The Supreme Court, Justinian, and Antonin Scalia*: Twenty Years in Retrospect

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Judge Durante, Justice Calogero, Judge Marullo, Your Honors, Ladies and Gentlemen:

Years ago my quest for treasure among used books turned up Piero Calamandrei's *Eulogy of Judges*. You may know Calamandrei was an Italian lawyer and a teacher of civil procedure. His *Eulogy of Judges* is a psalm book of uncommon legal prayer, from which I should like to read two verses. Take these words as my heartfelt greeting to the judges of the American Justinian Society of Jurists. You honor New Orleans and Louisiana by your presence.

Calamandrei’s words, of course, were directed to his native Italian judges; I borrow them in welcoming this country’s Italian-American jurists to Louisiana:

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The Board of Editors of the *Louisiana Law Review* is pleased to publish Professor Baier’s Columbus Day, 1986, address to the American Justinian Society of Jurists—the same year Justice Antonin Scalia took his seat on the Supreme Court of the United States. The speech appears here without the distraction of footnotes, thus saving its original rhetorical flavor. As a postscript, Professor Baier looks back twenty years and tells us how things have fared since, footnotes and all.


I wish to express thanks to my colleague Vicenç Feliu, Foreign, Comparative, and International Law Librarian, Paul M. Hebert Law Center, Louisiana State University, for his help with the books, for his knowledge of Sicilian geography, and for his abiding friendship. *Grazie, carissimo amico.* And to *mon cher collègue* Olivier Moréreau, Director of our Center of Civil Law Studies, Hebert Law Center, for his intellectual companionship apropos Gény and *La vie après le texte.*
I cannot meet abstract law on the path I take as a man among men in society... but many times do I find you, O Judge, the corporeal evidence of the law, on whom depends the fate of my worldly goods... When I meet you on the road and bow to you with reverence, there is a sweetness of fraternal gratitude in my greeting. I know you are the keeper and guardian of those things I hold most dear; in you I greet the peace of my hearth, my honor, and my liberty.

Now to my topic: “The Supreme Court, Justinian, and Antonin Scalia.”

It struck me that Your Honors might be curious about our civil law in Louisiana, about its origins in the recesses of Roman law, and about your Society’s namesake Justinian. I know the Supreme Court well enough to venture a few words about it in public. As for Antonin Scalia, he has been on all our minds of late.

First, a few words about Bowers v. Hardwick, the recent Supreme Court opinion sustaining Georgia’s sodomy statute.

Those of you who follow the Court know that last July, the month in which America celebrated the centennial of the Statue of Liberty, the Supreme Court affirmed the constitutionality of Georgia’s sodomy law. The vote was close, 5 to 4, much closer, I suspect, than most prognosticators would have guessed.

Chief Justice Burger’s special concurring opinion in the Georgia sodomy case cites the Digest of Justinian and Code of the Emperor Theodosius in support of Georgia’s sodomy law. The Digest, you will recall, was the centerpiece of Justinian’s temple of the law, the Corpus Jurus Civilis, which was completed well over a thousand years ago, through the labor of Tribonian and a battalion of jurists, in 534 anno domini.

Citing the Digest is a rare thing for a Supreme Court opinion, although not unprecedented. One may naturally wonder whether Justinian is a proper source of contemporary American constitutional law.

I tell you these things by way of an introduction to my remarks. I want to talk to you about two subjects that fascinate me as a law teacher in Louisiana. One is the law of the Corpus Jurus Civilis, represented by the figure of Justinian. The other is the law of the American Constitution, represented by the figure of Antonin Scalia.

These two figures came face to face one week ago today, in the Supreme Court building, when Justice Scalia took his judicial oath of office. Doubtless it was a silent encounter. Some of you may know that Justinian is one of the great law-givers frozen in marble
on the north wall of the courtroom. I am sure Justinian never entered Justice Scalia’s mind, which was probably focused on his new responsibilities, the highest that can weigh on an American judge.

My speech is divided into two parts. First, I want to take you on a horse and buggy tour of the Roman Quarter of Louisiana’s legal system. Second, I will assess two of Antonin Scalia’s judicial opinions, written on the District of Columbia Circuit, against Senator Pastore’s measure of expected performance from Italian American judges. Said the Senator: “The Italian American judge to be considered equal must be twice as good as the next judge.” Justice Scalia, you will hear me affirm, will prove a surpassing Supreme Court Justice. The marks are already there, in the federal reports. Along the way, I hope to show that the law of the *Corpus Juris* and the law of the American Constitution are at once both strikingly different and remarkably the same.

I

Now, I assume you know we have a Civil Code; Louisiana is what we call a “civilian jurisdiction.” This much about us was circulated pretty widely by Stanley Kowalski in Tennessee Williams’s *A Streetcar Named Desire*. You may remember Stanley exclaiming to Blanche: “There is such a thing in this State of Louisiana as the Napoleonic Code, according to which whatever belongs to my wife is also mine, and vice versa.” Blanche responded: “My, but you have an impressive judicial air!”

But beyond Stanley Kowalski, Louisiana law is a mystery to most outsiders, who are scared off by it. Consider, if you will, one of my favorite civilian noises, the “antichresis.” Now here is a word that sounds frightening enough. Rest assured, however, that the antichresis is only a pledge of real property—“immovables” we say here—to secure a loan. I won’t bother you with the details, which you can find in our Code. But I will ask you to smile at the plight of Edward Livingston’s lawyer, in the old case of *Livingston v. Story*, which required the lawyer to unravel Louisiana’s law at the Bar of the Supreme Court of the United States. The Court at that time was headed by Chief Justice Taney, from Maryland, whom I suspect knew nothing about the antichresis, which was the focal point of the case. This was 1837, and Livingston’s lawyer started out by telling the Justices that, “The code of law prevailing in Louisiana, is difficult to be understood.”

But the lawyer continued on, made his point, and won his case. His synopsis of early Louisiana law is worth quoting to Your Honors; it is our first stop on our tour of Louisiana’s legal
landscape: "The code of law prevailing in Louisiana," explained the lawyer,

has grown up since the first establishment of the province. Originally it was adopted by a proclamation of Governor O'Riley [sic], in 1768; and was afterwards confirmed by the King of Spain. This was the "Corpus Juris Civilis," and the "Partidas," and the "Recopilacion de Leyes de las Indias." The French inhabitants of the province became dissatisfied, and "Les Coutumes de Paris" were declared to furnish the rules of practice; the principles of the established laws to remain in full force.

This was the state of things, when the United States acquired the territory, and great embarrassments arose on the introduction of the provisions of the laws of the United States, and the forms of proceedings under the same. A code was prepared by authority of the Legislature of the State, which is called the civil code [of 1825], and is in most of its provisions the Code Napoleon; and allows the Spanish laws to prevail in all cases to which they will apply.

That, in a lawyer's nutshell, is the story of our early Louisiana law as recorded in the United States Reports.

The Civil Code of 1870 followed. It has been the private law of this state ever since, although there have been plenty of amendments and a large body of statutory law has swelled up outside the Code.

If you will allow me a personal note, may I say I knew nothing of Louisiana's civil law when I arrived at LSU some fifteen years ago. I can tell you from painful experience that passing the Louisiana bar examination is a trying affair for a common law lawyer, such as I was. I regard my membership in the Bar of Louisiana as one of my proudest boasts. I owe my learning to my civilian colleagues, including Dean Paul M. Hebert, who let me teach the Louisiana Civil Law System course; to Athanassios Yiannopoulos, whose Greek spirit is lineal to Papinius, Ulpian, and Paulus—Roman jurists of exquisite learning; to Saúl Litvinoff, whose genius is exceeded only by his wit; and to Robert Pascal, who in the style of Gaius molded his students into priests of the law.

