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The Tragedy of Justice Scalia

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THE TRAGEDY OF JUSTICE SCALIA

*Mitchell N. Berman**

A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW. By *Antonin Scalia*. Princeton and Chichester: Princeton University Press. 1997. Pp. xiii, 149. \$18.95.

INTRODUCTION

Justice Antonin Scalia died last February, at the age of seventy-nine. Having served nearly three decades on the Supreme Court, he was, by the time of his death, its best known and most influential member, the subject of two substantial biographies,¹ hundreds of academic articles,² and possibly thousands more in the popular press. If the most visible and vocal justice of the past quarter century, Scalia was also the most polarizing—the judicial equivalent of stinky cheese.³

Given the magnitude of Scalia’s renown and the intensity of the passions he has engendered, it would be folly to advance in this space any bold new thesis on his jurisprudence or judicial legacy. My ambitions, accordingly, are less grand. They are to offer an account of his central jurisprudential claims, the arguments he marshaled, and the difficulties they encountered, in a fashion that might enable partisans on both sides of today’s legal, cultural, and political divides to see a little more clearly at least some of what their opponents see—the other side of Scalia’s legacy. I will try to accomplish that task by concentrating on his Tanner Lectures delivered at Princeton two decades ago and published, complete with scholarly comments and his response, as *A Matter of Interpretation: Federal Courts and the Law*. You might say that my modest goal for this twenty-year retrospective on Scalia’s best-known and most important book is to render Justice Scalia two-dimensional.

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1. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009); BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* (2014). Although not biographies, full-length explorations of Scalia’s legal theory include RALPH A. ROSSUM, *ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION* (2006), and JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* (2006).

2. A Westlaw Law Reviews & Journals search for the term “TI(Scalia)” returns over 350 hits.

3. To put my own (turophilic) cards on the table: I’ve yet to meet a cheese too stinky.

Because I will try to make a case both for what was truly great and for what was profoundly flawed about Scalia the jurist, the account that follows depicts him as a tragic figure. That is not a novel characterization.⁴ But it remains disappointingly marginal. Too often, Scalia's critics demonize him as a simple villain,⁵ while his acolytes glorify him as a paladin without warts.⁶ These are disturbingly partial visions. Commentators who remain blind to the truths that others see vividly will never adequately understand the complex legacy of this complex man.

But that is not all. Although tragedies and tragic figures abound in life, tragedy's natural home is in the theater. Tragedies are performed for an audience. And the power, value, and meaning of tragedy "lies in its capacity to elicit the audience's response."⁷ Now, precisely *how* tragedy should affect an audience, or precisely *what* the audience is supposed to learn, is controversial. If theorists of tragedy agree on anything, it's that, while a concept of tragedy has been vital in Western culture since ancient Greece, its content, assumed functions, and associated norms, have varied across time and place.⁸ Still, there are lessons we can learn—not only about him, but also about our own condition—by understanding Scalia in tragic terms. Or so I hope to show.

I. SCALIA'S ARGUMENT

A Matter of Interpretation is a short book. Scalia's own contributions to it are shorter still. His initial text runs only forty-five pages (pp. 3–47), and his response to four distinguished commenters (historian Gordon Wood, philosopher of law Ronald Dworkin, and legal scholars Mary Ann Glendon and Laurence Tribe) adds another twenty (pp. 129–49). Consistent with its brevity, Scalia's arguments are straightforward. They contain both critical and constructive elements.

4. Indeed, this Review's title parrots that of two opinion pieces published upon Scalia's death. Andrew Koppelman, *The Tragedy of Antonin Scalia: How One of the Most Brilliant Jurists of His Generation Went So Wrong*, SALON (Feb. 16, 2016, 6:00 AM), http://www.salon.com/2016/02/16/the_tragedy_of_antonin_scalia_how_one_of_the_most_brilliant_jurists_of_his_generation_went_so_wrong/ [https://perma.cc/3393-LPGZ]; Eric Posner, *The Tragedy of Antonin Scalia*, SLATE (Feb. 15, 2016, 1:10 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/the_tragedy_of_antonin_scalia.html [https://perma.cc/LWG8-ZG68]. Posner, Koppelman, and I have somewhat diverging views regarding what Scalia's chief virtues and vices were.

5. See, e.g., Bruce Hay, *I Thought I Could Reason with Antonin Scalia: A More Naive Young Fool Never Drew Breath*, SALON (Feb. 27, 2016, 8:00 AM), http://www.salon.com/2016/02/27/i_thought_i_could_reason_with_antonin_scalia_a_more_naive_young_fool_never_drew_breath/ [https://perma.cc/S9E5-6HLF].

6. See, e.g., Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver*, 9 N.Y.U. J.L. & LIBERTY 793 (2015).

7. JENNIFER WALLACE, *THE CAMBRIDGE INTRODUCTION TO TRAGEDY* 3 (2007).

8. For a nice overview, see CLIFFORD LEECH, *TRAGEDY* 12–32 (1969). See also *A COMPANION TO TRAGEDY* (Rebecca Bushnell ed., 2005).

Let's take the critical component first. Judges, Scalia insists, should have a theory of what they are doing and ought to be doing when interpreting authoritative legal texts. But, by and large, the American judiciary lacks any such theory. The "science of construing legal texts" has fallen into neglect (p. 3). That is sad.

"Even sadder," he adds, "is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory" (p. 14). Devising, extending, and applying common law rules are no longer the principal occupations of American judges, let alone of federal judges. Most of their work today involves the interpretation of texts promulgated by others—statutes, regulations, ordinances, and constitutions. Yet American judges have no articulable theory to guide their efforts and don't seem much to care.

Paired with this criticism are what Scalia modestly describes as "suggestions for improvement" (p. 3). They include a general premise and a particular reform proposal. The general premise holds that constitutional and statutory interpretation are of the same genus and should be subject to the same rules and principles (pp. 37–38). Scalia's proposed "methodology" (p. 133) states that judges should endeavor to discern and follow the text's original meaning with the sole caveat that, under the doctrine of *stare decisis*, they should sometimes adhere to erroneous judicial decisions "that are effectively irreversible" (p. 138).

That's his view in a nutshell. Of course, Scalia supports his methodological proposals with arguments. Starting with his arguments for approach to statutory interpretation, they can be parsed as follows (where "T" stands for "textualism"):

- (T1) (a) In statutory interpretation, the principal alternative to following the meaning of the text (textualism) is following "the intent of the legislature" (p. 16).
 - (b) When interpreters speak of following "the intent of the legislature," what they really mean is that judges should follow "the intent that a reasonable person would gather from the text of the law," in context (pp. 16–17).
- (T2) But there is a practical worry: "[Y]our best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean" (p. 18).
- (T3) Therefore, as a practical matter, the only available alternative to textualism in statutory interpretation is for the judge to follow what she thinks the statutory text ought to mean (pp. 17–18).
- (T4) Plainly, it is not compatible with democracy for judges to interpret statutes in accordance with what they believe the statutory text ought to mean (p. 22).
- (T5) Therefore, judges should attend only to what the text does mean, which is necessarily what it originally meant.⁹

9. See p. 38.

Scalia's argument about constitutional interpretation follows the same basic structure ("O" is for "originalism"):

- (O1) In constitutional interpretation, the principal alternative to following what the text originally meant (originalism) is following the text's current meaning (p. 38).
- (O2) But there is a practical worry: your best shot at figuring out the constitutional text's current meaning is to consult "what it *ought* to mean" (p. 39).
- (O3) Therefore, as a practical matter, the only available alternative to originalism in constitutional interpretation is for the judge to follow what she thinks the constitutional text ought to mean.¹⁰
- (O4) Plainly, it is not compatible with democracy for judges to interpret the Constitution in accordance with what they believe the text ought to mean.¹¹
- (O5) Therefore, judges should attend only to what the constitutional text does mean, which is necessarily what it originally meant.¹²

II. CRITIQUE

What can we say about Scalia's affirmative position, his textual originalism? This cannot be the place for a full-blown assessment. Instead, I will try to make clear the most fundamental worries or difficulties that Scalia's affirmative positions on both statutory and constitutional interpretation confront.

The root problem is that Scalia is very loose—a critic might say "careless" or even "sloppy"—with the core concepts that interest him and that he repeatedly invokes. These core concepts are the text, the meanings of the text (what the text says or communicates), and the law to which the text gives rise. In short, Scalia invites us to reflect on *text*, *meaning*, and *law*. These are three different types of entities, yet Scalia routinely conflates them.

