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Justice Scalia's Truthiness¹ and the Virtues of Judicial Candor

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Antonin Scalia is by far the Supreme Court's greatest wit and most colorful personality. When I choose audio clips from the Court's oral arguments to play in my constitutional law classes, I would like to offer a balanced sample of views from the left and right sides of the Court. But I cannot resist loading up on Scalia sound bites, because in almost every major case he serves up the sharpest questioning and most imaginative hypotheticals. His judicial opinions are also remarkably passionate and frank. If he thinks a lawyer's or even a fellow Justice's argument is nonsense, he will bluntly say so.² He has received intense criticism for supposedly being "too political" in some of his opinions, such as his scorching dissent in last year's case about Arizona laws aimed at illegal immigrants³ or his bitter denunciation of the Court's last major ruling on the detention of suspected terrorists.⁴ But what purpose is really served by judges hiding their motivations behind a false veneer of detachment and stilted formalism?

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1. The word "truthiness," popularized by Stephen Colbert on his political comedy television show *The Colbert Report*, means "truth that one feels intuitively, rather than factually, or a truth that one wishes to be true rather than knows to be true." Russell Smith, *Dictionary Indulges in a Little Truthiness of Its Own*, GLOBE & MAIL (Toronto), Dec. 14, 2006, at R1. It was named the word of the year for 2005 by the American Dialect Association and for 2006 by publishers of the Merriam-Webster dictionary. *Id.*

2. See Erin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 399-400 (2000) (providing examples of the "sarcasm" and "dismissive rhetoric" in Scalia's opinions).

3. *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) (criticizing the Obama administration's immigration policies and asking "Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?"); see, e.g., E.J. Dionne Jr., *Too Political for a Justice*, WASH. POST, June 28, 2012, at A21 (calling for Scalia's resignation because Scalia's opinion in the *Arizona* immigration case crossed the line from judicial into political argumentation).

4. *Boumediene v. Bush*, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) (claiming that the Court's ruling "will almost certainly cause more Americans to be killed"); Dahlia Lithwick, *It Isn't Tilting in the Same Old Ways*, WASH. POST, June 15, 2008, at B1 (claiming that the Supreme Court has become "crassly political" and that Scalia "barely bothers to hide his scorn for his lily-livered colleagues").

Scalia can be so refreshingly candid in his judicial work that it pains me when I see his opposite tendency emerge in other contexts. For example, Scalia did an interview with CNN's Piers Morgan last summer to promote a new book.⁵ After the Court's blockbuster ruling on health care reform, Scalia's comments about relations within the Court naturally got the most attention. Scalia took the high road, saying that he was offended by those who accused Chief Justice John Roberts of acting illegitimately. "I don't think any of my colleagues, on any cases, vote the way they do for political reasons," Scalia declared, adding that the Supreme Court is in no way a political institution.⁶

Many people, liberals and conservatives alike, will roll their eyes at that statement. It is hard to imagine that any judge is entirely immune from the influence of political considerations. But that is nevertheless the sort of platitude one expects to hear. Even if it is not really true, we understand the ideal underlying it.

It is much harder to excuse Scalia's slippery defense of specific positions that he has taken, such as his part in the Supreme Court's ruling that resolved the 2000 presidential election in George W. Bush's favor.⁷ According to Scalia, those unhappy about the Court's decision need to "get over it" because "it's clear that the thing would have ended up the same way anyway. The press did extensive research into what would have happened if what Al Gore wanted done had been done county by county, and he would have lost anyway."⁸ Scalia has made similar claims in the past, saying in a 2008 interview that the press "unanimously" came to the conclusion that Bush would have won the election even if the Court allowed recounts in Florida to continue.⁹

In fact, the media recounts were far less conclusive than Scalia suggests, because of the fact that votes could have been counted under a variety of standards. A generous counting standard, for example, would have allowed even the most faintly marked or dimpled ballots to be counted, while a more restrictive standard could have required a fully detached chad. An initial study by *USA Today*, the *Miami Herald*, and Knight Ridder newspapers found that Bush would have retained his lead under most scenarios, but not all.¹⁰ A subsequent review conducted by the University of Chicago's National Opinion Research Center for a consortium of news organizations found that Gore would have prevailed under most standards.¹¹

5. *Piers Morgan Tonight: Interview with Antonin Scalia* (CNN television broadcast July 21, 2012) (available at <http://transcripts.cnn.com/TRANSCRIPTS/120721/pmt.01.html>).

