# PRECEDENT AND AUTHORITY IN ANTONIN SCALIA'S JURISPRUDENCE

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## I. THE AUTHORITY OF PRECEDENT

More openly than any other Justice sitting today, Antonin Scalia is ready to reverse prior Supreme Court precedent. Scalia has announced that *Roe v. Wade*[1] should be overruled altogether, while other Justices obviously unsympathetic to *Roe* have been unwilling thus far to do any more than whittle away at it.[2] Similarly, in death penalty cases, a majority of the Court since 1982 has been cutting back prior Supreme Court rulings without openly overruling them;[3] in two recent capital cases, Scalia alone stated that he would reverse prior rulings rather than join with unsympathetic majorities in confining their application.[4] In yet another context, a Court majority recently construed prior decisions prohibiting politically motivated firings of government employees also to forbid patronage-based hiring decisions;[5] Scalia, in dissent, was not content to argue that precedent did not require this further application, but maintained that the earlier decisions themselves should be overruled.[6]

This does not mean that Scalia is always ready to overrule a precedent simply because he would have decided the case differently as an original proposition. But in at least one case where he indicated his willingness to acquiesce in an error, as he saw it, that the Court committed in 1890, Scalia agonized openly and at length—notwithstanding that this ruling had been unquestioningly followed for one hundred years.[7] The cumulative implication of his opinions in these

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1 410 U.S. 113 (1973).

2 *See* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3065 (1989) (Scalia, J., concurring).

3 *See generally* Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1782-1805 (1987).

4 Walton v. Arizona, 110 S. Ct. 3047, 3067-68 (1990) (Scalia, J., concurring) (declining to follow Lockett v. Ohio, 438 U.S. 586 (1978) or Woodson v. North Carolina, 428 U.S. 280 (1976)); South Carolina v. Gathers, 109 S. Ct. 2207, 2217 (1989) (Scalia, J., dissenting) (advocating reversal of Booth v. Maryland, 482 U.S. 496 (1987)).

5 Rutan v. Republican Party, 110 S. Ct. 2729 (1990).

6 *Id.* at 2756 (Scalia, J., dissenting) (advocating reversal of Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980)).

7 Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2298-99 (1989) (Scalia, J., concurring in part and dissenting in part) (declining to overrule Hans v. Louisiana, 134 U.S. 1 (1890), which held states immune from federal damage actions).

cases is that Scalia does not honor precedent as such. Prior rulings command Scalia's respect primarily when he sees independent reasons that would lead him to decide the case the same way if it first appeared before him today. If the precedent cannot be justified on this independent basis, there is a presumption—apparently strong though rebuttable—for discarding it.

At first glance, it might seem that Scalia could rely on distinguished precedent for this agnostic view of precedent. His attitude seems reminiscent of Oliver Wendell Holmes's famous aphorism that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[8] Scalia might also claim kinship with Justice Brandeis's observation that, although "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right," this policy does not hold for constitutional law specifically because "correction through legislative action is practically impossible" and the Court accordingly should follow "the lessons of experience and the force of better reasoning."[9] There is, moreover, strong practical precedent for reopening past precedents in constitutional adjudication on which Scalia is also entitled to rely, in the wholesale reversal of constitutional doctrine carried out by Franklin Roosevelt's Justices. Scalia did indeed allude to this precedent in one of his recent opinions, citing the arch-liberal Justice Douglas in support of re-examining past rulings[10] and noting that "[o]verrulings of precedent rarely occur without a change in the Court's personnel."[11]

There is, however, a distinctive element in Scalia's attitude toward judicial precedent that sharply differentiates it from these other agnostic views. When Brandeis urged re-examination of past constitutional decisions, he relied on the premise "that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[12] Brandeis also stated that prior decisions

> not only may . . . have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile [and m]oreover, the judgment of the court in the earlier decision may have been influenced by prevailing views

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[8] O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920).

[9] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting) (footnote omitted).

[10] *Gathers*, 109 S. Ct. at 2218 (Scalia, J., dissenting) (citing Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

[11] *Id.* at 2217.