There are many nuances in this area, but we needn't strive for precision. Roughly: text is an arrangement of signs and symbols; meaning is conveyed, communicated, or carried by the signs or symbols that the text comprises;¹³ law is the set of norms—rights, duties, powers, permissions—that a legal system delivers or comprises.¹⁴

10. See pp. 39–40.

11. See p. 40.

12. See p. 38.

13. As Mark Greenberg has emphasized, there are different types of meaning that a statutory text can carry or convey. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 217, 217 (Andrei Marmor & Scott Soames eds., 2011). That is one of the nuances I'm eliding.

14. Some people, but very few nowadays, believe, or claim to believe, that there is no law. See, e.g., David R. Dow, *Essay, Gödel and Langdell—A Reply to Brown and Greenberg's Use of Mathematics in Legal Theory*, 44 *HASTINGS L.J.* 707, 716–717 (1993). I am assuming the orthodox view that there are legal norms is correct, but I am not providing arguments for that premise.

Here's proof that text is not the same as either meaning or law: different texts can have the same meaning and can give rise to the same legal obligations or rules. Consider a variation on an example that Scalia provides—a statute or ordinance that reads, “children under twelve may enter free” (p. 25). Whatever, exactly, this text means, and whatever legal permissions and obligations it creates, it is exceedingly likely that it bears the same meaning, and gives rise to the same law, as does a text in a sister jurisdiction that reads “guests twelve years old and older must pay an admission fee.” The texts are indubitably different: they share not a word in common. Yet it is at least plausible—and, to some people, obvious—that they have the same meaning and give rise to identical law. Therefore, text is not the same as either meaning or law. Also, legislatures sometimes amend a statute, not to change the law, but to clarify what the law is. That such a maneuver at least occasionally succeeds establishes again that identical legal norms can correspond to non-identical text.

And here's how we know that the meaning of an authoritative legal text is not the same as the law to which it gives rise: we can sensibly ask whether the law is what the text means. The proposition that *the law is the meaning of the text* represents a substantive claim, not a tautology. Following Ronald Dworkin, let us call the facts that constitute legal norms the “grounds of law.”¹⁵ It is a substantive question what the grounds of our constitutional or statutory law are and, in particular, whether they are limited to the text's meaning. Somebody who maintains, for example, that the law is the set of morally best norms that current conventional meanings of the text can bear might be mistaken (and might not be!), but would not be betraying a conceptual confusion, as would be the case were the meaning of a legal text and the law to be the same thing. Indeed, James Bradley Thayer justified his famous “clear error” rule for the exercise of judicial review in part on the ground that the constitutionality of legislation depends on much broader and diverse considerations than simply what the text means.¹⁶

In short: text, meaning, and law are distinct concepts and phenomena. Yet throughout *A Matter of Interpretation*, Scalia runs these distinct ideas together. I could cite many examples, but will limit myself to three simply to convey the flavor:

- Scalia: The main job of federal judges “is to interpret the meaning of federal statutes and federal agency regulations” (p. 14).

15. RONALD DWORKIN, *LAW'S EMPIRE* 4 (1986).

16. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150 (1893) (“When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In [such cases], *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*”).

No. Meaning is an *output* of interpretation; it is not the thing *being interpreted* (i.e., the “interpretandum”). Judges interpret statutes and regulations in an effort to determine what the law is.

- Scalia: “The text is the law, and it is the text that must be observed” (p. 22).

Again, no. Text and law are different things, and it is the *law* that must be observed. Texts are not the sort of thing that can be “observed” (in the sense of being “heeded”; they can, of course, be observed in the sense of being “seen”).

- Scalia: living constitutionalists flout “the rule that a text does not change” (p. 40).

Not at all. Living constitutionalists reject the claim that the *law* does not change. Their view regarding when a *text* changes are just the same as originalists’ view on that question: the text changes only when formally amended.

Now, you might suspect that I have merely identified infelicities in exposition, and that, although a little cleaning up is clearly necessary, Scalia’s substantive points need not be affected. My burden in this Part is to show that that is not so. I’m not playing a game of “Gotcha!” By appreciating the differences among these three core concepts, we can see that opponents of textual originalism have much more room to maneuver, and with much more plausibility, than Scalia recognizes. This is particularly important because, as I explained above, his arguments are, at their core, comparative. If Scalia is mischaracterizing or ignoring alternatives to the view that he favors, then his argument fails.

I will start with constitutional interpretation, both because that is my field of expertise and because once we understand the problems that Scalia’s theory encounters here, the problem with his views on statutory interpretation will become clearer.

A. *Constitutional Interpretation*

As we have seen, Scalia argues that constitutional interpreters have two basic alternatives: either originalism or the view—what he calls “Living Constitutionalism”—that “the Constitution means what it ought to mean.” This is not a stray characterization of the view he aims to demolish; Scalia repeats this very formulation, or a close variant, at least five times.¹⁷

But of course none of his intellectual adversaries—“living constitutionalists” or “non-originalists,” labels I will use interchangeably¹⁸—describe their view in these terms. And there is a good reason why they don’t, a

17. See pp. 39, 46, 47, 149.

18. In a previous article, Scalia had favored “non-originalism” as the most accurate term for the class of theories to be contrasted with his preferred theory, “originalism.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989). I think that “living constitutionalism” is not a synonym for non-originalism, but most accurately describes a theory or set of theories that fall within, but do not exhaust, the broader “non-originalist” class. I’m skipping past any such subtleties here.

reason that derives from the conceptual difference between the meaning of a text and the law to which it gives rise. Given that we are ultimately concerned with what the law is, a plausible alternative to originalism runs as follows (where “LC” represents “living constitutionalism”):

- (LC1) what we ultimately care about is what the law is, not what the text means;
- (LC2) what the law is and what the constitutional text means are not identical: the “grounds” of our constitutional law include but are not limited to the original public meaning of the text; and
- (LC3) at least some of the grounds of law *do* change, thus making it the case that what the law is also changes.¹⁹

That’s a little abstract. The sort of view I have in mind is conveyed, more or less, by Justice Harlan’s influential account of substantive due process. “Due process has not been reduced to any formula; its content cannot be determined by reference to any code,” he wrote in his famous dissent in *Poe v. Ullman*.²⁰ He continued:

The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.²¹

As I read him, Harlan is painting a picture of constitutional norms changing in evolutionary fashion, in response to changes in our polity’s deep commitments.

Harlan’s view in *Poe* concerns the evolving content of constitutionally protected rights of liberty. But a non-originalist may believe that the point generalizes—that constitutional guarantees of equality, and constitutional allocations of powers, also develop in organic, dynamic fashion. A living constitutionalist who holds a view along these lines will not believe, as Scalia claims she will, that the constitutional text means what it ought to mean.

19. There are at least two distinct ways in which the grounds of law can change. The more radical view holds that what is or is not a ground of our law can change over time. The more moderate view holds that the grounds themselves do not change, but their contents do. On the former account, to illustrate, it might be that practices of the non-judicial branches partially constitute our constitutional norms now, but served no constitutive role a century ago (or vice versa). On the latter account, if practices of the non-judicial branches partially constitute our constitutional norms now, then such practices have been grounds or determinants of our constitutional norms from the start (what is a ground of law does not change), but constitutional norms can change over time precisely because the historical practices (that, by hypothesis, are grounds) themselves change. I accept the more radical thesis, but the “living constitutionalist” picture I’ve sketched in text requires only the more modest thesis.

20. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

21. *Poe*, 367 U.S. at 542; see also, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 871–77 (2010) (Stevens, J., dissenting).

She will believe that the constitutional law is what it is (*not* what it *ought* to be), and that what it is currently is a function of diverse, possibly changing, determinants that include but are not limited to the text's original public meaning.

Don't misunderstand: in emphasizing that what we really care about is what the law is, and not what the text means, I am not also contending that this shift in focus plainly resolves the debate in favor of non-originalist approaches or theories, and against Scalian originalism. Most originalists will think that, if we find ourselves talking about "the grounds of law," they still have the better of the debate. Against the non-originalist view of changing grounds, the originalist may contend that there is only one ground, that single ground is the original public meaning ("OPM") of the text, and the original public meaning is, necessarily, fixed for all time. Originalists may believe, in short, that *the law is the OPM of the text*.