6. *Id.*

7. *See* *Bush v. Gore*, 531 U.S. 98 (2000).

8. *Piers Morgan Tonight: Interview with Antonin Scalia*, *supra* note 5.

9. *Charlie Rose: A Conversation with Justice Antonin Scalia About His Life, Career and Book Making Your Case: The Art of Persuading Judges* (PBS television broadcast June 20, 2008).

10. Dennis Cauchon, *Newspapers' Recount Shows Bush Prevailed*, USA TODAY (May 15, 2001, 5:18 PM), <http://usatoday30.usatoday.com/news/washington/2001-04-03-floridamain.htm#more>.

11. Kirk Wolter, Diana Jergovic, Whitney Moore, Joe Murphy & Colm O'Muircheartaigh, *Reliability of the Uncertified Ballots in the 2000 Presidential Election in*

Both studies agreed that Gore actually would have benefited from the counting standards favored by Bush, while Bush would have been better off under the standards requested by Gore.¹² Scalia thus chooses his words carefully when he says that Bush would have won the recount “if what Al Gore wanted done had been done.”¹³ But of course, a recount under Gore’s standards was not the only option available to Florida judges and election officials if they had been allowed to continue their work.

Scalia told a more blatant whopper during testimony before the Senate Judiciary Committee.¹⁴ Appearing with his colleague Stephen Breyer to talk about the role of judges in American democracy, Scalia faced questions about a magazine interview in which he had said that the Fourteenth Amendment should not be construed to prohibit sex discrimination because that was not its original meaning or intent.¹⁵ Senator Diane Feinstein took umbrage with that notion and challenged Scalia to explain why equal protection rights should not extend to women.¹⁶ “The 14th Amendment, Senator, does not apply to private discrimination,” Scalia huffed. “I was speaking of Title VII and laws that prohibit private discrimination. The 14th Amendment says nothing about private discrimination, only discrimination by Government.”¹⁷

Scalia managed to sound so indignantly perplexed by the question that Senator Feinstein sheepishly let the matter drop.¹⁸ “Oh, I see,” she apologized. “I see what you meant.”¹⁹ Feinstein is not a lawyer, and it is entirely understandable why she was reluctant to go toe-to-toe with Scalia in a constitutional debate. But if she had understood the issue well enough, she could have shredded Scalia’s response, for the explanation he offered her was laughably implausible. While he claimed that his remarks in the magazine interview had concerned only private discrimination and therefore did not call into question whether the Fourteenth Amendment prohibits governments from discriminating against women, that was simply not correct. The interviewer’s question and Scalia’s answer to it unambiguously

Florida, 57 THE AM. STATISTICIAN 1, 11 (2003).

12. Cauchon, *supra* note 10 (describing the “stunning irony” of the results); Wolter et al., *supra* note 11, at 11 (noting that Bush would have prevailed under the “Gore Request” while Gore would have won under the “Bush Standard”).

13. *Piers Morgan Tonight: Interview with Antonin Scalia*, *supra* note 5.

14. *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

15. *The Originalist*, CAL. LAW. (Jan. 2011), <http://www.callawyer.com/clstory.cfm?pubdt=NaN&eid=913358&evid=1> (interview of Antonin Scalia by Calvin Massey).

16. *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, *supra* note 14, at 19-20.

17. *Id.* at 20.