[12] *Burnet*, 285 U.S. at 408 (Brandeis, J., dissenting).

as to economic or social policy which have since been abandoned.[13]

Holmes similarly held an evolutionary conception of the "path of the law" generally. But for Scalia this conception, at least in constitutional adjudication, is an anathema. Scalia emphatically rejects the proposition that "interpretation [of the Constitution] must change from age to age"[14] and that the proper function of the Supreme Court is "to apply current societal values" in constitutional adjudication.[15]

Scalia's approach to precedent is inextricably linked to his insistence on original intent as the only legitimate source of constitutional authority. In a recent law school lecture, Scalia acknowledged the inherent difficulties of accurately reconstructing the intentions of long-dead legislators and applying those intentions in the context of radically different (and unforeseen) social circumstances.[16] Nonetheless, he concluded, for all its "practical defects," originalism was the preferable commitment for a judge. "[T]he main danger in judicial interpretation of the Constitution," he said, "is that judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge. . . . Nonoriginalism, which under one or another formulation invokes 'fundamental values' as the touchstone of constitutionality, plays precisely to this weakness."[17] Scalia accordingly discounts precedent not, as Brandeis suggested, in order to free judges "to follow the lessons of experience" but because past precedent is merely judge-talk and not necessarily law, as he sees it.

Scalia's view of precedent thus hinges on his conception of what deserves the encomium of "law." In another recent lecture,[18] Scalia distinguished between "personal rule" and the "rule of law." Borrowing a formulation from Aristotle, he stated that law as such must "fram[e] general rules for all contingencies" and that rules which permit considerable case-by-case discretion in their application, while sometimes necessary, are "a regrettable concession of defeat—an acknowledgment that we have passed the point where 'law,' properly speaking, has any further application."[19] Throughout this lecture, Scalia developed an instrumental justification for this conception of law: that it alone provided both the reality and appearance of equal

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13 *Id.* at 412 (citation and footnote omitted).

14 Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989).

15 *Id.* at 854.

16 *Id.* at 856-57.

17 *Id.* at 863.

18 Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

19 *Id.* at 1182.

treatment,[20] assured predictability in application,[21] guarded against judicial arbitrariness, and promoted judicial courage in unpopular decisions when judges "can stand behind the solid shield of a firm, clear principle enunciated in earlier cases."[22] On its face, this last observation seems to stand in some tension with Scalia's own professed willingness to overrule past precedents. Indeed, Scalia seemed to praise rigid adherence to precedent for the same instrumental reason that he embraced rules of high, exceptionless generality. "[W]hen, in writing for the majority of the Court," Scalia said,

> I adopt a general rule, . . . I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. . . . Only by announcing rules do we hedge ourselves in.[23]

This is the same justification Scalia advanced for his commitment to originalism in constitutional interpretation, and the conjunction points to an ironic twist in Scalia's view of precedent. Scalia is prepared to overrule more constitutional precedents more openly and more quickly than his colleagues on the Court—but only for today, only to construct a better future which would constrain him and all other Justices. Scalia's overruling enterprise is not based on the agnostic premise that contemporary judges should be free from the dead hand of the past. Scalia's mission is to reformulate constitutional law, by overruling contrary precedents which permit judges to rely on an evolving conception of "fundamental values," to ensure that judges must submit to this hoary grip.

Scalia thus seems to speak of precedent with a forked tongue: he must overrule a raft of past judicial decisions in order to establish a regime in which past precedents will be faithfully and rigidly followed. There is, however, clear consistency in his position. Scalia claims that the truly applicable past precedent—the original intent of the constitutional authors—binds him just as he wishes others to be bound. He does not see himself as exercising freedom in choosing to overrule erroneous judicial decisions; he claims merely that in these prior cases, judges wrongfully gave themselves freedom to depart from textual commands, and that he and they are obliged to return to original meaning and not to stray again.

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20 *Id.* at 1178.

21 *Id.* at 1179.

22 *Id.* at 1180.

23 *Id.* at 1179-80.

In Scalia's view of the binding force of precedent, judicial opinions as such count for virtually nothing in constitutional law. If a judge has correctly construed the document's original intent, this opinion is worth respect; if not, then not (unless the judge's error has become too deeply entrenched in practice—repeated too often, relied upon too extensively—to correct without substantial disruptions).