Next, let me take you back two thousand years to Rome, to the Forum, for a quick glance at the bronze tablets of the Twelve Tables; thence to the Golden Age of classical jurists, whose memory this Society honors by its name and by its membership.
Now, I will only bother you with the first of the Twelve Tables. We are far back in the recesses of time. This is 450 B.C. I have no earthly idea what a walk in the street was like, but it does seem to me remarkable that the first recorded Roman law pertains not to, say, the rights of the father as *pater familias*, but to—of all things—"concerning the summons to court." I quote the Scott translation: "When anyone summons another before the tribunal of a judge, the latter must, without hesitation, immediately appear." As I recall my civil procedure, this is good law today, with the exception that under the federal rules we allow a defendant twenty days to answer the summons and complaint.

S.P. Scott says that the proverbial "law's delay" was not known to the ancient Romans. When the case came to trial, always in the morning, the parties themselves argued it, and the judge was compelled to render a decision before sunset of the same day, in accordance with Law X of the First Table, to wit: "The setting of the sun shall be the extreme limit of time within which a judge must render his decision."

The genius of the Romans was eminently practical. Therefore, procedural rules precede substance in the bronze expression of Roman law. The first talk is of the summons and of the tribunal of the judge. Remedies define rights. You see the same thing in the development of the forms of action at common law.

The Twelve Tables, let me add, sparked the idea that the law should be written down where people can read it, thus enabling every citizen to become acquainted with the laws of his country and to apply to judicial tribunals to redress wrongs. A Frenchman today is proud of his Code, as Napoleon was proud of it in 1804, because he can carry it in his pocket and look up the law.

As to the Golden Age, roughly between 100 and 300 A.D., this was a period of high flowering in the fields of the law. It saw an outpouring of over 2,000 books of 3,000,000 lines by remarkable jurists, statesmen learned in the law who, for no remuneration, undertook to interpret the law for others as their contribution to public life.

The Golden Age was the period of Papinian, Paulus, Ulpianus, and Modestinus, vested by the Emperor with the "*Ius respondendi*," the right of giving written opinions under seal, binding on the parties to the case, in respect of which the opinion was delivered. These jurists were the real builders of the temple of Roman law. They were to Roman law what the common law, derived from actual cases, is to English law. The jurists recorded their cases of interest and their points of disagreement, and it is this record, both theoretical and derived from practice, which has come down to us in the *Digest* of Justinian.
The Golden Age was the period of "Gaius Noster"—"Our Gaius," as his students affectionately called him—Rome's premier law teacher and author of the *Institutes*, a truly civilized legal study guide for aspiring law students.

This was the period of the Roman praetor, the chief magistrate, and of the *Ius Praetorium*, predecessor of English equity. Through his power over procedure and remedies, the Roman praetor was the first to temper the letter of the law with the quality of mercy.

Let me give you a brief sampling of the legacy of Rome's jurists. I have in mind a few quick comparisons and contrasts between Rome's *Corpus Juris* and America's Constitution.

Papinian says: "No one can change his mind to the injury of another." And it was given at Constantinople, by the Emperor Valentinian, that: "It is certain that the laws and constitutions regulate future matters, and have no reference to such as are past." High authority suggests that the quoted maxim of Papinian, which Bracton lifted whole into English law without attribution to Rome, is the origin of the *ex post facto* prohibition and the rule against impairing the obligation of contracts found in Article I, Section 10 of the United States Constitution. True, a Roman Emperor, if he pushed his power, could trample vested rights with impunity. But as New York's Chancellor Kent observed years ago: "No correct civilian, and especially no proud admirer of the ancient republic (if any such then existed), could have reflected on this interference with private rights, and pending suits, without disgust and indignation."

Who would have thought that certain of our constitutional protections have come down to us from Rome?

Ulpianus says: "The governor should not permit the same person to be again accused of crime of which he has been acquitted." Is this not the Fifth Amendment's Double Jeopardy Clause? Of this extract in the *Digest*, Mr. Justice Black has written: "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times." At this point in his judicial opinion, Justice Black cited the *Digest* of Justinian.

And the greatest Chief Justice of them all, John Marshall, cited Justinian in *Cohens v. Virginia* on the lesser question, "What is a suit?" Said the great Chief Justice, "We understand it to be the prosecution, or pursuit, of some claim, demand, or request . . . . Or as Bracton and Fleta express it, in the words of Justinian, 'jus pro sequendi in judicio quod alicui debetur.'"
Citing Justinian as a source of the law of the Constitution is thus not unprecedented. But this is dangerous if care is not taken to distinguish dead letter law from living principles of justice.

For example, while it is true that the *Digest* and the *Theodosian Code* punish sodomy, as Chief Justice Burger recently noted, careful scrutiny of Clyde Pharr’s translation and notes teaches us that: “Sodomy was common during the later Roman Republic and the entire period of the Empire.” It seems the Romans were more liberal than the Chief Justice would have us believe.

I mean no disrespect of Chief Justice Burger. I mean only to point out that the law of the Roman Forum need not be our law.

Paulus laid it down that: “The authors of sedition and tumult, or those who stir up the people, shall, according to their rank, either be crucified, thrown to wild beasts, or deported to an island.” This hardly comports with our tradition of freedom of speech and of the press.

There are other stark contrasts. We are told that: “Liberty is the natural power of doing whatever anyone wishes to do unless he is prevented in some way, by force or by law.” There is no provision, however, in Roman law for judicial control of the Emperor’s sword or of his decree. Indeed, “The Emperor is free from the operation of the law,” says Ulpianus. And the Emperor Constantine laid it down in 316 A.D. that: “It is part of our duty, and it is lawful for us alone to interpret questions involving equity and law.”

This is not our constitutional way. To quote Chief Justice John Marshall in *Marbury v. Madison*: “It is emphatically the province and duty of the judicial department to say what the law is.”

I turn to Justinian the man. We remember him by his code of laws and by his majestic church, Sancta Sophia, at Constantinople. But who was this fellow Flavius Petrus Sabbatius Justinianus?

The mist of fourteen centuries blurs our vision. But we do have his portrait, and that of his wife, Theodora, set in the mosaic of St. Vitale in Ravenna, Italy. “There they stand apart but in balance, emperor and empress, flanked by their courts, making similar offerings to God.”

It is a fact that Justinian started out a Macedonian peasant. Theodora was born a bear keeper’s daughter. “They say this imp of the circus was the first feminist of the modern world.” There was a lifelong passion between Justinian and Theodora, his “sweetest charmer,” as he called her. “None other than Theodora could have inspired the famous pronouncement of Justinian on adultery: ‘We have set up magistrates to punish robbers and thieves; are we not even more straitly bound to prosecute the robbers of honor and the thieves of chastity?’”
Justinian had limitless energy. He was known as "the Emperor who never sleeps." Theodora had limitless ambition. Both of them died wrapped in the royal purple of Rome, the ultimate triumph of ultimate ambition and dumb good luck.

Justinian was Roman to the bone. "It was his boast that Latin was his native tongue." His respect for Roman law was profound. "There is nothing to be found in all things so worthy of attention as the authority of the law," he said, and so Justinian set out to preserve its ancient treasures in the permanent form of the Digest, five books of extracts which reduced the vast learning of the jurists to manageable proportions, in one big book the people could read, "the secular Bible of Christendom."

Add the Codex, which collected imperial decrees, and the Institutes, general principles of the law aimed at students, and you have Justinian's great gift to Western civilization, the Corpus Juris Civilis, a "most holy temple of justice," said Justinian, completed after seven years labor, from 528 to 534 A.D. "We decree that all these rules shall be observed in every age by all professors, students of law, and copyists, and by the judges themselves."

