

Judicial Minimalism in Constitutional Interpretation: A reply to Antonin Scalia’s “Common-Law Courts in a Civil-Law System.”

Tommaso Pavone¹
Department of Politics, Princeton University
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I. Introduction

In 1997 Princeton University Press published a series of essays stemming from an invitation extended to Supreme Court Justice Antonin Scalia by Princeton’s University Center for Human Values to deliver the Tanner Lectures. The resulting volume, *A Matter of Interpretation: Federal Courts and the Law*, opens with Scalia’s contribution, “Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws,” and subsequently provides detailed commentary by Professors Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin, concluding with a brief reply by the Justice. While Scalia’s essay is persuasive in many respects, it is nevertheless weakened by a few blind spots and occasional theoretic short-sightedness, defects that were generally addressed by the commentaries. Yet the responses of Wood, Tribe, Glendon, and Dworkin were far from exhaustive in their engagement with Scalia’s piece. In this light, the objective of this paper is to challenge Scalia’s essay on grounds not expounded by his official interlocutors. I posit that the theory of judicial minimalism that underlies Scalia’s argument requires a more holistic and realistic analysis of the non-judicial elements of the American constitutional system and its constitutional politics. In other words, before evaluating or critiquing the practice of judicial review or the concept of judicial supremacy, it is of fundamental importance to question whether the elected branches of government would prove better constitutional interpreters.

II. Scalia’s Argument and The Reply of His Interlocutors

Before undertaking the aforementioned task, it is important to briefly outline Scalia’s argument and the responses provided by Professors Wood, Tribe, Glendon, and Dworkin. Scalia’s essay

¹ Ph.D. Candidate. E-mail: tpavone@princeton.edu.

primarily outlines and advocates for his brand of textual originalism. He argues that “if we were really looking for the subjective intent of the enacting legislature we would more likely find it by paying attention to the text (and legislative history) of the new statute in isolation [...] Men may intend what they will; but it is only the laws that they enact which bind us” (1997: 17). He adds that “[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text” (1997: 38). In so doing, Scalia challenges two methods of constitutional interpretation. Firstly, he guards against variants of originalism that place significant value in legislative intent. “[I]t is simply incompatible with democratic government,” argues Scalia, “or, indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated” (ibid: 17). Discerning legislative intent is unnecessary and provides too much discretion to the judge, for whom legislative intent can become “a handy cover for judicial intent” (ibid: 18). Secondly, Scalia attacks living constitutionalism, casting it as “the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures” (ibid: 38). Not only is there “no agreement, and no chance of agreement, upon what is to be the guiding principle of the [Constitution’s] evolution” amongst living constitutionalists, but the “morphing” of constitutional provisions advocated by this strand of constitutional thought would amount to the “end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority” (ibid: 47). In contradistinction, the textual originalist may “not have all the answers,” but for Scalia he “has many of them” and “at least knows what he is looking for: the original meaning of the text” (ibid: 46; 45). “While the good textualist is not a literalist,” Scalia concludes, “neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible” (ibid: 24). Thus to the degree that formalism is inherent in this interpretive method, it is actually a desirable quality, for “[i]t is what makes a government a government of laws and not of men” (ibid: 25).

The responses of Professors Wood, Tribe, Glendon, and Dworkin generally engage with Scalia’s devotion to textual originalism. Wood’s commentary historically contextualizes and problematizes Scalia’s argument, noting that American judges have exercised “presumably

undemocratic authority from the very beginning of our history,” frequently blending judicial and political functions, and therefore the problem “is probably not as susceptible to solution as [Scalia] implies” (ibid: 58-59). Tribe retorts with a subtle defense of living constitutionalism, positing that “[i]n choosing among these views of what counts as “the Constitution,” and as binding constitutional law, one must of necessity look outside the Constitution itself,” for the Constitutional text “has a strong transtemporal extension” that is “capable of yielding new and unanticipated implications as future generations come to understand the deepest meaning and structure” of the document (ibid: 76; 83; 89). Glendon suggests that European civil law methods of statutory interpretation may yield results more harmonious with Scalia’s textual originalism than American common law cannons of interpretation: “From a comparative perspective, it would appear that many of our difficulties arise from the frequent omission of steps that civil lawyers perform instinctively,” namely the treatment of textual meaning as the starting point of adjudication (ibid: 109). Finally, Dworkin argues that Scalia’s “schizophrenic” essay endorses the wrong type of originalism (what he terms “semantic originalism”), where the more desirable variant is ““expectation” originalism, which holds that these [constitutional] clauses should be understood to have the consequences that those who made them expected them to have” (ibid: 115; 119). To this premise Dworkin adds that “Enlightenment statesmen were very unlikely to think that their own views represented the last word on moral progress,” thereby supporting his own variant of living constitutionalism (ibid: 127).