There are many different bases for quarrelling with this view of precedent. In one sense, Scalia's view is nothing more than a restatement of his commitment to a constitutional jurisprudence of originalism, and there is an extensive literature critiquing originalism from at least two perspectives. First, there is the hermeneutical objection that the very process of recapturing the "original intent" of past lawgivers inevitably involves reinterpretations rather than simple faithful reproductions of the past.[24] Second, even if it is possible to read long-dead lawgivers "in their own terms" rather than in some complex admixture of their terms and ours, the originalist argument can be turned on its head by demonstrating that the original lawgivers intended us to take their words merely as starting points for evolutionary constructions. The open-textured language of the Constitution—"equal protection of the laws,"[25] "Privileges and Immunities of citizens,"[26] "a Republican Form of Government,"[27] "freedom of speech, or of the press"[28]—surely suggests that the authors originally intended that their successors should not be bound by their original understanding of these terms.[29]

Scalia and his fellow originalists have rejoinders to these objections, but in this essay I do not propose to debate the merits of constitutional originalism. I want instead to identify the general conception of social authority that follows from Scalia's view of precedent and his conjunctive commitment to originalism. Once his underlying correla-

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24 For an elegant statement of this objection, see Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990):

> While historical interpretation seemingly presents itself as a self-denying submission to the identity of past ratifiers, closer analysis reveals that that identity is authoritative only insofar as we can be persuaded to adopt it as our own. . . . [T]he authority of the Constitution ceases to stand apart from the processes of its interpretation. That authority does not flow from the antecedent nature of the Constitution, but rather from the particular relationship we have forged with the Constitution.

*Id.* at 29.

25 U.S. CONST. amend. XIV, § 1.

26 *Id.* art. IV, § 2; *see also id.* amend. XIV, § 1.

27 *Id.* art. IV, § 4.

28 *Id.* amend. I.

29 For a persuasive statement of this paradoxical position, see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

tive conception of social authority is clear, it will be easier to evaluate his attitude toward the binding authority of judicial precedent in constitutional law.

## II. Two Conceptions of Precedent and Authority

To identify the differing underlying conceptions of social authority that accompany different views of judicial precedent, it is helpful to distinguish between two ways of comprehending the past: an "inclusively exegetical" and a "selectively authoritative" understanding. The inclusive understanding is inclined to view the contribution of past to present as seamlessly cumulative, and accordingly it gives equal weight to the contributions of and contemporary obligations toward successive past generations. The selective understanding, in contrast, insists on clear hierarchical rankings to award much more definitive respect to some past generations and events than to others. This is not to say that the inclusive understanding views all past events as possessing identical contemporary significance (so that Shakespeare and Neil Simon deserve the same stature as cultural icons, or that among the ancient Greek city-states the political experience and thought of Athenians and Spartans have equal importance for us today). But the inclusive understanding insists far less than the selective understanding on an explicit, hierarchically arrayed canon of a respect-worthy past or of definitive rules for admission to canonical status.

The distinction between these two understandings of the past is perhaps best described as a difference in mood. The inclusive understanding approaches the past with open receptivity—more as a consultation with and meditation about precedent. The selective understanding scans the past with a narrower focus and, in particular, with an eye toward using the past to extract definitively authoritative rules in order to resolve specific contemporary questions.

The correlative conceptions of authority that follow from these two perspectives can most easily be grasped by exploring analogous interpretive practice in religious thought. In religious interpretive practice, there is a clear difference between those who believe that God is still directly accessible and those who believe He no longer speaks to us but that His will and His meaning can only be approached indirectly through elaborate exegetical commentary on the ancient texts. Practitioners of the exegetical method are invariably less certain and more open to debate about God's meaning than those who believe that God still speaks to us as He did in the days of prophecy and revelation. Moreover, for those who believe that God re-

mains directly accessible today, there is no reason to give any special weight to others in past times who have offered their interpretations of His word; if the source of Divine Authority is directly available and speaks on His own account, why then listen to His imperfect intermediaries? In contrast, the practitioners of exegesis who no longer imagine the possibility of direct access to God but approach Him only through interpretation of ancient and sparse texts are much more attentive to and respectful of past interpreters, and to the variety of and conflicts in the accumulated interpretations, of His will.[30]

The exegetical mode—what I have called the inclusive understanding of past precedent—is thus a self-consciously collaborative enterprise; and this collaboration works from an essentially egalitarian premise, both among present-day interpreters and between present-day and past interpreters. Because God no longer directly speaks to anyone, that is, there is no ideological basis for any single interpreter to claim special status as God's anointed prophet. The same texts are available to everyone and the claim for special erudition or agility in interpreting these texts must rest on persuasion, not on apodictic assertions of self-evidently authoritative Divine sanction.[31]

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30 In his richly provocative work on analogies between religious and constitutional interpretative traditions, Sanford Levinson has juxtaposed Protestant and Catholic practices as corresponding to differential reliance on original texts or on those texts only as refined through accumulated traditions of interpretations, and to different approaches toward the role of unmediated individuals or an intermediate priestly caste as authorized interpreters of text and tradition. *See* S. LEVINSON, CONSTITUTIONAL FAITH (1988). Levinson's categorization of the two religions in these dimensions are more useful as heuristic devices than as complete accounts of Protestantism or Catholicism as such. George Kannar has shown how Justice Scalia's reliance on constitutional originalism—which Levinson would categorize as Protestant in its fundamentalist impulse—corresponds to an important strand in Catholicism, in which Scalia himself was educated. *See* Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1312-20 (1990).