Rumor circulates that Justinian was "The Demon Emperor" and Theodora, whose character has been debated for fourteen centuries, was—say it softly—"The Harlot Empress." Scott in his preface to his translation of the Corpus Juris says some pretty nasty things about Justinian, whose character, Scott says, "was defiled by the practice of the most odious vices. He was cruel, tyrannical, treacherous, unprincipled, and corrupt." But these are mere general allegations, the sort of character assassination politicians of every age are used to; Mr. Scott provides no facts to back them up.

Procopius, who was Justinian's official court historian—"Boswell of the Byzantines"—paints a lurid picture of behind-the-scenes happenings in his Secret Anecdota, a book he kept well hidden from the eyesight of Theodora and her Emperor. But from what scholars tell us, it's difficult at this distance to separate Procopian fact from Procopian fiction. I find it hard to believe the Procopian legend of Justinian—and here I quote the legend, "pacing the corridors—with or without his head—listening to no voice but that of a spectral companion." I have read Justinian's prefaces to his Corpus Juris. They are not the work of a man who has lost his head.

In short, Justinian remains a paradox. Two portraits have descended to us—one the Demon Emperor of Procopius. Another of that great and august man, something of whose wisdom and large-mindedness is traditionally enshrined in the very name "Justinian." But they were one and the same man.
Our tour must move on. *Requiescat in pace Justinianus.*

II

We reach our last subject, Antonin Scalia, first American of Italian blood to reach the Supreme Court. I predict he will make this Society, of which he is a member, proud.

I assume you know his basic background from newspapers of late. He was born in Queens, New York, fifty years ago, of Italian immigrant parents. He is a Catholic with a court of nine children. He has black bushy eyebrows that furrow up when he’s concentrating, and I’m told he’s instantly likeable. The pictures I’ve seen always show him with a smile, which is a good thing in a Supreme Court Justice. I heard him say on TV, during the White House press conference, that luck is involved in being selected over the next fellow. His credentials are good. He graduated from Harvard Law School, where he was Note Editor of the *Harvard Law Review*. He has a penchant for debate. From the opinions I’ve read, I can affirm he is a hard-nosed warrior who enjoys a good intellectual fight. “Scalia comes across as a knife-fighter, but a friendly knife-fighter,” says a lawyer who has argued before him in court.

People who know Scalia say he has been a vociferous, argumentative, and persuasive conservative all his life—a “live wire on the D.C. Circuit,” which he joined in the fall of 1982 on President Reagan’s nomination.

Now, let me recall to your minds Senator Pastore’s measure of expected performance from Italian American judges: “The Italian American judge to be considered equal must be twice as good as the next judge.”

Our first test case—I promised you two—involves the question whether lethal drugs used to execute condemned killers must first be certified as safe and effective by the Federal Food and Drug Administration. Believe it or not, this was the holding of a majority opinion written by the D.C. Circuit’s liberal icon, Judge J. Skelly Wright. Judge Scalia’s dissent is devastating: “The condemned prisoner executed by injection is no more the ‘consumer’ of the drug than is the prisoner executed by firing squad a consumer of the bullets,” shot back Judge Scalia. The Supreme Court promptly granted certiorari and reversed, nine to nothing. Justice Rehnquist wrote the Court’s opinion; it reverses on Judge Scalia’s rationale and uses the same language in rejecting the “implausible result” below. Chief Justice Rehnquist, who will speak first at the conference, and Justice Scalia, who will speak
last as the junior justice, will get along just fine. Both are men of large intellectual capacity, like the jurists of old.

At Rome, there were schools of juristic thought, just as there are in Washington. The Sabinians, founded by Capito, were firm adherents of the empire, "inclined to follow tradition and to rest upon authority." The Proculians, on the other hand, founded by Labeo, were republicans "of independent mind and prone to innovation." I see Chief Justice Rehnquist as a good Sabinian, Justice Brennan a good Proculian.

There are those who subscribe to restraint in the exercise of judicial power, others who would allow judges a freer hand.

This judicial division is two thousand years old. Chief Justice Rehnquist and Justice Scalia belong to the same school of restraint. This is not my school, but I cannot say theirs is an illegitimate way of judging. To quote Holmes, who also subscribed to judicial restraint, "I'm not God."

Our next case is a fantastic one. It is about as good an example of competing views regarding the proper scope of judicial review of executive action as one can find. The United States Defense Department decided to establish a military training center in Honduras at which American military specialists would train Salvadoran soldiers. The case obviously has foreign policy implications. The trouble was that the Secretary of Defense put his training center smack in the middle of plaintiff Ramirez's private property. About one hundred Green Berets and 1,000 other soldiers, including Honduran troops, swarmed all over Ramirez's property, set up a tent camp, ammunition storage areas, and a firing range; prime grazing land and fences were bulldozed; cattle were shot by stray bullets.

Ramirez, a United States citizen, filed suit in the United States District Court for the District of Columbia. He alleged that his private property, valued at about thirteen million dollars, had been seized and damaged wholly without statutory or constitutional authority and that he had been deprived of property without due process of law. Plaintiff prayed for an injunction against the Secretary of Defense, a declaratory judgment, and such other relief as the court deemed just and proper.

Judge Scalia, writing for the majority, affirmed the dismissal of plaintiff's complaint. "The fact is that in enjoining a United States military operation of this sort we have no idea what harm we may be doing," said Judge Scalia. "And the fact that the supervision would relate to an ongoing military operation adds separation of powers concerns to the factors weighing against injunctive relief," he added. Ramirez was not remediless: he could bring an action for money damages for an unconstitutional taking in the Claims
Court. The closing part of Judge Scalia’s majority opinion speaks loudly of his habit of judicial abstinence. I quote from his opinion:

The dissent invokes “the great tradition of judicial protection of individual rights against unconstitutional governmental activities” . . . . But that tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong by thrusting the sharpest of our judicial lances heedlessly and in perilous directions. It acknowledges the need to craft judicial protection in such fashion as to preserve the proper functions of government . . . . [The dissent’s] vision of judicial supremacy . . . does not comport with our understanding of the separation of powers. It is a vision that obscures not merely the common-law tradition that injunction is an extraordinary remedy, but also the political truth that society has many other needs that must be accommodated with proper protection of individual rights, and the related constitutional reality that we serve beside the officers of two other coequal branches, whose responsibilities, no less important than our own, require knowledge and judgment we do not possess.

Scalia concludes:

If the traditional and hence limited relief we have found available in this case, based upon a more modest conception of our abilities and powers, lends itself less to stirring eulogy of the judicial role in vindicating individual liberties, we are consoled by the fact that it lends itself more to the preservation of the Constitution.

On rehearing en banc, the full D.C. Circuit Court of Appeals disagreed with Judge Scalia’s narrow view of the judicial function. Said Judge Wilkey for the en banc majority:

The Judiciary is fully empowered to vindicate individual rights overridden by specific, unconstitutional military actions. Charges that United States officials are unconstitutionally housing over 1,000 soldiers on a United States citizen’s private ranch and running military forays throughout the pastures cannot conscionably be dismissed by this court at the stage of a bare complaint and supporting declarations. We emphatically reject the proposition that the federal courts are closed to these United States plaintiffs from the start.

Judge Scalia, dissenting on rehearing en banc, retorts:
Whereas John Marshall was prepared to issue a writ against the Secretary of State despite the latter’s high public office . . . this court is especially willing to enjoin the Secretary of Defense because of that status. To a court imbued with such a philosophy, it is small wonder that concepts such as equitable restraint on the basis of interference with military and foreign affairs, and the act of state doctrine, have little meaning. Marshall was right and the majority wrong. I dissent.