It is only Professor Dworkin’s “schizophrenic” critique of Scalia’s article that explicitly addresses the judicial minimalism that underlies, and may well be the primary objective of, the latter’s textual originalism. Dworkin alleges that Scalia promotes a “style of constitutional adjudication which he ends by denouncing,” for allegiance to textual meaning as originally understood is not deferential to contemporary legislative action, which elsewhere Scalia implies to be desirable (ibid: 115). Yet Dworkin may overstate his case; Scalia’s originalism is deferential to the legislature even if it is temporally discordant with Dworkin’s approach. More fundamental is the fact that Scalia’s legislative deference seeks to minimize judicial discretion, which stands in sharp contradistinction with Dworkin’s ideal type of the Herculean judge (see

Dworkin 1986). For Scalia, the problem is rooted in the pedagogical approach of law school education, which “consists of playing common-law judge, which in turn consists of playing king” (1997: 7). He subsequently laments how law students become obsessed with the “image of the great judge,” further perpetuating the undesirable “attitude of the common-law judge – the mind-set that asks, “What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?”” (ibid: 9; 13).

Scalia has had plenty of occasions to reiterate this point from the bench when deploring the perceived judicial activism of his colleagues. Objecting to the court’s defense of the precedent set by *Roe v. Wade* (1973)² in *Planned Parenthood v. Casey* (1992), Scalia asserts that “[t]he Imperial Judiciary lives [...] We should get out of this area [abortion politics], where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”³ In his dissent in *Romer v. Evans* (1996), Scalia writes that “[t]his Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected.”⁴ In a similar dissent to the Supreme Court’s majority opinion in *US v. Windsor* (2013), which struck down the Defense of Marriage Act (DOMA)’s exclusive application to heterosexual couples, Scalia reiterates that “[t]he result will be a judicial distortion of our society’s debate over marriage, a debate that can seem in need of our clumsy “help” only to a member of this institution.”⁵ In other words, not unlike law students, Scalia views judges as reproducing a tradition that promotes a form of social paternalism and exaggerates the positive and normative authority of the common law judge.

III. A Response to Scalia and a Challenge to Judicial Minimalists Generally

It is in the foregoing account that an important blind spot emerges in Scalia’s essay that his respondents equally fail to address: what specifically makes the legislature or the executive so worthy of deference by the courts? As Keith Whittington reminds us, originalism need not be

² *Roe et al. v. Wade, District Attorney of Dallas County*, 410 U.S. 113 (1973).

³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), at 996; 1002.

⁴ *Romer v. Evans*, 517 U.S. 620 (1996), at 636.

⁵ *US v. Windsor*, 133 S.Ct. 2675 (2013), at 2710.

equated with judicial minimalism, for “[o]riginalism requires deference only to the Constitution and to the limits of human knowledge, not to contemporary politicians” (1999a: 4). Judicial restraint, particularly if it does not necessarily follow from originalism *per se*, requires its own justification.

Scalia’s defense of judicial minimalism lies in his almost exclusive preoccupation with the deficiencies inherent in the judicial practice of constitutional interpretation in the common law tradition. Importantly, this concern is far from particular to Scalia’s intervention. Indeed, judicial minimalists from Judge Learned Hand to Justice Hugo Black to more recent legal scholars (see Berns 1987; Nagel 1989; Tushnet 2000) have focused most of their energies arguing that bestowing the exclusive power of statutory and constitutional review within the hands of unelected judges (thereby rendering said power binding over the contrary interpretations of the political branches of government) may at best invite abuse and at worst produce an antidemocratic and systemic undermining of popular will. This perspective has a long lineage and myriad manifestations in American constitutional history. We can find similar skepticism of the judiciary in *Brutus No. 11* (1788), who criticized the proposed Constitution on the basis that its Article 3 provisions, which constitute the “Judicial power,” would ensure that “judges will be interested to extend the powers of the courts,” and would thus exploit their authority to “mould the government, into almost any shape they please” at the expense of the other branches of government (quoted in Paulsen et al. 2013: 133). Departmentalist Presidents have similarly attacked the concept of judicial supremacy – the notion that courts should be the Constitution’s final and exclusive interpreters (see Whittington 2007). In an 1804 letter to Abigail Adams, Thomas Jefferson wrote that to vest the binding power of constitutional interpretation exclusively in the courts “would make the judiciary a despotic branch” (quoted in Paulsen et al. 2013: 159). Similarly in his 1832 veto of Congressional appropriations for the Bank of the United States Andrew Jackson implicitly attacked John Marshall’s opinion in both *McCulloch v. Maryland* (1819)⁶ and *Marbury v. Madison* (1803)⁷ by declaring that “the