18. To watch the exchange between Senator Feinstein and Justice Scalia, see *Supreme Court Justices Take a Seat at the Witness Table* (C-SPAN Oct. 5, 2011), available at <http://www.c-span.org/Events/Supreme-Court-Justices-Take-a-Seat-at-the-Witness-Table/10737424545-1/> (at 1:07:25 to 1:09:30).

19. *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, *supra* note 14, at 20.

addressed gender discrimination in general, without any limitation to only private discriminatory acts.²⁰

Indeed, Scalia's remarks in the interview would have made no sense if they had concerned only private discrimination. He enthusiastically agreed with the interviewer's suggestion that we have "gone off in error" by applying the Fourteenth Amendment to sex discrimination.²¹ Scalia could not possibly have meant that we have gone wrong in extending the Fourteenth Amendment to private acts of discrimination because that has not happened. In decisions dating back well over a century, the Supreme Court has held that the Fourteenth Amendment applies only to government actions.²² That is why federal statutes prohibiting sex discrimination by private companies (like Title VII of the Civil Rights Act of 1964) are based on the federal power to regulate interstate commerce rather than just the Fourteenth Amendment.²³ If Scalia was talking only about private discrimination in the magazine interview, that would mean he was nonsensically complaining about a misinterpretation of the Constitution that has not occurred.

Scalia told the truth in the magazine interview, which is that he does not think gender is a characteristic that should get special protection under the Fourteenth Amendment. That is a perfectly viable conclusion to reach if you utilize Scalia's originalist method of interpreting the Constitution.²⁴ But Scalia's comments in the interview had been heavily criticized and he knew that Senator Feinstein would disparage them, so he tried to pretend that he had not really said what he in fact had said.

Politicians do this all the time. If a President says something and then regrets it, he will try to "walk back" the remark and deny that he really said what we all thought we had heard.²⁵ But Justice Scalia is not a politician. And that is ultimately

20. *The Originalist*, *supra* note 15.

21. *Id.*

22. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 621 (2000) (reiterating the "time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action"); *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (declaring that the Fourteenth Amendment can be violated only by certain types of "State action" and not "[i]ndividual invasion" of rights).

23. *See* 42 U.S.C. §§ 2000e, 2000e-2 (prohibiting gender discrimination by employers engaged in an industry affecting interstate commerce and having fifteen or more employees); *see also* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 380-81 (1979) (Powell, J., concurring) (noting that the Constitution does not prohibit "gender-based discrimination perpetuated solely through private action" and that the federal statutory prohibition of gender discrimination in employment is based on the Commerce Clause and "accords less than full protection to private employees").

24. *See, e.g.*, Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161 (1979) (asserting that "the framers of the fourteenth amendment did not contemplate sex equality" and that finding a right against gender discrimination in the Equal Protection Clause requires "departing radically from the original understanding"). *But cf.* Steven G. Calabresi & Julia T. Rickert, 90 TEX. L. REV. 1, 2 (2011) (challenging the widespread assumption of judges and scholars that "as a matter of original meaning, the Fourteenth Amendment does not ban sex discrimination").

25. *See, e.g.*, Bill Santiago, *To Walk It Back or Double Down, That Is the Question*, HUFFINGTON POST (Sept. 20, 2012, 9:48 AM), <http://www.huffingtonpost.com/bill->

what bothers me when I hear him being less than candid in talking about the difficult issues the Court must handle. We have come to expect politicians, whether they are Democrats or Republicans, to play fast and loose with facts and pretend that they are unequivocally right and their opponents are wrong on every issue. But if there is anyone in a position of great power in this country who has the freedom to speak plain truths, it is Scalia and his fellow members of the Supreme Court. They have unlimited terms in office and never need to worry about being re-elected. It is easy to understand why they nevertheless want to persuade us that their decisions are correct. But if they really want to be persuasive, they might find that straight talk goes a lot further than spin.

[santiago/to-walk-it-back-or-double_b_1899103.html](#) (“Walking it back is a form of back pedaling in response to push back that behooves you to back down, although you really don’t want to entirely take it back.”).