This debate over how judges should exercise their power is ageless.

In bringing my speech to a close, I want to recur to the law of Rome one last time. In one crucial respect, the workways and habits of mind of Rome’s jurists are the golden treasure of the Corpus Juris. Exposure to it is a good thing for America’s judges, swamped as they are in the facts of a thousand cases each.

I’m talking here about the duty of the judge. How should Your Honors judge the conflicts that come before you? Justinian’s Institutes speak of the duty of a judge this way: “A judge ought to be careful not to decide in any other way than prescribed by the laws, the constitutions or the customs.” I’m sure you have heard this admonition before, but I doubt you knew its Roman ancestry. Justinian, in his preface to his Digest says, “We entertain so much reverence for antiquity that we cannot suffer the names of these learned jurists to be consigned to oblivion.” Justinian’s purpose in collecting the extracts of the jurists was to prevent judicial caprice, to avoid, in his own words, “cases [being] disposed of rather according to the will of the judge than by the authority of the law.”

Here, Your Honors, is the birthright of Antonin Scalia: the idea of judicial restraint from the lips of Justinian himself.

But judicial restraint is not the sole measure of judicial duty as conceived in the Digest. Ulpianus tells us: “The law obtains its name from justice; for (as Celsus elegantly says), law is the art of knowing what is good and just.” A second birthright, according to Justinian’s Digest, makes Your Honors “priests of this art, for we cultivate justice aiming (if I am not mistaken) at a true, and not a pretended philosophy.”

And more: “Justice is the constant and perpetual desire to give to every one that to which he is entitled,” says Ulpianus.

I realize that this general principle will not decide concrete cases. How Justice Scalia will vote on the agonizing affirmative action cases before the Supreme Court this Term remains to be seen. But general principles are not worthless either. They set
direction; they may inspire a philosophy of judgment. In the words of the Chief Justice of the United States who outlawed segregation in public schools:

In all times and places man has had a sense of justice and a desire for justice. Any child expresses this fact of nature with his first judgment that this or that “isn’t fair.” A legal system is simply a mature and sophisticated attempt, never perfected but always capable of improvement, to institutionalize this sense of justice and to free men from the terror and unpredictability of arbitrary force.

There are those who hate the name Earl Warren. Some say he was too much a praetor and too little a judge. But can there be any doubt that segregation in the schools or apartheid in South Africa today is unjust?

I realize the Romans exploited slavery, and it is a fact that the Dred Scott case cites the Institutes of Justinian in support of the legal degradation of human beings. But I rejoice in the fact of the Fourteenth Amendment and in judges unrestrained in their quest to guarantee due process, equal protection, and a full measure of liberty for Americans.

The jurists of ancient Rome sought to cultivate justice openly and unashamedly. I pray Your Honors of the American Justinian Society of Jurists will pursue this same sacred trust, with renewed enthusiasm, when you return home to your judicial hearths.

Members of the American Justinian Society of Jurists:
I deeply appreciate the honor of your company on this Columbus Day, 1986. In the years ahead, I predict you will take great pride in the judgments of Il Giudice, Antonin Scalia, rendered in the Supreme Court, in the shadow of Justinian.

I close with a final verse from Eulogy of Judges:

The judge who becomes accustomed to rendering justice is like the priest who becomes accustomed to saying mass. Fortunate indeed is that country priest who, approaching the altar with senile step, feels the same sacred turbulation in his breast which he felt as a young priest at his first mass. And happy is that magistrate who even unto the day of his retirement experiences the same religious exaltation in rendering judgment which made him tremble fifty years before, when as a young praetor he handed down his first decision.

Thank you, my dear friends, colleagues, and judges. Grazie, carissimi amici, colleghi, e giudici.
II. SCALIA—TWENTY YEARS IN RETROSPECT

Nor let the sea surpass his bounds.¹

And what of Antonin Scalia after twenty years? To my mind, Justice Scalia appears as *Il Giudice Sapiente*. I taught with him in Siena, Italy. The rubric certainly fits his teaching. The nuances of the meaning of “sapient”—present participle of the Latin “sapere,” to have taste or flavor; wise; full of knowledge; discerning: often ironical²—assuredly fit the first Roman on the Court.

I have no doubt that Justice Scalia falls into the third of Holmes’s tripartite division of legal minds: “kitchen knives, razors, stings.” Holmes, if I may say so, would give Scalia high marks for his Oliver Wendell Holmes, Jr. Lecture at Harvard, *The Rule of Law as a Law of Rules*.³ And in the tradition of Story and Frankfurter, fellow Harvard professors of law on the Supreme Bench, Justice Scalia is a voluble talker. I recall a student’s account of Joseph Story’s teaching at Harvard Law School:

Judge Story was a most voluble talker. He concluded his remarks about Pinkney by saying, “As great a man as he was, he had one grievous fault—a fault I advise young men to guard against—he was an interminable talker.” As a smile flitted across our faces, the Judge broke into a laugh and added, “It is a great fault no matter who indulges in it.”⁴

True it is that Justice Scalia’s bombarding of counsel during oral argument grates on his colleagues. Others have documented the fact:

On a bench lined with solemn gray figures who often sat as silently as pigeons on a railing, Scalia stood out like a talking parrot . . . . Scalia’s show did not always play well with the other justices. Several said they wished he would be quiet for a change. On occasion, Byron White would

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glare down the bench with a look that suggested he would like to put the newest justice into a headlock if it would shut him up. Sandra Day O'Connor would harrumph slightly when [Scalia] interrupted one of her questions.\(^5\)

I know from personal experience that a handshake with Justice Byron White is crushing, a headlock, God forbid, terminating. Yet Justice Scalia goes his merry way. “I suppose it’s the professor in me.” Indeed.

As to my prediction twenty years ago that Antonin Scalia would prove a surpassing Supreme Court Justice, he has proved to be “surpassing” indeed. I have in mind the definition found in Webster’s New International Dictionary of the English Language: “1. To pass or go beyond or over; to surmount. Now rare. Nor let the sea surpass his bounds. Milton.”\(^6\)

Twenty years in retrospect show Antonin Scalia a sea crashing over the Court, condemning his colleagues for surpassing the bounds of the Constitution. “I am chained, because of my theory of the Constitution,” to what each provision meant to those who

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6. Webster’s New International Dictionary of the English Language 2539 (2d ed. 1940). Justice Scalia is fond of dictionaries, as is any follower of Bartolus. My favorite is Holmes’s old stand-by, The Century. In his dissenting opinion in Maryland v. Craig, 497 U.S. 836, 864 (1990), for example, Justice Scalia recites Noah Webster’s definition of the noun “witness”—“in 1791 as today.” For good measure, Scalia adds: “See also J. Buchanan, Linguae Britannicae Vera Pronunciato (1757).” Id. For a listing of citations to “Cases in Which Justice Scalia Has Cited Dictionaries”—four pages of ten-point type—, see Ralph A. Rossum, Antonin Scalia’s Jurisprudence: Text and Tradition app. at 209–12 (2006).