31 This is the lesson of one of the most famous passages in the Talmud, regarding the dispute in which a majority of the sages determined the oven of Akhnai to be subject to impurity according to *Halakhah*, the religious law. Rabbi Eliezer ben Hyrkanos disagreed with this conclusion, however; as the Talmud relates,

> On that day Rabbi Eliezer brought forward all the arguments in the world, but they were not accepted. He said to them: "If the *Halakhah* . . . agrees with me, let this carob tree prove it." Thereupon the carob tree was uprooted a hundred cubits from its place; some say, four hundred cubits. They replied: "No proof may be brought from a carob tree." Then he said: "If the *Halakhah* agrees with me, let this stream of water prove it." Thereupon the stream of water flowed backwards. They replied: "No proof may be brought from a stream of water." Then he said: "If the *Halakhah* agrees with me, let the walls of the schoolhouse prove it." Thereupon the walls of the schoolhouse began to totter. But Rabbi Joshua rebuked them and said: "When scholars are engaged in *halakhic* dispute, what concern is it of yours?" Thus the walls did not topple, in honor of Rabbi Joshua, but neither did they return to their upright position, in honor of Rabbi Eliezer; still today they stand inclined. Then he said: "If the *Halakhah* agrees with me, let it be

What I have called the selective understanding of past precedent, in contrast, does not at all depend on a collaborative process and rejects any egalitarian implication in favor of a clear-cut hierarchical conception of social authority. This hierarchical conception is characteristically reflected in the style of discourse common to the practitioners of this interpretive perspective—a tone of certainty, an inclination toward authoritatively pronounced rules, an emphasis on clear-cut resolution of conflicting claims.[32]

There is also a profound difference between these two perspectives regarding the importance of past precedent. For the inclusive understanding, contemporary interpreters of the ancient texts can never wholly disregard the exegetical interpretations of past generations because contemporary interpreters can claim no specially privileged access to or authority over those texts. This does not mean that contemporary interpreters are obliged to give binding or even presumptive force to past interpretations. Past interpreters have no more authority regarding the meaning of ancient texts than contemporary interpreters. And by parity of reasoning, contemporary interpreters have no more authority over these texts than their predecessors. This is the implication of the egalitarian premise as applied to the relationship between past and present exegesis.

It might appear that the selective understanding demands greater respect for past precedent, but this understanding actually collapses the distinction between past and present. According to this perspective, the ancient texts are directly accessible to contemporary perception. This means not only that historically intermediate interpreters can be wholly ignored; it also means that the historical status of the ancient texts is irrelevant to their contemporary authority. The ancient texts record the voice of God; but since He still speaks directly

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proved from Heaven." Thereupon a heavenly voice was heard saying: "Why do you dispute with Rabbi Eliezer? The *Halakhah* always agrees with him." But Rabbi Joshua arose and said (Deut. 30:12): "It is not in heaven." What did he mean by that? Rabbi Jeremiah replied: "The Torah has already been given at Mount Sinai [and is thus no longer in Heaven]. We pay no heed to any heavenly voice, because already at Mount Sinai You wrote in the Torah (Exod. 23:2): 'One must incline after the majority.' " Rabbi Nathan met the prophet Elijah and asked him: "What did the Holy One, blessed be He, do in that hour?" He replied: "God smiled and said: My children have defeated Me, My children have defeated Me."

Baba Metzia 59b, *quoted in* G. SCHOLEM, THE MESSIANIC IDEA IN JUDAISM 291-92 (1971).

32 David Weiss Halivni presents an illuminating discussion of differing conceptions in Jewish interpretive practice, concluding that while the exegetical inclusive mode has been historically predominant, the alternative mode was more significant for some two hundred years immediately after the destruction of the second Temple, as a direct response to this traumatic dislocation. *See* D. HALIVNI, MIDRASH, MISHNAH, AND GEMARA: THE JEWISH PREDILECTION FOR JUSTIFIED LAW 54, 64-65 (1986).

to us, authority resides in His directly perceived commandatory voice, not in the texts as such nor in their historicity. God may choose not to alter or supplement His word, as it had been recorded in the ancient texts. However, within the religious exegetical tradition that exalts the "original meaning" of the ancient texts over intermediate historical interpretations, and accordingly claims the possibility of direct contemporary access to the source of this "original meaning," God's voice is still available today and He might in principle issue new commands that authoritatively displace the directives recorded in the ancient text. From this perspective, therefore, the past warrants no respect; past precedent has no binding or even persuasive force, except when prior commands are currently reiterated by the Godhead—that is, when He actively chooses today not to change what He commanded yesterday.