At least on the face of things, this is a different type of claim than what Scalia presses in *A Matter of Interpretation*. The claim he presses there is a *prescriptive* claim about how judges ought to interpret texts. The claim we are now considering is a *constitutive* claim about the grounds of our constitutional law. The subject matter of these claims differ: the first concerns how judges should engage in a particular activity; the second concerns either the metaphysics of law, or the truthmakers of propositions about law,²² or something similar.

That said, we should not make too much of the difference, for the two types of claims do seem to go together naturally, the prescriptive claim piggybacking on the constitutive one. According to an originalism that unites these prescriptive and constitutive strands, judges should enforce the text's OPM *because* the OPM of the text "makes out" (i.e., "determines" or "constitutes") the law.²³ Many originalists in the academy make precisely this claim,²⁴ and Scalia at least flirts with, and arguably embraces, the view in

22. See Christopher R. Green, *Constitutional Truthmakers* 4–5 (2016) (unpublished manuscript) (on file with *Michigan Law Review*).

23. These claims are extricable. Cf. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *GEO. L.J.* 1823, 1835 (1997) (distinguishing theories of interpretation from theories of adjudication). One could endorse an originalist constitutive thesis but disavow the prescriptive thesis, perhaps on the belief that courts should underenforce constitutional norms. Conversely, one could reject the constitutive thesis, perhaps believing that there are no valid constitutional norms, but endorse the originalist prescriptive thesis on the ground that such an approach best serves democratic values.

24. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 551–52 (1994) ("Originalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law."); Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 *CONST. COMMENT.* 189, 193 (2010) ("[O]riginalism insists (with some arguable lapses . . .) that what counts as law—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be.").

later writings.²⁵ At a minimum, I think it more charitable than not to assume that this is the type of move Scalia would have expressly endorsed had the issue been squarely posed to him.

I cannot in this Review resolve the dispute between originalism and non-originalism over the grounds of law. My more limited aim is to show that, when understood as a constitutive thesis about the grounds of constitutional norms, originalism is far less plausible than might first appear, and that evolutionary forms of non-originalism are far more plausible than critics, including Scalia, often maintain.

Let's start with the originalist constitutive thesis. Many people, not only originalists, find the thesis that the law is whatever the constitutional text means quite intuitive. Mark Greenberg aptly calls such a view "the Standard Picture."²⁶ But many intuitive propositions prove false on inspection, and we have ample reason to worry about this one. Most fundamentally, it seems inconsistent with too many constitutional judgments that strike many of us as correct, even on reflection—judgments including that the Fourteenth Amendment prohibits the distribution of governmental benefits in an unequal manner regardless of whether the benefits at issue involve or implicate "protection"; that the federal government is subject to equality-based constraints at least broadly similar to those that the Equal Protection Clause imposes on the states; that Congress has power to protect the environment even from harms that do not arise from commerce; that states are constitutionally prohibited from establishing churches; and so forth.²⁷ In fact, I believe that this way of putting the worry understates its force. The problem for originalism is not only that almost all of us accept some constitutional propositions that we believe *are not* licensed by the OPM of the text. It's also that we believe that some constitutional judgments are true *whether or not* licensed by the OPM of the text. This is why originalists who labor to show that originalism can deliver *Brown v. Board of Education*²⁸ are missing some of the point. Many Americans—lay people and legal elites alike—find it implausible that the correctness of *Brown* is hostage to a final verdict from

25. In a coauthored book published fifteen years after *A Matter of Interpretation*, Scalia asserts that "we are governed not by unexpressed or inadequately expressed 'legislative goals' but by *the law*"; that "the true law is" what an enacted text "state[s]"; and that "it is the *text's* meaning . . . that binds us as law." ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 383, 397–98 (2012) (quoting p. 66). Statements such as these all indicate a constitutive claim. Other passages in the same book, however, strongly indicate that Scalia continues to understand his project in prescriptive terms, as when he and Garner insist that the textual-originalist approach they advocate is "unapologetically normative, prescribing what . . . courts *ought* to do with operative language." *Id.* at 9 (emphasis added). For further reflections on the ambiguity in Scalia's work regarding whether his claims are prescriptive, constitutive, or both, see Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777 (2015) (reviewing RICHARD A. POSNER, *REFLECTIONS ON JUDGING* (2013)).

26. Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 39–41 (Leslie Green & Brian Leiter eds., 2011).

27. For an especially nice discussion, see Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013).

28. 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

historians of Reconstruction regarding what anybody in 1868 believed or intended, let alone what some hypothetical reasonable person would have believed.

To be sure, judicial decisions and extrajudicial judgments that appear inconsistent with the OPM might not be inconsistent, and those that are could be mistakes. But we would need good reason to believe that they are mistakes; we cannot rely upon a mere *stipulation* that *the law is the OPM of the constitutional text*. This is especially true because considered judgments of the form “Congress has constitutional authority to X,” or “states have a constitutional duty not to Y,” have epistemic force on any coherentist epistemology.²⁹

According to the method of reflective equilibrium, we best justify our beliefs in a range of domains, not by reasoning forward from premises accepted as foundational, but by continually revisiting and adjusting our judgments about diverse propositions in an effort to produce a coherent and mutually supporting network of beliefs. When applied to ethical judgments, for example, the method counsels that we seek coherence among our considered judgments about the rightness or wrongness of particular act-tokens and act-types, midlevel rules or principles, and the even more abstract or general theoretical considerations or commitments that shape, determine, or constitute the rules and principles. Of critical importance, no class of judgments is categorically, epistemically privileged over another class of judgments: judgments, say, that *this is wrongful* and that *one should act only in accordance with that maxim that one may will that it become a universal law* are, in principle, revisable in light of each other, and in light of all other judgments the agent has or may come to have.

If this model applies to reasoning about constitutional matters,³⁰ then it is a mistake to believe that we can properly reason only in one direction—*from* constitutive accounts of our constitutional norms *to* judgments about the constitutionally correct outcomes of particular controversies. The legally correct resolution of concrete constitutional disputes will result from applying the more general constitutional theory. But our *judgments* about what *is* the correct constitutional theory are themselves answerable to, and informed by, any considered judgments we may have about the *legally* correct resolution of concrete constitutional disputes.

For this reason, originalists need good reason to conclude that the OPM of the constitutional text fully determines our constitutional law. And it's very doubtful that originalists have what they need.

To begin with, many of the most familiar arguments for prescriptive originalism are of much more doubtful relevance, or much weaker force,

29. See generally Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in *THE CHALLENGE OF ORIGINALISM* 246 (Grant Huscroft & Bradley W. Miller eds., 2011).

30. I grant that the antecedent of this conditional cannot be taken as a given. I believe that reflective equilibrium is an epistemically appropriate method for reasoning about systems of practical normativity, but I cannot argue for that here.

when offered in support of a constitutive thesis. Take Scalia's fundamental premise that an originalist interpretive posture would better serve democratic values than would any realistic alternative. That fact, if true, is clearly a reason (albeit not a conclusive reason) for judges to interpret and enforce the constitutional text according to its OPM so long as promoting democracy is worthwhile. But many more dots would have to be connected to explain why a fact about which judicial behavior would be *desirable* also tells us something about what the grounds of our law actually *are*. I cautioned earlier that we should not make too much of the distinction between originalism as a *prescriptive* thesis about how judges should interpret texts (the thesis that Scalia explicitly defends in *A Matter of Interpretation*) and originalism as a *constitutive* thesis about what the grounds of our constitutional norms are (the type of thesis that Scalia seems to need once we distinguish, as he himself did not, among text, meaning, and law). My point here is that we shouldn't make too *little* of the difference either. The truth of the constitutive thesis would be a weighty reason in favor of the prescriptive thesis. But few arguments for the prescriptive thesis that do not contain the truth of the constitutive thesis as a premise will weigh heavily in favor of the constitutive thesis itself.

The most persuasive arguments for the constitutive thesis will have to connect closely, I think, to general jurisprudential claims about the nature of law, broadly understood. As I'll explain, originalists could defend *the position that the law is the OPM of the text* as either a universal thesis or a parochial one.³¹ But neither route looks very promising.