7. Scalia’s dissent in Lee v. Weisman, 505 U.S. 577, 631–32 (1992), is a paradigm:

In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste to a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion . . . . Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.
adopted and ratified the Constitution. Scalia remains a friendly knife-fighter; vociferous; argumentative; hard-boiled; Sicilian. Often he is on fire: "In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use." His opinions show a good Sabinian of the school of restraint. He reminds me of Gaius: "Of rules which he disapproves he speaks his mind much more strongly, perhaps, than is customary among jurists." Like Gaius, Scaliaus speaks of particular rules as "absurd." Vide his eruption, Mt. Etna if you will, in the partial-birth abortion case of Stenberg v. Carhart: "The notion that the Constitution of the United States, designed, among other things, 'to establish Justice, insure domestic Tranquility,... and secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."
The reader will recall Senator Pastore’s measure of expected performance from Italian American judges: “The Italian American judge to be considered equal must be twice as good as the next judge.” This links performance to race. *Il Giudice* Scalia would dissent, loudly. “This is absurd.” “Mortadella!” In the late Michigan Law School case, Justice Scalia satirized Michigan’s minority admissions program. If the supposed benefits of diversity are as compelling as the Michigan Law School claims, it should lower its admissions standards and give up its desire to have “a super-duper law school.”14 A generation ago, Professor Scalia railed against *The Disease As Cure*, and ridiculed Justice Powell’s lonely *Bakke* opinion:

> [I]t is increasingly difficult to pretend to one’s students that the decisions of the Supreme Court are tied together by threads of logic and analysis—as opposed to what seems to be the fact that the decisions of each of the Justices on the Court are tied together by threads of social preference and predisposition.15

To repeat the point, this is Justinian’s insistence on avoidance of judicial caprice—“cases [being] disposed of rather according to the will of the judge than by the authority of law.”16 But recall Ulpian: “[The] derivation [of *jus*] is from *justitia*. For, in terms Celsus’ elegant definition, the law is the art of goodness and fairness.”17 A second birthright, according to Justinian’s *Digest*, makes judges “[o]f that art . . . deservedly called the priests. For [the priests] cultivate the virtue of justice . . . and affecting a philosophy which, if I am not deceived, is genuine, not a sham.”18

Justice Powell, I am sure, sought to cultivate justice by his *Bakke* opinion. His is the soft voice of judicial balance, of moderation.19 Justice Scalia’s voice is the categorical roar of an angry lion. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”20 After *Grutter*, Justice Powell’s voice is the law of

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16. Second Preface to DIG. 17 (S.P. Scott, 2 THE CIVIL LAW 195 (1932)).
17. DIG. 1.1.1 (Ulpian, INSTITUTES 1).
18. Id. at 1.1.1.1.
the land.\textsuperscript{21} As at Rome, there are two schools at work on the Court. Twenty years have emphasized the fact to me. In turn, I emphasize it to my students. We hear competing voices in class.

At Siena, Italy, Justice Scalia taught "Separation of Powers and the Rule of Law" for Tulane Law School's summer program. I tagged along—this was 1991—to compile our teaching materials and to grade the exams. Our classes met in the camera columna of Siena University. \textit{Morrison v. Olson}\textsuperscript{22} was part of the feast. The reader will recall Justice Scalia's "lonesome dissent"—all alone, but never nonplused—over the Court's sustaining the independent counsel provisions of the Ethics in Government Act of 1978:

The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it \textit{ought} to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.\textsuperscript{24}

Scalia of Siena reminds me of Bartolus of Sassoferrato: "Bartolus always frankly expressed his views on the laws on which he was lecturing. He expressed admiration for useful laws, condemnation for poor or ill-conceived legislation and scorn for opinions which he considered foolish. He frequently used the expression: 'Sed Truffa est' (but this is nonsense)."\textsuperscript{25}

\textit{Mistretta v. United States}\textsuperscript{26} was another of our Siena offerings in which Justice Harry A. Blackmun sustained the constitutionality of the United States Sentencing Commission. "I think the Court errs," said Scalia, "because it fails to recognize that this case is not about commingling, but about the creation of a new Branch

\begin{itemize}
  \item 24. \textit{Morrison}, 487 U.S. at 734 (Scalia, J., dissenting).
\end{itemize}
altogether, a sort of junior-varsity Congress."²⁷ Chief Judge Stephen Breyer, as he then was, attended our Siena classes. He served on the United States Sentencing Commission and thought it constitutional. I sat in silence as these two doctors of law clashed over our students' heads. "And in the long run," warned Il Giudice Sapiente, "the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."²⁸ Lately, Justice Stephen Breyer, as he now is, and Justice Scalia clashed anew over the Sentencing Reform Act of 1984, as surgically reconstructed in United States v. Booker.²⁹

Another philosopher of the Constitution joined us at Siena. I am convinced that Justice Hugo L. Black's faith lives on in the breast of Il Giudice Sapiente. "[I]t is language and history that are the crucial factors which influence me in interpreting the Constitution," says Justice Black in his treasured little book, A Constitutional Faith.³⁰ "The courts are given the power to interpret the Constitution and laws, which means to explain and expound, not to alter, amend, or remake. Judges take an oath to support the Constitution as it is, not as they think it should be."³¹

"Oh, I like Justice Black," Scalia instructed me as I composed our teaching materials. "Substantive due process" is a contradiction in terms—an "oxymoron."³² Neither Black nor Scalia would allow judges to invent rights out of this vagary. Both share the restraining philosophy of Plato: "It is the Laws which govern—not the philosophical Artists of King-Craft."³³ Both stand

²⁷. Id. at 427 (Scalia, J., dissenting).
²⁸. Id.
³¹. Id. at 20–21.
³². "Consistent with his text-and-tradition approach, Scalia rejects substantive due process, rightly calling it an 'oxymoron'; it is . . . nothing more than "each Justice's subjective assessment of what is fair and just."" Rossum, supra note 6, at 167 (footnote omitted).

Grote's Plato, Aristotle's Treatise on Rhetoric, Montesquieu's The Spirit of the Laws, and many other of Hugo Black's personal books fell into my hands during my year as a Judicial Fellow at the Supreme Court. I would spend
with Aristotle: "It would then be most admirably adapted to the purposes of justice, if laws properly enacted were, as far as circumstances admitted, of themselves to mark out all cases, and to abandon as few as possible to the discretion of the judge." Both echo Justinian—De Officio Judicis. They champion Montesquieu: "Fixed laws" to prevent "capricious will or arbitrary power." They follow Bentham: "But let a judge dare to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, and everything becomes arbitrary; no one can foresee the course which caprice will take."

Justice Black cited Justinian when he condemned trying people twice for the same conduct. Justice Scalia invoked the ancient Greeks in condemning the conviction of a man for murder that was not murder (only manslaughter) when the offense was committed. "Nulla poena sine lege," exclaimed Scalia in his dissent in Rogers Saturdays in the Hugo Black Reading Room exploring Justice Black's marginalia, "gloss," as the Civilians say. A man's books are a roadmap to his mind.

34. Aristotle, TREATISE ON RHETORIC 4 (Theodore Buckley trans., 1853). Hugo Black underscored this passage in his personal copy of the book. Earl Warren, who had never judged a day in his life and came to the Court as Chief Justice, asked Hugo Black to recommend some reading to help him with his new job. Justice Black recommended Aristotle's Rhetoric. Let not the sea surpass his bounds. "I stand with Aristotle, then—which is a pretty good place to stand," says Scalia. Scalia, supra note 3, at 1182.

35. De officio judicis in genere: "It remains, that we inquire into the office and duty of a judge: whose first care it ought to be not to determine otherwise, than the laws, the constitutions, or the customs and usages direct." J. INST. 4.8 (Thomas Cooper ed., Dr. Harris trans., 1812).

36. Baron de Montesquieu, I THE SPIRIT OF THE LAWS 150 (Thomas Nugent trans., 1899) (Hugo Black's indexing note, end papers, in his personal copy). "But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?" Id. (underscored boldly by Hugo Black).