⁶ *McCulloch v. Maryland*, 17 U.S. 316 (1819), where Marshall upholds the constitutionality of establishing a federal Bank of the United States.

Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution” (ibid: 68). As Edward Corwin has written, often “the notion of a departmental right of constitutional construction takes its rise not from the effort to establish judicial review but from an attempt to overthrow it” (1914: 58).

Scalia’s essay cannot be compartmentalized as departmentalist, nor is it a fundamentally opposed to judicial review, but it shares with the foregoing arguments the belief that the scales of constitutional interpretative authority should be tipped more strongly in favor of the elected branches of government. Yet if we are to conclude that the Constitution must be ‘taken away from the courts’ (Tushnet 2000), then some assurance must be provided that executive and legislative branches, along with the political actors composing them, would be worthier Constitutional guardians. Presumably it is not enough to criticize judicial supremacy as an imperfect practice or potentially dangerous – it must also be carefully argued that the other branches of government would be meritorious of least sharing in the practice of constitutional interpretation.⁸ Judicial review and judicial supremacy cannot be evaluated *in vacuo* – greater comparative political argumentation is required than that displayed in Scalia’s otherwise erudite essay.

In this light, the rest of this response outlines three challenges to judicial minimalism, particularly as articulated by Scalia’s article. Their purpose is not to suggest that judicial supremacy is preferable to judicial restraint; rather, it is to suggest that all constitutional branches of government are imperfect. As elsewhere, from expertise comes a greater awareness of imperfection – lawyers and legal scholars familiar with the judiciary have been well situated to mount excellent critiques of constitutional interpretation by the courts. But their relatively lacking understanding of the political branches of government has engendered a naively optimistic perception of their comparative operational efficacy and democratic legitimacy.

⁷ *Marbury v. Madison*, 5 U.S. 137 (1803), where Marshall provides a defense of judicial review and plants the seeds for judicial supremacy.

⁸ Whittington’s two-part work, *Constitutional Interpretation* (1999a) and *Constitutional Construction* (1999a), is one of the first works to seriously undertake such a task.

First, implicit in Scalia's arguments for judicial restraint is the belief that judges should avoid tackling political issues and thus cannot be allowed to dictate to the people's representatives how to do their job unless the legislation in question clearly violates the Constitutional text.⁹ Such a perspective constructs a binary opposition between unrepresentative, elite judges (whom Judge Hand disparagingly referred to as "a bevy of Platonic Guardians" (quoted in Bickel 1962: 20)) and representative, populist legislators. The more minor issue with this construction is a normative one – as Whittington writes of John Hart Ely (1980)'s democratic proceduralism, but might as well have written about Scalia's essay: "[h]e rejects substantive judicial activism on the grounds that it would impose "elitist" values, yet he cannot consistently justify condemning elitist values in favor of more populist ones" (1999a: 24). This critique takes on a new light when coupled with the more substantial concern, namely that the foregoing binary construct confounds the degree to which both Congressmen and judges are largely drawn from the same social strata and share similar backgrounds. According to the Congressional Research Service, 169 current members of the House of Representatives and 57 members of the Senate hold law degrees.¹⁰ Economic wealth adds to the considerable educational endowments of contemporary Congressmen: 48 percent are millionaires, according to the Center for Responsive Politics.¹¹ Despite a record number of women in the 113th Congress, men continue to make up over 81 percent of total Congressional membership.¹² Although these data are not longitudinal, in general Congressmen have come from either the most privileged or the most politically well-connected strata of society. In fact, when it comes to demographic composition, the Supreme Court has occasionally been more representative and diverse than the Congress, as the membership of the current Court, with its three women Justices,

⁹ This is a view not unlike that explicated by James Bradley Thayer in his influential 1893 work, *The Origin and Scope of the American Doctrine of Constitutional Law*, and has led some scholars, like Alexander Bickel, to refer to this as "Thayer's rule" (1962: 50-51). And it is a view reiterated by Robert Nagel, who argues that "[t]he judiciary's power to invalidate the decisions of other institutions should be reserved for those special occasions when some aberrant governmental action is emphatically inconsistent with constitutional theory, text, and public understanding as expressed in prolonged practice" (1989: 3).