As a universal thesis, *the law is the OPM of the text* maintains, roughly, that it is a general truth about law that, in any legal system that contains authoritative legal texts, the law is fully determined or constituted by the OPM of those texts. This is a claim about law at what Mark Greenberg has usefully described as its "most fundamental level."³² Such a claim is hard to swallow. First, the apparent empirical counterexamples now explode in number. A defender of this thesis must explain away all putatively correct legal propositions from every legal system, from any place and any time, that depart from the OPM of an applicable authoritative legal text. Second, although the "standard picture" may be part of the *implicit* package of beliefs for most of us, including for many legal scholars and elites,³³ it gains no support from any well-developed, general jurisprudential theory I know of. For both these reasons, the universal approach is exceedingly doubtful.

Understood, instead, as a parochial thesis, *the law is the OPM of the text* would be true of our constitutional law not because that is a legal truth at

31. The universal–parochial distinction roughly tracks the Austinian distinction between "general" and "particular" jurisprudence. See WILLIAM TWINNING, *GLOBALISATION AND LEGAL THEORY* 21–23 (2000). Although that latter distinction is familiar, it is also ambiguous, which is why I prefer my less familiar terms.

32. Mark Greenberg, *The Moral Impact Theory, the Dependence View, and Natural Law*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* (George Duke & Robert George eds., forthcoming 2017) (manuscript at 4) (on file with *Michigan Law Review*).

33. *Id.* (manuscript at 3).

the most fundamental level, but because it is made true by whatever is true at the most fundamental level married to the contingent facts about our constitutional order that the fundamental level makes relevant. To take a cartoon illustration, suppose that it is a universal jurisprudential truth that the law of a community consists of whatever set of norms would best promote aggregate community utility. That would be a truth about law “at its most fundamental level.” If it were also true that, in our legal system, legal norms that corresponded to the OPM of the constitutional text best promote aggregate utility among members of our polity, then *the law is the OPM of the text* would be true of our constitutional order, at a contingent and derivative level. That, as I say, is a fanciful example designed only to illustrate the structure of the argument. The question is whether a nonfanciful argument to the same conclusion is in the cards.

Believers in Scalian originalism would have to think so, but they frequently underestimate the steepness of the argumentative hill they must climb. Very probably, the dominant view in the American legal academy is broadly Hartian. On the standard reading of H.L.A. Hart’s theory of law, the law is the set of norms that are ultimately grounded in a convergent practice of legal officials, especially judges.³⁴ On that view of law at its most fundamental level, *the law is the OPM of the text* is true of our constitutional system if and only if American judges converge on a practice of recognizing that as so. But the many seemingly non-originalist constitutional decisions alluded to earlier make this highly unlikely. And even Scalia has acknowledged that we have never had a consistently originalist judiciary.³⁵ Not surprisingly then, most commentators who have expressly addressed the issue have concluded that the U.S. rule of recognition is non-originalist.³⁶

In sum, if *the law is the OPM of the text* is a truth about the determinants of our constitutional norms, we are vastly far from having it established. At the same time, if the case for constitutive originalism weakens the harder one thinks about its jurisprudential underpinnings, matters are precisely the reverse for the non-originalist constitutive thesis that the law is the inescapably dynamic product of various factors that are themselves changing and incapable of being fixed.

34. See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012). For the view that this common reading of Hart gets him wrong, see Kevin Toh, *Hart’s Expressivism and His Benthamite Project*, 11 *LEGAL THEORY* 75, 77 (2005).

35. Scalia, *supra* note 18, at 852.

36. See the chapters, especially those by Kent Greenawalt and Richard H. Fallon, Jr., in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (Matthew D. Adler & Kenneth Einar Himma eds., 2009). Will Baude has recently argued that “our current constitutional practices demonstrate a commitment to” an interpretive approach that he dubs “inclusive originalism.” William Baude, *Essay, Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2349 (2015). I am unpersuaded, mostly because, with Richard Primus, I believe that Baude is too quick to accept judicial rhetoric as judicial reasoning. See Richard Primus, *Is Theocracy Our Politics?*, 116 *COLUM. L. REV. SIDEBAR* 44 (2016). In any event, as Baude makes entirely clear, his “inclusive originalism” differs significantly from Scalian originalism; it does not maintain that *the law is the OPM of the text*. See Baude, *supra*, at 2355 (distinguishing between “exclusive originalism” and “inclusive originalism”).

That thesis strikes many as mysterious or dubious at first blush. Scalia ridicules the notion that “what the Constitution [required] yesterday it does not necessarily [require] today.”³⁷ But the gibe loses its sting once two broad types of change are distinguished: abrupt or purposive change and gradual, organic, or evolutionary change. Non-originalists tend to believe that law changes in an organic or evolutionary way. That is how most social phenomena change. Mores, fashion, the use of money, market prices, word meanings, rules of prescriptive grammar, etiquette, games, religion—all are “the result of human action, but not of human design. They are *evolutionary* phenomena, in the original meaning of the word—they unfold.”³⁸ To suppose that law changes in a similar way is hardly audacious. That seems like a pretty apt description of the common law after all. Of course, as Scalia emphasizes in *A Matter of Interpretation*, statutory and constitutional law are different from the common law. But it’s still arresting to contend that *all* legal norms that have a textual basis are *wholly resistant* to evolutionary or organic change.

Maybe they are. I don’t think so, but that’s an argument for another day. For today, it’s enough to note that if our surface-level constitutional norms do rest upon, or are constituted by, “grounds of law” subject to evolutionary change—“gradual, incremental, undirected, emergent and driven by natural selection among competing ideas”³⁹—Scalia would reap at least one benefit. He wouldn’t have to struggle against his “faint-hearted” disposition to abandon originalism when it yielded results too offensive to broadly held, contemporary moral judgments.⁴⁰ If there is *any* evolutionary component to the grounding of our constitutional norms, then the only plausible forms of originalism will be fainthearted.

Against this, recall Scalia’s exchange with Ted Olson, attorney for the plaintiffs, in the oral argument for *Hollingsworth v. Perry*,⁴¹ the pre-*Obergefell*⁴² case that considered the constitutionality of state laws that refuse to recognize same-sex marriage.

JUSTICE SCALIA: . . . [W]hen did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868 . . . ?

. . . .

37. Pp. 39–40. I have replaced “meant” and “mean” with “required” and “require” to shift the focus where, for non-originalists, it belongs: on legal norms rather than textual meaning.

38. MATT RIDLEY, *THE EVOLUTION OF EVERYTHING: HOW NEW IDEAS EMERGE* 4 (2015). As already noted, theorists of tragedy clearly believe this is true of their subject matter. See *supra* note 8 and accompanying text.

39. RIDLEY, *supra* note 38, at 2.

40. Scalia fessed him faintheartedness in *Originalism: The Lesser Evil*. Scalia, *supra* note 18, at 864. He later backtracked in Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/5XYN-KXSG>].

41. 133 S. Ct. 2652 (2013).

42. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

MR. OLSON: There's no specific date in time. This is an evolutionary cycle.

JUSTICE SCALIA: Well, how am I supposed to know how to decide a case, then . . . if you can't give me a date when the Constitution changes?

. . . .

JUSTICE SCALIA: It seems to me that you ought to be able to tell me when. Otherwise, I don't know how to decide the case.⁴³

Put aside the particular issue of same-sex marriage. The general thrust of Olson's response looks right to me. But if it's wrong, that's not for any reason that Scalia gives. Consider an analogy. Nobody denies that word meanings change over time. As Scalia has noted, the word "artificial" meant "highly artistic" in the early eighteenth century.⁴⁴ One of its primary meanings today is "contrived or arbitrary."⁴⁵ So imagine somebody objecting (in parity with Scalia's *Hollingsworth* objection) that she does not "know how to use 'artificial' in a sentence" or "how to line-edit a student's paper," unless told "when 'artificial' changed its meaning." That seems absurd, no? So it is in the legal case too. All we usually need to know is *that* it (the meaning of a word, the content of our law) has changed; we rarely need to know, in addition, *when* it changed.⁴⁶

The key upshot here is not that originalism is wrong and non-originalism is right. My more modest claim is that Scalia's arguments in *A Matter of Interpretation* fall far short of their mark. Scalia can't establish that living constitutionalism is misguided so long as he attributes to his opponents a view of constitutional interpretation that they do not endorse, and so long as he overlooks views in the vicinity that are more plausible.