38. Bartkus v. Illinois, 359 U.S. 121, 151-52 (1959) (Black, J., dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times."). Justice Black cites Justinian's Digest: "The Governor should not permit the same person to be again accused of crime of which he has been acquitted." Id. at 152 n.3 (quoting Dig. 48.2.7.2 (S.P. Scott, 11 THE CIVIL LAW 17)).
Hugo Black would join it. I commend this dissent as pure Scalia—"surpassing" in Noah Webster's second sense: "2. To be better, greater, stronger, etc., than; to be superior to in quality, degree, performance, etc.; to exceed; as ... he surpassed all his contemporaries in skill."\textsuperscript{40}

At Siena, our "New Justinians"\textsuperscript{41} confronted \textit{Coy v. Iowa}.\textsuperscript{42} This is Justice Scalia's opinion for the Court holding that the Sixth Amendment prohibits putting a screen between an alleged sexual assailant and his two thirteen-year-old girl accusers.\textsuperscript{43} The right of confrontation "existed under Roman law," Scalia taught. "Simply as a mater of Latin as well, since the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)."\textsuperscript{44}

Side-by-side Scalia of Siena, Justice Sandra Day O'Connor turned her back to the Confrontation Clause in \textit{Maryland v. Craig}, rejecting any \textit{absolute} right to a face-to-face confrontation and allowing a child witness in a child abuse case to testify outside the defendant's presence by one-way closed circuit television.\textsuperscript{45} The reader, I am sure, knows what to expect from our Siena Doctor of Law. "Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current 'widespread belief,' I respectfully dissent."\textsuperscript{46}

Justice Hugo Black assuredly lives on at the Court:

\begin{quote}
For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote from the document one last time (for it plainly says all that need be said): "In \textit{all} criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (emphasis added).\textsuperscript{47}
\end{quote}

\textsuperscript{39} 532 U.S. 451, 467 (2001) (Scalia, J., dissenting).
\textsuperscript{40} WEBSTER'S, \textit{supra} note 6, at 2539. Of course, as I said elsewhere, judicial evaluation, whether of one opinion or twenty years in retrospect, "necessarily depends on one's philosophy of performance." Paul R. Baier, \textit{The Court and Its Critics}, 78 A.B.A.J. 59, 59 (1992).
\textsuperscript{41} This is how Justinian wanted students in the first-year of their legal studies to be known. "[T]hey are to be known as 'New Justinians.'" Dig., \textit{supra} note 17, at li.
\textsuperscript{42} 487 U.S. 1012 (1988).
\textsuperscript{43} \textit{Id.} at 1021.
\textsuperscript{44} \textit{Id.} at 1016.
\textsuperscript{45} 497 U.S. 836, 850 (1990) (emphasis added).
\textsuperscript{46} \textit{Id.} at 861 (Scalia, J., dissenting).
\textsuperscript{47} \textit{Id.} at 870.
Both Justice Black and Justice Scalia are champions of the Bill of Rights, without any ifs, ands, or buts. Justice Scalia's heated dissent in *Hamdi v. Rumsfeld*, against Justice O'Connor's plurality opinion for the Court sustaining the detention of an alleged "enemy combatant" in President Bush's "war on terror," was of a piece with Hugo Black's insistence that the Constitution controls the military. Absent a congressional suspension of the writ of habeas corpus, "a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release."

Enforcing the Bill of Rights is one thing. Adding to it is quite another. The other day Justice Scalia identified himself with Justice Black's attack upon the Court for adding "supposedly 'constitutional' prophylactic rules to what the Constitution itself requires." This was in our Bartolus's burning dissent in *Dickerson v. United States*, where Scalia condemns the Court for "imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States," beyond the Constitution's bounds. "That is an immense and frightening anti-democratic power, and it does not

48. In *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563 (2006), Justice Scalia for the Court reversed a criminal conviction where the trial court, in violation of the Sixth Amendment, denied the accused counsel of his choice. "Oh, but the trial was fair and the accused had substitute counsel," says the Government. *Id.* at 2561–62. Nothing doing, says Scalia, J.: "In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" *Id.* at 2562 (footnote omitted).


51. *Hamdi*, 542 U.S. at 572. Justice Scalia's dissent relies on Justice Black's plurality opinion in *Reid*, 354 U.S. at 30 ("*Ex parte Milligan*, 4 Wall. 2 (1866), remains 'one of the great landmarks in this Court's history.'").

52. See, e.g., Justice Scalia's refusal for the Court in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to add a third layer of prophylaxis for the *Miranda* right to counsel. He quotes Mr. Justice Jackson's sage admonition, in *Douglas v. Jeannette*, 319 U.S. 157, 181 (1943): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." I know from personal observation that this is a favorite apercu of Justice Scalia. Similarly, in his opinion for the Court in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), Justice Scalia refuses to extend the *Mapp* exclusionary rule to a violation of the "knock and announce" rule. "Resort to the massive remedy of suppressing evidence of guilt is unjustified." *Id.* at 2168.


exist." The Court, said our Gaius, is acting as a "nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy." Let not the sea surpass his bounds.

Justice Black's dissent in Harper v. Virginia Board of Elections, against Justice Douglas's egalitarian reading of the Equal Protection Clause, anticipated Justice Scalia's dissent against Justice Ginsburg's majority opinion, which opened the doors of the Virginia Military Institute to women. The virtue of a democratic system is that Virginia is free to change its law. "That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution." The Court is "most illiberal . . . inscribing one after the other of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society's law-trained elite) into our Basic Law." The history and the long tradition, enduring down to the present, of all-male military colleges supported by both the states and the federal government, count for nothing. "Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent."

55. Id.
56. Id. at 454.
57. Id. at 455.
58. 383 U.S. 663 (1966) (holding Virginia's $1.50 annual poll tax a violation of equal protection). Justice Douglas's opinion for the Court reads the Equal Protection Clause through "le sens évolutif":

In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

Id. at 669.

Said Justice Black, dissenting:

[When a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

Id. at 678.

60. Id. at 567 (Scalia, J., dissenting).
61. Id.
62. Id.
And what of fundamental rights jurisprudence? Scalia condemns *Roe v. Wade*\(^63\)—"*Sed Truffa est.*" Justice O'Connor's view in another abortion case "cannot be taken seriously."\(^65\) "I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so."\(^66\) The Constitution "contains no right to abortion. It is not found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution,"\(^67\) insists Justice Scalia.

And then there is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, June 29, 1992, the joint opinion of Justices O'Connor, Kennedy, and Souter, saving *Roe v. Wade*. I was teaching at Aix en Provence, France, awaiting Justice Harry A. Blackmun's arrival. He brought the *Casey* slip opinions to class and taught a competing view of liberty: "That tradition is a living thing."\(^69\) Not so at all, "*Sed Truffa est,*" according to Justice Scalia's surpassing dissent: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."\(^70\) The reader will sense the clash of Proculians and Sabinians in the contemporary corridors of Siena or aside the mossy fountains of Aix.

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\(^{63}\) 410 U.S. 113 (1973). Nor does the Constitution say anything about a supposed "right to die with dignity":

[T]he point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).  

\(^{64}\) "But this is nonsense." Miceli, *supra* note 25, at 1034.  


\(^{70}\) *Planned Parenthood*, 505 U.S. at 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).
Justice Scalia derides the idea of a "Living Constitution." His Tanner Lectures at Princeton address the neglect "of the science of construing legal texts." Scalia insists on interpreting the Constitution according to the original meaning, not the current meaning, of its texts. "I favour an approach called originalism, the basic tenets of which are twofold: (1) adhere to text; and (2) give text the meaning it bore when it was adopted." According to Justice Scalia, his theory of interpretation is the lesser evil. "[T]he originalist at least knows what he is looking for: the original meaning of the text." At the end of A Matter of Interpretation: Federal Courts and the Law, Justice Scalia’s teaching echoes Justinian’s instructions to professors of law and to judges—they must limit themselves within the bounds of the Corpus Juris. There is no room to roam at large: “The American people have been converted to belief in The Living Constitution, a ‘morphing’ document that means, from age to age, what it ought to mean.”

