perhaps a form of judicial restraint that does not consistently serve constitutional democracy, because it allows the widespread transfer of authority from the Congress to executive branch agencies.¹⁸

In the area of administrative law, the deference doctrines are another important aspect of the relationship between courts and democracy. Judicial deference to agency decision-making was a principle that Justice Scalia was a strong proponent of, at least through much of his career.¹⁹ He was, of course, rethinking some of the deference doctrines such as the *Auer*²⁰ doctrine.²¹ Yet a consistent practice of deference reinforces delegations of authority to agencies, because courts are deferring to an agency's interpretation of an ambiguous statute. Thus, deference allows regulatory decision-making to rest with agency officials, rather than the people's democratically elected representatives in Congress.

To Justice Scalia's credit, one justification he often offered for judicial deference was that it furthered a certain kind of democratic accountability. He noted that at least executive branch agencies were democratically

Scalia's opinion [in *Whitman*] rejected the notion that agencies could play any role in discerning the textual limits on their own authority, for purposes of the nondelegation inquiry.”).

¹⁵ U.S. CONST. art. I, § 1.

¹⁶ See *Loving v. United States*, 517 U.S. 748, 776–77 (1996) (Scalia, J., dissenting) (“While it has become the practice in our opinions to refer to ‘unconstitutional delegations of legislative authority’ versus ‘lawful delegations of legislative authority,’ in fact the latter category does not exist. Legislative power is nondelegable.”).

¹⁷ *Mistretta v. United States*, 488 U.S. 361, 415–22 (1989) (Scalia, J., dissenting) (“But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”).

¹⁸ See, e.g., Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1 (2018); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).

¹⁹ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting); see also *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (“*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.” (citation omitted)).

²⁰ *Auer v. Robbins*, 518 U.S. 1016 (1996).

²¹ *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (“Our cases have not put forward a persuasive justification for *Auer* deference.”).

accountable through the President, which, of course, they are.²² As between courts and agencies, then, agencies had greater democratic legitimacy.²³

Administrative law, however, involves not only courts and agencies, but also Congress. While the executive branch is democratically accountable, it lacks the kind of collective, representative decision-making that we have in the first branch of government.²⁴ Thus, permitting open-ended delegations of authority to agencies and then deferring to their interpretations moves important decisions further from Congress and the representative legislative power.

This is something that Justice Scalia certainly understood and wrote about before taking the bench. He was very aware that a tremendous amount of political decision-making was happening in the executive branch:

The main problem is that the agencies have been assigned too many tasks requiring judgements that are of an essentially political nature and that ought to be made by our elected representatives. And the only remedy, if we really want a remedy, is to take some of those tasks away and to perform them instead by legislation, or not to perform them at all.²⁵

We know Justice Scalia was willing to reconsider his precedents,²⁶ so I think he would appreciate our discussion on his very important legacy and how the principles he articulated continue to be applied to new problems of separation of powers.

Judge David Stras: Thank you for inviting me, and thanks to Judge Pryor for a wonderful talk. That was quite provocative. I am going to reach pretty far back into my own career to make two points. It has been about ten years since I was a law professor, but both of my points rely on things that I learned in that role.

The first thing, and it is sort of a preliminary point, is that it struck me early in my professorial career how fundamentally Justice Scalia changed judging. When you look back at briefs and judicial opinions in the '40s, '50s, '60s, and '70s, you notice how the briefs would often start with policy and

²² See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (1989) ("If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight.").

²³ *Id.*

²⁴ See generally sources cited *supra* note 18.

²⁵ Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG.: AEI J. ON GOV'T & SOC'Y (Dec. 6, 1979), <http://www.aei.org/publication/the-legislative-veto-a-false-remedy-for-system-overload/>.

²⁶ See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgement) ("I would therefore restore the balance originally struck by the APA with respect to an agency's interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written.").

legislative history, and then by the end they would get around to the text and say, “Oh, by the way, this is consistent with what the text says as well.”

Justice Scalia prompted a complete reversal. Having been a judge now for a little while, I am now happy to see people start with the text and sometimes end with the text. And that is a fundamental change that I think Justice Scalia brought to the judiciary that was only enhanced and accelerated when Justice Thomas joined him in the early 1990s.

The second point I want make is that one of the things I admire about Justice Scalia, among many things, is his rejection of what I call working backwards or results-oriented judging. Political scientists believe that judges cannot leave their politics at the door—that their policy preferences infect many of their decisions. But that relies on a proposition that I think I—and I’m sure Justice Scalia—would reject, which is that judges are inherently political.

I think Justice Scalia would reject that. And I think Justice Scalia proves that there is room for first principles, for text, and for reading the law in judicial interpretation. And I think that was Justice Scalia’s first allegiance. As many others on the panel have mentioned, legislating and executing the law are the stuff of the other branches of government.

There are many examples of this, but I think there is no better example than his criminal procedure jurisprudence. Justice Scalia once said that he should be the darling of the criminal defense bar for all of his pro-criminal defendant decisions. And there are many of them.

One that was alluded to by Professor Bernstein is *Crawford v. Washington*.²⁷ There, Justice Scalia turned a doctrine that was based on pure pragmatism into one based on a simple proposition of law: is a statement testimonial? If the answer to that question is yes, then you need to bring an actual witness to the trial to have him testify and make that statement. If the answer is no, the Confrontation Clause does not apply. *Crawford*’s categorical rule, to use Justice Scalia’s own words, took discretion out of “judicial hands.”

Another example I think that Judge Pryor mentioned was *Apprendi v. New Jersey*²⁸ and the Sixth Amendment jury-trial right. Justice Scalia joined the majority opinion in *Apprendi*, which echoed the serious concerns he had raised two years earlier in a case called *Almendarez-Torres v. United States*.²⁹ Interestingly, Justice Scalia authored a separate concurrence in *Apprendi*. I think this gets back to his rejection of pragmatism and purposivism, both of which Judge Pryor mentioned. In his concurrence, Justice Scalia said that equitable considerations of fairness and efficiency are irrelevant because the Constitution unambiguously guarantees a trial by jury. And it is an erroneous “assumption that the Constitution means what we think it ought to mean. It does not; it means what it says.”

²⁷ 541 U.S. 36 (2004).

²⁸ 530 U.S. 466 (2000).

²⁹ 523 U.S. 224 (1998).

And Justice Scalia was equally true to his principles even when, as Paul Clement just mentioned, he lost. In *Maryland v. King*,³⁰ for example, the Supreme Court held that the Fourth Amendment permits states to collect DNA samples from arrestees by swabbing their mouths as part of a routine booking procedure. Justice Scalia did not buy that. He said it may very well be that the Court's decision would have "the beneficial effect of solving more crimes." And, in one of his best lines, he said he doubted "that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." Each of these examples was typical Justice Scalia: clear, concise, and, most importantly, principled.

Let me leave you with a parting thought. Figuring out Justice Scalia's philosophy, at least to me, has never been a Rorschach test. That is not true for every judge. Pick up any Justice Scalia opinion, and you will come away with the same impression. In fact, his approach may be best encapsulated by the two-word title of a book he coauthored towards the end of his career: *Reading Law*.³¹

As I now enter my tenth year of judging, I think of what it means to be a judge. I think Justice Scalia's answer was really simple. His job was to read the law, figure out what it means, and leave the policy questions for everyone else to figure out, including, as Judge Pryor pointed out, for We the People. And I think that Justice Scalia's example to law students, to lawyers, and to law professors may, in fact, be his most enduring legacy.

³⁰ 569 U.S. 435 (2013).

³¹ SCALIA & GARNER, *supra* note 7.