B. Statutory Interpretation

A similar failure to recognize a range of conceptual, or even ontological, distinctions also besets Scalia's arguments on statutory interpretation, though my discussion must be brief.⁴⁷

Recall that, according to Scalia, statutory interpreters face a choice between following what the legislature "said" and what it "intended" (p. 16). A textualist maintains that judges should attend to only what the words in the statutory text mean (pp. 22–23). A non-textualist maintains that judges should attend, instead or in addition, to what the legislature intended. Scalia seems to assume that what the non-textualist has in mind is transparent. But

43. Transcript of Oral Argument at 37–41, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

44. SCALIA & GARNER, *supra* note 25, at 78.

45. *Artificial*, THE AMERICAN HERITAGE DICTIONARY (5th ed. 2011).

46. True, if you can't know just when it changed, then you can't (always) know just what the law is. So what? The consequent is true: you *can't* (always) know just what the law is.

47. Jonah Gelbach and I elaborate on this line of argument. Mitchell N. Berman & Jonah B. Gelbach, *Legal Intention: Between Text and Purpose* (Nov. 1, 2016) (unpublished manuscript) (on file with *Michigan Law Review*).

it isn't. One who advocates that judges should pay attention to "what the legislature intended," and not only to what the statutory words mean, could herself intend to be contrasting what the words in the statute mean with *any* of the following things: (1) the meanings of the words that the legislature intended to utter; (2) the meanings that the legislature intended that the words in the statutory text would convey; (3) the meanings that the legislature intended to communicate by means of its utterance; (4) the legal changes that the legislature intended to effectuate by means of enacting the statute; or (5) the consequences in the world that the legislature intended to realize by means of changing the law.

Let me explicate these varied types or objects of legislative intent with examples.⁴⁸ I'll then explain why these distinctions matter.

1. Suppose that a statutory provision declares that "the winning party must pay the other side's reasonable attorney fees," but that the legislature intended to write "losing" instead of "winning."⁴⁹ One who believes that the meaning of the compound phrase "losing party" should govern might argue that judges should follow, not the meanings of the words in the statute, but *the meanings of the words that the legislature intended to utter*. This principle addresses the problem of misspeaking, or of scrivener's error.

2. Imagine now that a statutory provision declares that "applications are due at 12 a.m.," and that the legislative drafters thought, erroneously, that "12 a.m." means noon. One who believes that judges should interpret the statute to require applications by noon might argue that judges should follow, not the meanings of the words in the statute, but *the meanings that the legislature intended that the words in the statutory text would convey*. Whereas the first intentionalist principle addresses linguistic *accidents*, this second principle addresses linguistic *mistakes*.⁵⁰

3. Recall an example I introduced earlier: a statutory provision that reads "children under twelve may enter free."⁵¹ None of the words in this provision, singly or collectively, mean that persons *not* "under twelve" must pay. Very probably, however, the legislature intended to communicate that negative implication. In philosophical jargon, the idea that persons twelve and over must pay is a "pragmatic implicature"⁵² of the utterance, but is not encoded in the meanings of the words. One who believes that this pragmatic implicature should be respected might argue that judges should follow, not

48. Throughout this Section I will be bracketing worries about what it is for a legislature, as a collective body, to have an intention of *any* type. In doing so, I don't mean to suggest that such worries are trivial. They are not. But addressing them would consume more space than I can afford, especially given that the specific problem of collective intentions is not one that Scalia presses. The nature of collective intention is mostly orthogonal to the topic at hand, which is the variety of objects of intention.

49. The example is from SCALIA & GARNER, *supra* note 25, at 235.

50. For the classic discussion of the difference, see J.L. Austin, *A Plea for Excuses: The Presidential Address*, PROC. ARISTOTELIAN SOC'Y, June 1957, at 1.

51. See p. 25; *supra* text following note 14.

52. See H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 41–58 (Peter Cole & Jerry L. Morgan eds., 1975).

the meanings of the words in the statute, but *the meanings that the legislature intended to communicate by means of its utterance*.

4. A legislature enacts a statute intending that by so doing it will change the law. But it does not intend merely *that the law be changed*; it intends *that the law be changed in thus-and-such a manner*—that is, to create a legal power to X, to expand the legal right to Y, and so forth. Sometimes, however, the meaning that the enacted text communicates fails to reflect the legal change that the legislature intended to effectuate (its “legal intentions”), not due to a linguistic accident or mistake (cases 1 and 2), but due to what, for want of a better term, we might call a “statutory design defect.” Maybe, for example, the legislature (or its drafting agents) failed to understand how separate parts of a complex statute would mesh,⁵³ or failed to account for an interpretive canon employed by the courts. One who believes that a legislature’s legal intentions are deserving of respect (perhaps on democratic grounds) might argue that judges should follow, not the meanings of the words in the statute, but *the legal changes that the legislature intended to effectuate by means of enacting the statute*.

5. Let us extend the previous case. When a legislature enacts a statute in order to effectuate a legal change, it does so with the further intent (commonly called a “purpose”) that the legal change thereby effectuated (a new legal power, a more stringent legal duty, etc.) will help bring about some desired consequence in the world (a reduction in car accidents, an improvement in maternal health, etc.). Sometimes, however, the practical results aimed at do not materialize, not due to a linguistic accident or mistake, or to a statutory design defect, but due to erroneous empirical assumptions or predictions. One who believes that courts should help legislatures achieve their practical objectives might argue that judges should follow, not the meanings of the words in the statute, but *the consequences in the world that the legislature intended to realize by means of changing the law*.

In sum, there is no one thing that someone who advocates attention to legislative intention, in contrast to the meanings of the words in the statutory text, must be recommending. Yet Scalia does not recognize any of these differences. As it happens, Scalia would approve departures from what the words of the statute mean in cases 1 and 3; he allows for a limited doctrine of scrivener’s error,⁵⁴ and he accepts that the textualist should at least sometimes attend to the pragmatic meaning of a statutory text and not only its semantic meaning.⁵⁵ But his position on case 2 (concerning linguistic mistakes) is not entirely clear,⁵⁶ and he unequivocally rejects departures in cases

53. See Richard Primus, *The Cost of the Text*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 7–9) (on file with *Michigan Law Review*); cf. *King v. Burwell*, 135 S. Ct. 2480, 2492–93 (2015).

54. SCALIA & GARNER, *supra* note 25, at 234–35.

55. The *expressio unius* canon is, as Scalia notes, “so commonsensical” (pp. 25–26) precisely because what a text communicates is not reducible to what its words mean.

56. For a case (from early in his tenure on the Court) in which Scalia arguably privileges the meaning that the legislature intended that the words of the statutory text would convey (case 2) over the meaning of the words in the text, see *Green v. Bock Laundry Machine Co.*, 490

4 and 5—those involving legal intentions, or extralegal purposes.⁵⁷ Maybe his positions are optimal, all things considered. I express no view on that issue here. My point is only that he is unable to marshal effective arguments on this score so long as he overlooks possibly relevant distinctions and instead lumps a diversity of types of intent into a single legislative-intent bogeyman. For example, one of his principal arguments against intentionalism is that judges may not be competent to discover and enforce “the broad social purposes” behind legislation, and should not have the authority to do so (p. 23), in part because there may be no agreement about them. This is a reason why judges should not seek to effectuate extralegal purposes (case 5). It is not a reason why judges should not seek to correct “linguistic mistakes” (case 2) or to effectuate “legal intentions” (case 4).

III. SCALIA’S GREATNESS

Dramatic tragedy requires a tragic hero—*tragic* in virtue of his flaws and the calamity they usher forth, and *heroic* in virtue of the nobility of his character or the greatness of his deeds. Yet I have just argued that the chain of reasoning that Scalia relies upon in *A Matter of Interpretation* for his theories of statutory and constitutional interpretation is deeply flawed. If I am right, then in what does Scalia’s greatness lie?

Not in his considerable personal warmth or in his dazzling prose. Though the first is admirable and the second enviable, they don’t add up to what tragedy requires. Nor does he earn his wings, so to speak, on the strength of the legal or moral merits of the legal doctrines he crafted or the rulings he helped to produce or to frustrate. We’d all assign credits and debits differently on this particular ledger. But the tragic hero’s greatness must be visible to all of us, not something that depends on each scorer’s final tally. Scalia’s greatness does not reside in his doctrinal legacy; it resides in his jurisprudential one.