The consequences are dire, according to Il Giudice Scalia:

If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.

71. Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44–45 (Amy Gutmann ed., 1997) ("Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.").
72. Id. at 3.
73. Id. at 38.
75. Scalia, supra note 71, at 45.
76. Id. at 47.
77. See DIG., supra note 17, at xlvii–xlix:
No skilled lawyers are to presume in the future to supply commentaries thereon and confuse with their own verbosity the brevity of the aforesaid work, in the way that was done in former times, when by the conflicting opinions of expositors the whole of the law was virtually thrown into confusion.
78. Scalia, supra note 71, at 47.
79. Id.
As I said twenty years ago, the debate over how judges should exercise their power is ageless. Justice Scalia’s originalism is akin to Justice Black’s textualism. Hugo Black objected vociferously to judges “keeping the Constitution in tune with the times.” So does Scalia.

Of course, it pains Justice Scalia to see the Court surpassing its bounds. But, truth to tell, the Court has never bound itself to text or to original meaning. Life after text frees the judge. La vie après le texte libère le juge.

I have in mind a walk Scalia and I took after class in Siena to see the Catedrale di Santa Maria (the “Duomo”). I mentioned Chief Justice Hughes’s interpretation for the Court in Home Building & Loan Ass’n v. Blaisdell, apropos the Contracts


I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.


Cf. Alain Levasseur, Code Napleolian or Code Portalis?, 43 Tul. L. Rev. 762, 773 (1969) (Portalis’s insight, apropos the Projet of France’s Code Civil: “The Codes of nations are the fruit of the passage of time; but properly speaking, we do not make them.”). One hundred years after the Code Civil, François Gény’s Méthode d’Interpretation trumpets life after text:

One has tried to replace the syllogistic and dogmatic method, which deduced from the codes a completely fictitious and unreal “life” incapable of development and fixed definitely at the moment the logical construction was completed, by a method tied to organic life or to historical development, a method which is external rather than only internal as the first was, and the characteristic of which is the constant revival of the codes, not by their own substance, but through the introduction of all the elements of dynamic life itself.


82. The “Duomo” overwhelms any talk of law, see http://europeforvisitors.com/europe/galleries/italy/blg-it_siena_duomo_facade_blue_sky.htm (last visited Nov. 10, 2006).

83. 290 U.S. 398 (1934).
Clause. I paraphrased Hughes in Siena. I quote the Hughes Court here exactly:

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation of the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: "We must never forget that it is a constitution we are expounding" (McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579); "a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." Id., page 415 of 4 Wheat.

As I remember it, Scalia took me and Hughes to task. Those who imply from Marshall's utterance that the Constitution must change from age to age are mistaken—"But that is a canard."

"Sed Truffa est."

Cardozo taught differently in his day: "No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality," says Cardozo in his immortal classic, The Nature of the Judicial Process. Yet it is put before the courts en bloc. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Cardozo's answer is to see the notion of modern liberty as a "fluid and dynamic conception," which "must also underlie the cognate notion of equality." "From all of this, it results that the content of constitutional immunities is not constant, but varies from age to age."

84. Id. at 442–43.
85. Scalia, supra note 23, at 853. Justice Scalia prefers Justice Black's interpretation of Marshall's line: "We conclude as we do because we remember that it is a Constitution and that it is our duty 'to bow with respectful submission to its provisions.'" Bell v. Maryland, 378 U.S. 226, 341 (1964) (Black, J., dissenting) (quoting Cohens v. Virginia, 19 U.S. 264, 377 (1821)). "Or as Felix Frankfurter put it more concisely: 'Precisely because "it is a constitution we are expounding," we ought not to take liberties with it.'" Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV. 581, 596 (1989) (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting)).
87. Id.
88. Id. at 81–82.
89. Id. at 82–83.
Good teaching requires a clash of views. At Siena, Justice William J. Brennan, Jr. also obtruded into our classroom, his contribution to the science of construing legal texts: *The Constitution of the United States: Contemporary Ratification.*

If I may obtrude myself, let me add an insight of my own to this retrospective on text, tradition, and teaching. Let us leave Siena and return to Aix en Provence, where Portalis—*le Père du Code Civil* (the Father of the Civil Code)—played as a little boy on the *Cours Mirabeau.* Justice Blackmun joined us “to talk anew of the timeless problem of judicial interpretation of written texts, from Napoleon’s Code to America’s Constitution.” The theme of our teaching, the subtitle of our course on constitutional interpretation, was drawn from a little book by a great French law teacher and jurist. The book is François Gény’s *Les Procédés d’Elaboration du Droit Civil,* a lecture delivered by Gény at Nancy in 1910. At the end of his book, Gény emphasizes the role, which he suggests was neglected by theoreticians of his time, “des procédés intellectuels et de la terminologie dans l’élaboration juridique,” the role “of the intellectual process and of the terminology in juridical elaboration.” As we taught at Aix, there is more than a rough connection between the methods suggested by Gény and other continental thinkers for interpreting their codes and our own workways in interpreting the American Constitution.

Cardozo saw the link between code and Constitution in terms of juridical technique:

The same problems of method, the same contrasts between the letter and spirit, are living problems in our own land and law. Above all, in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the Constitution have a content and a significance that vary from age to age. The method of free decision sees through


92. Id. at v.

93. Harvard Law School Professor and comparativist Mary Ann Glendon voiced the same idea in her commentary on Justice Scalia’s Tanner Lectures at Princeton, see Scalia, supra note 71, at 103–06.
the transitory particulars and reaches what is permanent behind them.94

Like Napoleon’s Code, America’s Constitution is seen as a living document.95 Portalis puts it this way: “The Codes of nations are the fruit of the passage of time; but properly speaking, we do not make them.”96 “Par le Code civil, mais au-delà du Code civil” (“Through the Civil Code; but beyond the Civil Code”).97 Judges of Cardozo’s school are entrusted to interpret code or Constitution through “le sens évolutif.”98 Our Siena interloper, Justice Breyer, espouses Active Liberty.99 Breyer’s book, let me say, is a nice foil to Scalia’s A Matter of Interpretation.

To repeat my own idea: Life after text frees the judge. Au-delà de la Constitution, mais par la Constitution.

Once more: There are two schools at work at the Court. Bowers v. Hardwick, of twenty years ago, has been overruled.100


95. See generally Paul R. Baier, Mr. Justice Blackmun: Reflections from the Cours Mirabeau, 43 AM. UNIV. L. REV. 707 (1994).

96. The Preliminary Discourse of Portalis (Shael Herman, trans.), quoted in Levassuer, supra note 81, at 763.

97. “I could not end with better words than those inspired by an analogous phrase of Jhering, which is the focal point of the whole book of Mr. Gény: ‘Through the Civil Code; but beyond the Civil Code.’” Saleilles, supra note 81, at LXXXVI. All of which is detailed masterfully in Colonel John H. Tucker, Jr., Au-Delà du Code Civil, Mais Par le Code Civil, 34 LA. L. REV. 957 (1974).

98. “The President of the highest French Court, M. Ballot-Beaupré, explained, a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in ‘le sens évolutif.’” Cardozo, supra note 86, at 84 (quoting Munroe Smith, JURISPRUDENCE 29–30 (1909)).

99. Stephen Breyer, ACTIVE LIBERTY: INTERPRETATING OUR DEMOCRATIC CONSTITUTION 5–6 (2005) (“My thesis . . . finds in the Constitution’s democratic objective not simply restraint on judicial power or an ancient counterpart of more modern protection, but also a source of judicial authority and an interpretative aid to more effective protection of ancient and modern liberty alike.”).