¹⁰ "Membership of the 113th Congress: A Profile." Congressional Research Service, accessed January 6th, 2014, <https://www.fas.org/sgp/crs/misc/R42964.pdf>. See figures at page 5.

¹¹ "Nearly half of Congress members are millionaires." Star Tribune, August 10, 2013. Accessed January 6, 2014, <http://www.startribune.com/politics/statelocal/219127451.html>

¹² "Membership of the 113th Congress: A Profile." Congressional Research Service.

two Justices belonging to racial minorities, and all nine Justices affiliated with minority religions, exemplifies.¹³ It is therefore unclear why Justice Sonia Sotomayor, who grew up in a public housing project in the Bronx,¹⁴ should be more deserving of a sweeping “elitist” charge than Senator John Kerry, whose father was a diplomat and mother “was a member of an aristocratic American family.”¹⁵

Finally, given the distortionary effects of gerrymandering, the disproportionate influence of wealthy donors, the demands of internal partisan politics, and principal-agent problems generally, “it does not follow that all statutes gaining the support of a legislative majority in Washington, D.C., represent the considered judgment of a mobilized majority of American citizens” (Ackerman 1991: 9). But even if we grant that Congressmen usually seek to adopt positions in harmony with predominant political opinion, there is similar evidence that historically the Supreme Court only rarely strays far from legislative or executive preferences (McCloskey 1960; Whittington 2007). It follows that addressing the counter-majoritarian difficulty by deferring to a legislative branch assumed to be more representative and less elite than the judiciary is to take an overly simplistic view of the correlation between electoral accountability and representativeness.

Second, we need to explore the degree to which partisan fragmentation within the political branches of government complicates the picture. First, it is frequently unclear whether a discernable legislative will or overarching textual meaning meritorious of deference can be said to exist. We may speak of an executive will with relative ease, for Article 2 of the Constitution concentrates the executive power in the President. But if there is anything that the chaotic periods of past partisan realignments and the more recent era of partisan polarization have taught political scientists, it is that legislative cohesiveness and programmatic parsimony cannot be assumed. The pork-barrel concessions and compromises required for legislation to pass through

¹³ Scalia, Kennedy, Thomas, Roberts, Alito, and Sotomayor are Roman Catholics; Ginsburg, Breyer, and Kagan are Jewish. See: “Top court will have no Protestants with Kagan.” Reuters, May 11, 2010. Accessed January 6, 2014, <http://www.reuters.com/article/2010/05/11/us-usa-court-religion-idUSTRE64A5NP20100511>.

¹⁴ “Judge Sonia Sotomayor.” The White House, May 26, 2009. Accessed January 7, 2014, http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor

¹⁵ “John Kerry.” PBS Online News Hour, Accessed January 7, 2014, http://www.pbs.org/newshour/vote2004/primaries/kerry_bio.html

Congress increasingly make up large shares of substantive statutory provisions: between 1985 and 1999, “the growth in annual earmarks increased substantially faster – between 25 to 1,000 times faster in most cases – than inflation-adjusted federal domestic discretionary spending.”¹⁶ The 1998 Transportation Equity Act for the 21st Century, for example, contained some 1,850 earmarks.¹⁷ Not only do these trends undermine local and state representation by seeking to “micromanage state and local affairs,”¹⁸ but more importantly (at least from the judge’s point of view) they rarely align in favor of producing internally consistent documents. To the degree that deference to legislative sovereignty has its home in the British parliamentary system, it is because in the prototypical Westminster system the party in power monopolizes both legislative and executive authority while the opposition is relegated to symbolic acts of protest (King 1976; Hofferbert and Budge 1992; Tsebelis 1995; Tsebelis 2002). By monopolizing power and reducing the number of veto players, the ruling party can pass reasonably internally consistent statutes, which can then more easily be applied by the courts without creative acts of construction. Even Sir William Blackstone, the influential exponent of British parliamentary sovereignty, planted the seeds of judicial review in his statement that courts should leverage their interpretive function only when statutes are “impossible to be performed;” in other words, when they are so internally contradictory that they cannot be enacted without judicial intervention (quoted in Corwin 1914: 33). When courts are provided a statute in the modern era of partisan polarization and fragmentation (Mann and Ornstein 2012), can we expect a common understanding or substantive textual ‘logic’ to be always found therein? Would the Congress itself do any better than a court in discovering and articulating such an oracle?