Recall my suggestion that we separate the critical and constructive strands of the positions advanced in *A Matter of Interpretation*. I will put aside the latter. My own view is that Scalia’s strong form of originalism (in

U.S. 504, 527–30 (1989) (Scalia, J., concurring) (interpreting a statutory provision that referenced “defendant” to apply only to a “criminal defendant”).

57. See *Clinton v. City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (“It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law.”). Consistent with *Bock Laundry*, my colleague Ryan Doerfler has suggested that Scalia’s position on statutory interpretation was that judges should privilege objectified (legislative) communicative intentions over both actual communicative intentions and non-communicative intentions, whether actual or objectified. I believe that is probably right as a matter of Scalia exegesis. I’m suggesting here only that the details of his position are not made clear in *A Matter of Interpretation*, and that his argumentation is hampered by excessive lumping.

either prescriptive or constitutive variants) is, not merely unpersuasively defended, but substantively mistaken.⁵⁸ And I am not competent to say very much about his textualism.⁵⁹ Nonetheless, Scalia's critical or negative interventions are themselves contributions of the first order *even if* (as I admit not to have established) his affirmative theses regarding statutory and constitutional interpretation are ultimately indefensible.

Scalia was far from the first to charge justices of the Warren and Burger Courts with fundamental failures of judicial craft. Conservative critics of "judicial activism," notably including Scalia's fellow originalist Robert Bork,⁶⁰ had long been beating that drum. In fairness, political liberals had too, from Herbert Wechsler's questioning of *Brown*⁶¹ to John Hart Ely's takedown of *Roe*.⁶² But Scalia pressed the objection with rare urgency, energy, argumentative depth, and rhetorical power. The complaint was not formulated in terms of judicial restraint—it was that judges need, but lacked, a self-conscious and defensible account of how they should engage with authoritative legal texts formally promulgated by other governmental actors (pp. 10–14). "The Constitution . . . even though a democratically adopted text, we formally treat like the common law. What, it is fair to ask, is the justification for doing so?" (p. 40).

That *is* a fair question to ask. It is more than fair; it is compelling. To be sure, as Richard Posner has observed, judges can "decide a case without a theory of how to decide it correctly."⁶³ Not only *can* they, if they don't have a theory but do have a case, then they *must*. But that is a happy state of affairs only so long as current practices are generally thought to be in good order, and Scalia, among others, raised doubts more than sufficient to require a response.

Of course, responses have been made, including a defense of the common law constitutionalism that Scalia thought patently unacceptable.⁶⁴ But any advances in non-originalist constitutional theory that the Scalia-fueled

58. For some arguments, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 37–93 (2009). I should emphasize here, as I do there, *see id.* at 21–24, that I am addressing only those forms of originalism—notably including Scalia's—that treat an original object as (with the most limited of exceptions) either the sole target of constitutional interpretation or the sole ground of constitutional norms. I am entirely open to more moderate forms and am encouraged by their recent growth.

59. For whatever it's worth, I think it generally accepted that Scalia's textualism has been significantly more influential in practice than has his originalism.

60. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–7 (1971).

61. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959).

62. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937–40 (1973).

63. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 539 (2012).

64. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

explosion in originalist thinking has provoked do not undermine the importance of Scalia's critical charge. They vindicate it. So too, of course, do any improvements to originalist theory that have arisen in response to Scalia's own efforts. Scalia, more than any other figure, inspired a generation of lawyers (and not only conservatives) to take seriously the demand that judges account for how they decide statutory and constitutional cases. In the eyes of some, the constitutional philosophy of the liberal icon Justice William Brennan looked like one part "human dignity"⁶⁵ married to another part "counting to five."⁶⁶ Scalia insisted that wasn't near good enough. He was right. And he deserves acclaim for forcing us to see it.

IV. SCALIA'S TRAGIC FLAWS

If the greatness of Scalia's contributions to American jurisprudence lies chiefly in the cogency and importance of the challenge he posed, his tragic flaws start with his dogmatic insistence that he alone could meet it. Hubris was the central tragic flaw for the Greeks. Similarly, for Hegel, "[t]ragedy arises . . . when a hero courageously asserts a substantial and just position . . . and so falls prey to a one-sidedness that is defined at one and the same time by greatness and by guilt."⁶⁷ Scalia was self-confident and one-sided to a fault. He had an unequalled capacity to announce clarity where others saw murkiness and ambiguity. That's admirable when it results from exceptional discernment. It's deplorable when it results from undue certitude. Throughout his judicial and extrajudicial writings, Scalia made claims for his view, and about opposing views, that were wholly out of proportion to the warrant he had for believing them.

These faults make occasional appearances in *A Matter of Interpretation*. Return, for example, to my parsing of Scalia's arguments for both his textualism and his originalism.⁶⁸ The third premise in each argument (what I've designated (T3) and (O3)) are pretty obviously caricatures. That's not a solid foundation on which to construct an argument. And is it really true that "the Due Process Clause quite obviously does not bear [a substantive] interpretation" (p. 24)—even though the phrase "due process of law" had often been used as a synonym for "the law of the land"?⁶⁹ Moreover, if the Due Process Clause is "inescapabl[y]" limited to *process* (p. 24), shouldn't the Equal Protection Clause be inescapably limited to *protection*? I could offer additional examples, but most would be quibbles. Overall, as Jeffrey

65. See, e.g., William J. Brennan, Jr., Speech to the Text and Teaching Symposium (October 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55 (Steven G. Calabresi ed., 2007).

66. See Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 HASTINGS L.J. 683, 685 (1999).

67. Mark W. Roche, *The Greatness and Limits of Hegel's Theory of Tragedy*, in A COMPANION TO TRAGEDY, *supra* note 8, at 51, 51.

68. See *supra* Part I.

69. Comment by Gordon S. Wood, p. 57.

Rosen aptly observed in a contemporaneous review of *A Matter of Interpretation*, “As a literary performance, Scalia’s lecture shows him in uncharacteristically good temper.”⁷⁰

It is an unhappy fact that Scalia’s temper was often worse, or his vices more on display, in his judicial opinions. This is a hard claim to establish in a short essay. Scalia authored nearly 1,000 opinions yet I have space for only a few examples. If I am necessarily left open to a charge of cherry-picking,⁷¹ I might as well pick the plumpest: Scalia’s majority opinion in *District of Columbia v. Heller*,⁷² which held that the Second Amendment constitutionalizes a preexisting common law right to possess a handgun for self-defense. Maybe Scalia is right on the history, maybe not. Reasonable people disagree. What seems entirely unreasonable is the strength of Scalia’s conclusion: “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms” unrelated to militia service.⁷³ This is hard to buy. My reading of the literature suggests that most professional historians who have examined the issue disagree with *Heller*’s bottom-line conclusion and that Justice Alito surely had things closer to right when acknowledging, two years after *Heller*, that “there is certainly room for disagreement about *Heller*’s analysis of the history of the right to keep and bear arms.”⁷⁴ If Scalia really had “no doubt” about the state of the evidence, that says more about him than it does about the historical record.

In a similar spirit, can Scalia really be right, as he asserted in his lone *VMI* dissent, that “it is entirely clear” that the Constitution allows a state to provide an all-male college without providing *any* all-female alternative?⁷⁵ That is a striking assertion given that none of his fellow justices, and nobody on the appellate panel, saw things that way. And one would think the picture is at least somewhat murky even for an originalist. Steven Calabresi, who shares Scalia’s starting “premise that originalists ought to begin and end all analysis with the original public meaning of constitutional texts,”⁷⁶ has concluded that *VMI* was rightly decided because the original meaning was understood to effectuate “a ban on all systems of caste.”⁷⁷

70. Jeffrey Rosen, *Originalist Sin*, NEW REPUBLIC (May 5, 1997), <https://newrepublic.com/article/74152/originalist-sin> [<https://perma.cc/QL2C-CKMX>].

71. But, really, I shouldn’t be. A linguistic analysis of opinions of the Roberts Court through 2010 found that Scalia exhibited the highest level of certainty of the ten justices included. This was true for his majority opinions, concurrences, and dissents. Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 889 & tbl.2.

72. 554 U.S. 570 (2008).

73. *Heller*, 554 U.S. at 595.

74. *McDonald v. City of Chicago*, 561 U.S. 742, 788 (2010).