Lawrence v. Texas, to my eye, reads the Fourteenth Amendment's guarantee of liberty through "le sens évolutif":

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.101

All of this, of course, is foreign nonsense to the Scalianistae. "We must never forget that it is a Constitution for the United States of America that we are expounding."102 Expounding the United States Constitution, Il Giudice Sapiente exclaimed in his Lawrence dissent:

What Texas has chosen to do is well within the range of democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.103

The reader will recall Justinian's warning to his professors of law, Theophilus, Dorotheus, Isodorus, Anatolius, and Salaminius, to mention a majority of five, at the outset of the Digest. They are to teach the truth of the Corpus Juris. They are forbidden to reach beyond it:

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101. Id. at 578–79.
102. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting). A plurality of the Court, per Stevens, J., citing the law of foreign nations, held that the Eighth Amendment prohibits the execution of persons under the age of fifteen at the time of the offense. Id. at 838. Justices Scalia and Breyer continue this debate on television in A Conversation on the Relevance of Foreign Law for the American Constitutional Adjudication (C-SPAN television broadcast Jan. 13, 2001) (on file with LSU Law Center Media Library).
103. 539 U.S. at 603–04 (Scalia, J., dissenting) (citation omitted).
We say this because we have heard that even in the most splendid *civitas* of Alexandria and in that of Caesarea and others there are unqualified men who take an unauthorized course and impart a spurious erudition to their pupils; we warn them off these endeavors, under the threat that they are to be punished by a fine of ten pounds of gold and be driven from the *civitas* in which they commit a crime against the law instead of teaching it.\(^{104}\)

The Court's "death-is-different" Eighth Amendment jurisprudence\(^{105}\) irritates Justice Scalia. The Supreme Court, we are advised, has surpassed its bounds. Hamilton's No. 78 insists that courts "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."\(^{106}\) Yet in *Roper v. Simmons*, the Court unbounded itself to hold that the Eighth Amendment forbids the death penalty for a seventeen-year-old who bound and gagged a woman with duct tape, tied her hands and feet together with electrical wire, and threw her from a bridge above the Meramec River, drowning her in the waters below.\(^{107}\) Roars our lion-hearted friend Justice Scalia—jaws wide open:

Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution *has changed*. . . . Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of

\(^{104}\) [DIG., *supra* note 17, at liii.]

\(^{105}\) [See, *e.g.*, Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting).]

\(^{106}\) [THE FEDERALIST No. 78, at 298 (Alexander Hamilton) (J. & A. McLean ed., 1788). This is the original edition, which I found by way of a Sunday flea-market outing in the Virginia countryside during my year as a Judicial Fellow at the Supreme Court. I paid a dollar for it. When I showed this treasure to Chief Justice Burger, he said to me, "Paul, how would you like to double your money?" I took it with me to Siena, with Scalia in class. Although it is not signed by Alexander Hamilton, it is signed by "Antonin Scalia July 4, 1991, Siena, Italy." A double treasure.]

\(^{107}\) [543 U.S. 551, 578 (2005).]
discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.108

Let me conclude this retrospective by taking you back one hundred years before Justice Scalia took his seat on the Supreme Court. The year is 1886, the year of Hugo Black's birth.109 We are in a classroom at Harvard College where Oliver Wendell Holmes, Jr. is addressing undergraduates on "The Profession of the Law." The law is not the place for the artist or the poet, "The law is the calling of thinkers."110 In a word, twenty years in retrospect show

108. Id. at 608 (Scalia, J., dissenting) (citation omitted). There is a kinship, I am happy to report to Louisiana's legal community, between Justice Scalia and Louisiana's Edward Douglass White—born of Thibodaux, Louisiana, 1844, baptized St. Joseph's Church, Confederate soldier boy, opposite Captain Oliver Wendell Holmes, Jr., captured at Port Hudson, Chief Justice of the United States, 1910–1921. Those who know Chief Justice White's monumental dissent (Holmes joined it) in Weems v. United States, 217 U.S. 349, 382–413 (1910), will see the same constraints being applied by both White and Scalia in construing the Eighth Amendment—constraints "directly repugnant to the conception that by judicial construction constitutional limitations may be made to progress so as to ultimately include that which they were not intended to embrace." Id. at 411. To both of them, text, history, and tradition bind the judge down from "mere emotional tendencies." Id. at 385.

On the one hundredth anniversary of Edward Douglass White taking his seat on the Supreme Court, March 12, 1994, Justice Scalia was an honored guest—I was his driver—at a Centennial Celebration at White's boyhood home in Thibodaux. From the front porch of this historic landmark, Justice Scalia told the assembled citizens and Mayor Alton "Checkerboard" Roundtree: "Our history makes us who we are. If we forget our history, we've lost a part of ourselves." Colley Charpentier, Scalia in City to Honor White, DAILY COMET (Thibodaux), Mar. 14, 1994, at 10A. Of Chief Justice White, Scalia told the Daily Comet, "In many areas, he and I are alike. He dissented in a case called Weems, and a few years ago I dissented in a case using the very same argument." Id. Justice Scalia's words will not lightly fade from the memory of those who heard him remember Louisiana's great Chief Justice on White's Centennial Day.


110. Oliver Wendell Holmes, Jr., The Profession of the Law, Lecture Delivered to Undergraduates of Harvard University (Feb. 17, 1886), in Oliver Wendell Holmes, Jr., SPEECHES 22–23 (1891):
Antonin Scalia a thinker—just as Holmes, another practitioner
turned professor, and thence to the Court, was a thinker. Let me
affirm also that our friend Nino Scalia is what the Romans knew as
a bonus vir. "I suggest, in other words, that it is by teaching your
students virtue and responsibility—much more than by teaching
them the contents of their legal 'rights'—you preserve the
foundations of our freedoms."111

I will end with an excerpt from Joseph Story, the first Harvard
Professor on the Supreme Bench. This from a letter to a friend on
the value of the study of romance languages to the judicial mind:

To be ignorant of these languages is to shut out the lights of
former times. There is not a single language of modern
Europe, in which literature has made any considerable
advances, which is not directly of Roman origin. The
English language abounds with words and meanings drawn
from classical sources. Innumerable expressions have
received their vivid tints from the beautiful dyes of Roman
and Grecian roots.

Who, that mediates over the strains of Milton, does not
perceive in them a discipline of the old school, whose genius
was inflamed by the heroic verse, the terse satire, and the
playful wit of antiquity? Who does not feel that the fires of
his magnificent mind were lighted by coals from ancient
alters?112

Salve, Il Giudice Justinianus.

Of course, the law is not the place for the artist or the poet. The law is
the calling of thinkers. But to those who believe with me that not the
least godlike of man's activities is the large survey of causes, that to
know is no less than to feel, I say—and I say no longer with any
doubt—that a man may live greatly in the law as well as elsewhere; that
there as well as elsewhere his thought may find its unity in an infinite
perspective; that there as well as elsewhere he may wreak himself upon
life, may drink the bitter cup of heroism, may wear out his heart after the
unattainable.

111. Antonin Scalia, Teaching About the Law, 8 CHRISTIAN LEGAL SOC'Y Q. 6, 10 (1987).
112. Quoted in Paul R. Baier, Il Giudice Sapiente: Antonin Scalia, Remarks to
the Southern Conference of State Bar Presidents Introducing Antonin Scalia as
Keynote Speaker (Sept. 28, 1991), New Orleans, in Paul R. Baier, SPEECHES AND
SELECT LEGAL PAPERS, with a Foreword by Justice Harry A. Blackmun (on file
with author) (citing 1 LIFE AND LETTERS OF JOSEPH STORY 508–11 (William W.
Story ed., 1851)).