Relatedly, unlike the British system that facilitates single-party government, the American system can quickly turn into a gridlock machine if political fragmentation and polarization gets out of hand (see Sartori 1997; Mann and Ornstein 2012). It is in this context

¹⁶ “How Congressional Earmarks and Pork-Barrel Spending Undermine State and Local Decisionmaking.” The Heritage Foundation, April 2, 1999. Accessed January 7, 2014, <http://www.heritage.org/research/reports/1999/04/congressional-earmarks-and-spending-undermine-decisionmaking>.

¹⁷ Ibid.

¹⁸ Ibid.

that Martin Shapiro writes that the American tradition of functional separation of powers combined with constitutional checks and balances “has served as a basis for the [Supreme] Court acquiring enormous lawmaking powers [...] Americans, for instance, have learned that if Congress won’t give them what they want, the President may, and if he will not, perhaps the Supreme Court will” (1981: 30-32). Christopher Wolfe’s study of the rise of modern American judicial power corroborates this insight by noting that when political issues cannot be resolved “through the normal political process, there may be pressure – internal as well as external – on judges to further it through the judicial process” (1994: 9). Other scholars have demonstrated that politicians frequently stand to benefit from the exercise of judicial review and even judicial supremacy, and may thus actively work to establish it (Ginsburg 2003; Hirschl 2004; Whittington 2007). If constitutional politics are inviting judicial activism, is it not possible that judges are more responsive to democratic politics (and less power-hungry) than Scalia leads us to believe?

Thirdly and to conclude, Scalia fails to stress the fact that even in the United States, which is home to “the most extraordinarily powerful court of law the world has ever known” (Bickel 1962: 1), the judicial power remains fundamentally limited. For judicial review is a negative power, entailing the invalidation of statutes or particular provisions within them (at most offering opportunities for suggesting statutory amendments along the way). This is not a practice comparable in scope with the exercise of positive legislative authority, which can both rescind past legislation *and* create new and expansive public commitments. Even the President retains substantial positive authority in foreign affairs, bureaucratic policymaking, and via executive orders (Paulsen et al. 2013: 174; 411-412). To shift the power of constitutional interpretation favorably for the executive or the legislature would produce an interactive effect with the positive powers already denied the judicial branch. Courts, as Hamilton professed in *Federalist No. 78*, “may truly be said to have neither FORCE nor WILL, but merely judgment,” thus he concluded that the judiciary’s lack of “the sword or the purse” would render it “the least dangerous branch” of government (quoted in Paulsen et al. 2013: 134). If judgment is to be shared between the three branches while the purse and sword continue to be concentrated in the

legislature and the executive, does this not engender a constitutional imbalance derived from an unacceptable concentration of power within the political branches of government?

IV. Judicial Minimalism and Comparative Political Reasoning

Doubtless, the foregoing arguments are plagued by blind spots of their own, but it is not my purpose in this brief space to mount an exhaustive and fully persuasive alternative to Justice Scalia's views and to other advocates of judicial restraint. Rather, the objective is to incentivize greater use of comparative political reasoning in their defense of judicial minimalism. To shift power in the direction of the legislature and executive does not automatically empower "We the People," for as Bruce Ackerman reminds us, "normally elected representatives are only "stand-ins" for the People and should not be generally allowed to suppose that they speak *for the People themselves*" (1991: 238). One does not have to endorse Ackerman's progressive narrative of American constitutional development to appreciate the point that the democratic problems with judicial review will not be magically resolved via greater deference to the legislative and executive branches. Such an argument could be made, but it must be constructed and cannot be assumed to logically flow from the empirical observation that constitutional interpretation is imperfectly practiced by the judiciary. Undertaking this endeavor would render Scalia's assertions, and those of judicial minimalists, that much more persuasive.

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