75. *United States v. Virginia (VMI)*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

76. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011).

77. *Id.* at 27.

Or consider one of my personal favorites: Scalia's dissent, for himself and Justice Clarence Thomas, in *PGA Tour, Inc. v. Martin*.⁷⁸ The case raised two questions: whether the Americans with Disabilities Act covers the PGA Tour; and if so, whether waiving the rule that golfers walk between holes for a golfer with a degenerative circulatory disorder would effect a "fundamental alteration" of the activity.⁷⁹ The Court answered the first affirmatively and the second negatively.⁸⁰ Scalia disagreed on both counts.⁸¹ In my view, his bottom-line positions on both issues were plausible, possibly persuasive. But he didn't stop there, insisting "it is the very nature of a game to have no object except amusement," and that, for this reason, all rules of all games "are arbitrary and none is essential."⁸² These claims are not merely false, they are foolish. Games, as a class, have a rich multiplicity of objects—not only amusement, but providing exercise, honing mental and physical skills, developing virtues of honesty, fair-dealing, teamwork, and resilience, and so on. It's hard to figure how he could have missed this. Furthermore, Scalia's second claim would be false even were the first one true. "Arbitrary" means ungoverned by reason, governed by whim or caprice.⁸³ So long as games have even the single object of being amusing, then the choice of rules is governed by reason—namely, how well it promotes amusement.

Because these missteps result in the sort of mindless pronouncements that Scalia would have savaged had they issued from Justice Kennedy's pen, I have found myself wondering what explains them. My own guess is that when he says that all rules of all games "are arbitrary *and* none is essential"⁸⁴ he's really thinking something along the lines of "all rules of all games are arbitrary *because* none is essential"—a frame of mind that reflects a discomfort in the broad expanse of life and law where things are neither essential nor arbitrary, where reasoned judgment must reign. In one of his final opinions after nearly thirty-five years on the Supreme Court, Justice John Paul Stevens observed that the practice of judicial review, especially in unenumerated rights cases, "depends on judges' exercising careful, reasoned judgment. As it always has, and as it always will."⁸⁵ One cannot imagine Scalia voicing a similar thought. That's a shame.

Hubris, overconfidence, arrogance, dogmatism—these constitute one cluster of vices. They do not entail that the possessor of such defects of character be sarcastic, caustic, or disrespectful of others. Regrettably, however, Scalia fell victim to these vices too. This is very well-worn ground.

78. 532 U.S. 661, 691–705 (2001) (Scalia, J., dissenting).

79. *PGA Tour*, 532 U.S. at 664–65, 682 (majority opinion).

80. *Id.* at 681, 683.

81. *Id.* at 691, 698 (Scalia, J., dissenting).

82. *Id.* at 700–01.

83. See *Arbitrary*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002).

84. *PGA Tour*, 532 U.S. at 701 (emphasis added).

85. *McDonald v. City of Chicago*, 561 U.S. 742, 911 (2010) (Stevens, J., dissenting).

Whole articles have been written on the topic.⁸⁶ Here's a sampler: Scalia opined that the majority's arguments in one abortion case "cannot be taken seriously,"⁸⁷ and that the Court's conclusion in another rested not on "reasoned judgment" but "only personal predilection."⁸⁸ He asserted that the holding of one gay rights case "has no foundation in American constitutional law, and barely pretends to."⁸⁹ He derided a second as rife with "mummeries and straining-to-be-memorable passages" and "couched in a style that is as pretentious as its content is egotistic."⁹⁰ He disparaged a free exercise decision as "nothing short of ludicrous" and "beyond the absurd,"⁹¹ an Eighth Amendment decision as resting "obviously upon nothing but the personal views of its Members,"⁹² and a Fourth Amendment case as "serv[ing] up a freedom-destroying cocktail consisting of two parts patent falsity."⁹³ Examples could be multiplied with ease.

This is not okay. One state appellate judge issued a verdict that, in my judgment, can hardly be improved upon:

Whatever one thinks of [Scalia's] intellectual prowess, his writing skill, his jurisprudence generally, and his theory of "originalism," his written decisions provide a case study of how not to act in the legal arena.

His written decisions are lacking in humility and punctuated with mean-spirited, personal and sarcastic language. In a culture where basic norms of civility and courtesy are breaking down before our very eyes, Scalia's use of insulting rhetoric, vitriolic personal put-downs and puerile cheap shots in his written decisions was lamentable, to say the least. If there is one venue left where society is entitled to reasoned, respectful debate—not the sort of testosterone-laced toxic exchanges which increasingly characterize discourse in society at large—it is the judicial arena.⁹⁴

86. See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000); Marie A. Failinger, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia*, 34 U. TOLEDO L. REV. 425 (2003); Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y. L. SCH. L. REV. 907 (2007).

87. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

88. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., concurring in part and dissenting in part).

89. *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

90. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628, 2630 (2015) (Scalia, J., dissenting).

91. *Lee v. Weisman*, 505 U.S. 577, 637–38 (1992) (Scalia, J., dissenting).

92. *Atkins v. Virginia*, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting).

93. *Navarette v. California*, 134 S. Ct. 1683, 1697 (2014) (Scalia, J., dissenting).

94. Douglas S. Lavine, *Scalia Provided Example of How Not to Practice*, NAT'L L.J., May 16, 2016, at 10. Retired Justice Lewis Powell had worried about precisely this early in Scalia's tenure on the Court. See BISKUPIC, *supra* note 1, at 195.

As Gil Seinfeld, a former Scalia clerk, pithily concluded, “The manner in which Justice Scalia chose to express himself publicly under conditions of sharp disagreement is dismaying, and it is a blot upon his legacy.”⁹⁵

It is frankly disappointing that conservative defenders of civil public discourse so routinely give Scalia a free pass on this score. Some of Scalia’s champions deny that he so much as ratcheted up the rhetoric.⁹⁶ A few acknowledge that Scalia was unduly caustic, but criticize him only on the narrowly instrumental ground that his dismissive language might have impeded his ability to cobble together a majority.⁹⁷ That may be true, but it truly misses the point: Scalia’s frequently nasty tone and rhetoric degrades the quality of public discourse and, by “characteriz[ing] majority decisions of the Court as not just wrong, but without principle,” tends “to undermine the essential integrity and legitimacy of the Court’s work.”⁹⁸

The dogmatism and incivility that Scalia displayed throughout his career are, in my judgment, two very serious defects of judicial character. But there was a third. To illustrate it, I will finish this Part where so many critical analyses of Scalia’s jurisprudence start—with affirmative action.

On one hand, by all accounts, Scalia’s commitment to a political principle of color blindness ran deep in his bones. On the other, affirmative action represents precisely the sort of highly controversial social issue that most forcefully implicates his central jurisprudential thesis that judges must let the people work it out unless the OPM of the text clearly takes the issue out of the democratic realm. Because color blindness is no obvious part of the meaning of the Fourteenth Amendment’s declaration that no state shall deny any person “the equal protection of the laws,”⁹⁹ one would have hoped that the apparent conflict between these two commitments would have driven Scalia in one of two directions: (1) to seriously investigate the history surrounding the Equal Protection Clause and to be willing to uphold race-based affirmative action if the results of the investigation did not deliver a persuasive conclusion that color blindness was part of the clause’s original public meaning; or (2) to forthrightly embrace a constitutional principle of color blindness despite the unhelpful state of the historical record and to modify his official interpretive approach by leavening strict adherence to the OPM with a dose of justice. Scalia opted for neither of the above. Instead, he

95. Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111, 120–21 (2016), http://michiganlawreview.org/wp-content/uploads/2016/04/114MichLRevFI111_Seinfeld.pdf [<https://perma.cc/P37A-DK3A>].

96. See, e.g., Calabresi & Braga, *supra* note 6, at 823–31 (seeing no meaningful difference between Scalia’s language and “heated dissents” authored by Story, Holmes, and Curtis). I encourage anyone who is uncertain who has the better of this little debate to read the opinions that Calabresi and Braga cite.

97. See, e.g., George F. Will, *Why Antonin Scalia Was a Jurist of Colossal Consequence*, WASH. POST (Feb. 14, 2016), https://www.washingtonpost.com/opinions/why-antonin-scalia-was-a-jurist-of-colossal-consequence/2016/02/14/6936b8fc-d359-11e5-9823-02b905009f99_story.html [<https://perma.cc/5T62-XLBX>].

98. Newman, *supra* note 86, at 916.

99. U.S. CONST. amend. XIV, § 1.

simply insisted that a principle of color blindness is encoded in the OPM of the Equal Protection Clause, and he did so without bothering to undertake even a rudimentary historical inquiry.¹⁰⁰ And that's to say nothing about the utter implausibility of the idea that the OPM of any portion of the constitutional text imposes a norm of color blindness against the federal government.

Please understand that the issue is not, exactly, whether an originalist case could possibly be made for color blindness. It's whether Scalia had made the case, or even tried to. His commitment to democracy, as he understood it, dictated that the burden falls on those challenging the action of the politically accountable branches.¹⁰¹ Courts have no license to hold legislative or executive action unconstitutional unless persuaded that it runs afoul of the OPM of some portion of the constitutional text. Scalia declared himself persuaded that affirmative action did so, but he had no remotely adequate basis for his confidence. It looks a darn sight closer to fiat than to reason.¹⁰² Here's Seinfeld's conclusion:

To me, at least, this is gravely disappointing, and it gives the lie to those who regard the Justice as an unflinching champion of adjudicative rectitude.

...

The affirmative action cases presented a real opportunity for legal principle to strut its stuff. Imagine how strong a statement Justice Scalia would have made about the importance of the rule of law, and about the need to adhere to one's theory of constitutional interpretation even when one doesn't like the result, if he had published opinions saying that he thought affirmative action terribly misguided, yet still permissible in light of the original understanding of the Fourteenth Amendment. He chose not to make that statement, and our constitutional discourse is weaker for it.¹⁰³

100. See Berman, *supra* note 25, at 796.

101. See pp. 17–23.

102. For elaboration, see Berman, *supra* note 25, at 795–98. Many originalist scholars candidly acknowledge that Scalia did not do the historical homework that his professed originalism requires. But even among those who do, many or most substantially understate that fact's significance. For example, in the course of offering the most substantial original-meaning argument for color blindness yet produced, Michael Rappaport forthrightly grants that Justices Scalia and Thomas together “have not made any real effort to justify their affirmative action opinions based on the Constitution's original meaning. Instead, their decisions have relied on a combination of precedent, moral claims, and legal principles.” Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 73 (2013). But he then concludes, on the strength of his measured assessment that his own novel arguments make out a “reasonable” case “that state government affirmative action is unconstitutional,” that “the originalist Justices are therefore not being inconsistent or hypocritical by supporting a colorblind Constitution.” *Id.* at 72–73. I believe that Rappaport is drawing the wrong conclusion. The right conclusion (assuming the premises) is, at best, that the originalist justices are not *mistaken* in supporting a colorblind Constitution. By exercising judicial power to override decisions made by democratically accountable actors, without the epistemic warrant their theories demand, their behavior *would* still be “inconsistent or hypocritical.” *Id.*

103. Seinfeld, *supra* note 95, at 120.

Many critics have objected that Scalia's performance in the affirmative action context unmasks him as a partisan, result-oriented justice.¹⁰⁴ They argue that Scalia simply would not follow his prescribed methodology when its conclusions were too distasteful for him, notwithstanding his disavowal of faintheartedness.¹⁰⁵ His most stalwart defenders deny the charge categorically.¹⁰⁶ They find the suggestion that Scalia would have willfully violated his principles fantastic.¹⁰⁷ I'm willing to grant the benefit of the doubt. But that would not be enough to salvage Scalia's reasoning on affirmative action. As I have just tried to show, his performance on the topic was unacceptable whether or not a persuasive originalist case for color blindness lurks in the wild still waiting to be bagged (or whether color blindness is part of our constitutional order on non-originalist grounds). If Scalia's supporters are right, that would just go to show, I think, that it's not that Scalia *wouldn't* walk the walk, but that he *couldn't*. For me, this rings true. All of us must know that the constitutionality of race-based affirmative action presents at least a "difficulty" or a "challenge" for originalist conservatives. None of us thinks that the originalist case for color blindness is a lay-down. All the same, I'd venture, none of us could have envisioned Scalia coming out any differently than he did.

And so we arrive at Scalia's third and final flaw: the *inability* to perform as one knows one ought. As tragic flaws go, it's a peculiarly modern one, for it manifests the essence of tragedy in our time: "[A]n exposition of man's powerlessness in his cosmic setting."¹⁰⁸

V. CALAMITY

I have just discussed Scalia's flaws or vices as a jurist. The Greek word often translated as tragic flaw is *hamartia*. Although its full meaning is controversial, it is widely understood to denote not only a flaw, defect, vice, or error, but one that drives the action to its calamitous end.¹⁰⁹ Can disaster be fairly laid at Scalia's feet?

Not yet, at least. I have already said, repeating many others, that Scalia's absolutism and dismissive rhetoric threaten our legal and political culture by hardening divisions and encouraging disrespect, even disdain, for our judiciary. These are genuine dangers and they threaten grave harm. But to proclaim that Scalia has brought forth disaster does appear rather hysterical. That is good. I'm not committed to pressing the "tragedy" theme all the way home.

104. See, e.g., RICHARD A. POSNER, REFLECTIONS ON JUDGING 198–99 (2013).

105. See, e.g., *id.* at 215–19.

106. E.g., Calabresi & Braga, *supra* note 6, at 804–06.

107. See, e.g., *id.* at 804–05.

108. LEECH, *supra* note 8, at 16.

109. See GEOFFREY BRERETON, PRINCIPLES OF TRAGEDY: A RATIONAL EXAMINATION OF THE TRAGIC CONCEPT IN LIFE AND LITERATURE 39–40 (1968).

If we do not yet have a full-blown tragedy, though, we have seen enough to make out the lesson I promised. Tragedy, Aristotle taught, arises “because the world is full of actors not only with clashing ethical perspectives, but with strong, unyielding commitments to them.”¹¹⁰ We can see where we are heading, and we have time to turn back. Clashing ethical perspectives are here to stay. It’s the “unyielding commitments” that must yield. And we should hope they yield soon, for norms of civic engagement evolve in ways that none of us can control, though many of us can influence. (Like social phenomena generally, one might think.¹¹¹)

No side has entirely clean hands when it comes to the character of our constitutional and jurisprudential debates. Liberals too often charge conservative jurists with being morally insensitive or odious, even when those jurists may well be operating in good faith from plausible jurisprudential accounts that rule certain moral considerations legally irrelevant.¹¹² Conservatives too often charge liberal jurists with willfully disregarding law, even when those jurists may well be operating in good faith from plausible jurisprudential accounts that rule certain non-originalist and non-textualist considerations legally relevant.¹¹³

Truth is not one-sided. Law is not simple. “Certitude is not the test of certainty.”¹¹⁴ Those who exercise the power of judicial review in a democratic society should heed Scalia’s insistent demand that they undertake seriously to justify their exercise of this power. That is an ethical obligation. But they, and the rest of us, should renounce the example Scalia set of convincing ourselves that we alone have all the answers and of castigating those who view things differently as liars and cheats. That is an ethical obligation, too.

110. Richard Ned Lebow, *Tragedy, Politics and Political Science*, 19 INT’L REL. 329, 330 (2005).

111. See *supra* notes 20–21, 38–39 and accompanying text.

112. Here, for example, is Senator Barbara Boxer: “Engraved over the Supreme Court are the words, and I quote, ‘Equal Justice Under Law’. It does not say equal justice under law except for women. But yet, that is what the Hobby Lobby case says.” *The Rachel Maddow Show, Transcript 07/09/14*, MSNBC (July 9, 2014, 9:00 PM), <http://www.msnbc.com/transcripts/rachel-maddow-show/2014-07-09> [<https://perma.cc/72TY-J3GM>].

113. And here is Senator Ted Cruz: “To see the court behaving as it is today, as a super-legislature, simply enacting the policy preferences of the elite judges who are serving upon it, is a profound betrayal of their judicial oaths of office and of the constitutional design that has protected our liberty for over two centuries.” Katie Zezima, *Cruz Once Clerked for a Chief Justice, but He’s No Longer a Friend of the Court*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/politics/inside-ted-cruzs-new-war-on-the-supreme-court/2015/07/06/efa8fb54-20bf-11e5-aeb9-a411a84c9d55_story.html [<https://perma.cc/Z3BX-AFBB>].

114. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).