All of the elements that I have identified as characteristic of the selective authoritative mode in religious interpretive practice are also the central constitutive elements in Justice Scalia's approach to precedent and in his jurisprudence generally. I do not mean that Scalia commits the sacrilege of investing the founders with divine attributes. I mean that Scalia sees his relationship as a judge to the founders in essentially the same conceptual framework as those who believe in a religious context that God is directly accessible to them, and that interpretive exegesis of God's will is an unnecessary (and sacrilegious) enterprise. We can best see the linkage between this religious conception and Scalia's approach to secular constitutional law in a criticism that the Roman philosopher Seneca directed at Plato's exegetical approach to ancient laws: "I censor Plato, because he added justifications to the laws. Let the law be like the voice that reaches us from heaven. Command and do not argue. Tell me what I have to do. I do not want to learn. I want to obey."[33]

This is the heart of Scalia's conception of law: that in its nature, law's modality is to command, and the essence of the legal relationship is dominance/submission. This is the underlying implication of Scalia's insistence that rules of high generality, which give judges no case-by-case discretion, are alone entitled to be called "law." This is also the underlying implication of Scalia's insistence that the only source of law is in its formally inscribed texts, and that judges must not look beyond texts to discern implicit but unstated legislative motives.[34] This conception of law and the legal relationship is antitheti-

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[33] *Quoted in* D. HALIVNI, *supra* note 32, at 5.

[34] *See* Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1619-20 (1991).

cal to the propositions that interpreters of the law engage in a collaborative enterprise to add evolutionary glosses to the original authoritative pronouncements and that the balance of the obligation to respect and the freedom to depart from past interpretive precedents derives from an egalitarian relationship between successive generations of interpreters. These propositions depend on a radically different conception of law, in which law's modality is to solicit consent and the essence of the legal relationship is mutually acknowledged equality. The inclusive exegetical understanding of precedent follows from this consensual, egalitarian conception; the Scalian, selective understanding of precedent follows from the commandatory, hierarchically authoritarian conception of law.

I have no difficulty in identifying my own preference between these two conceptions of law; nonetheless, I am constrained by my preference for the consensual, egalitarian conception against apodictically presenting this preference as if it were self-evidently correct. For those who are not persuaded of its correctness, this is neither the place nor the time to carry the conversation further. It is enough for my present purpose of evaluating Justice Scalia's conception of judicial precedent to show that his view is inextricably linked to a constellation of attitudes toward law and the legal process, and that if you adopt his view of precedent, his entire conceptual family comes with it. It is enough for the moment, and it is consistent with my own conception of legitimate social authority, to alert you to this implication of his view of precedent, and to leave the choice to you.

## III. THE INTRINSIC AUTHORITY OF THE PAST

One additional aspect of Scalia's conception of precedent amplifies the full dimensions of the choice he has made. This aspect has been identified by my colleague Anthony Kronman in his recent article devoted to the proposition that tradition has intrinsic value and authority.[35] Justice Scalia rejects this view; his commitment to the original intent of the authors of the constitutional text is not based on respect for the authors' ancestral status but on the positivist premise that their text was ratified by the requisite constitutional formalities and therefore binds us all. From this perspective, any contemporary constitutional amendment enacted by the requisite formalities and aggregated super-majority votes of Congress and the states—including a wholesale reformulation of, say, the Bill of Rights or even the entire constitutional document—would be equally entitled to respect. This

[35] Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

is not to say that Scalia advocates repealing the Bill of Rights or shredding the constitutional structure generally. Because the terms of his jurisprudence give no independent weight either to tradition or to equality, however, there is no basis for a claim that a contemporary super-majority should abstain from such action either because the tradition of the Constitution deserves respect or because egalitarianism demands respect for the contemporary vulnerable minority.

Scalia's disregard for the claims of tradition is not unique in contemporary jurisprudence. As Kronman has shown, none of the currently prevalent justifications for respecting precedent value tradition for its own sake; the conventional accounts command respect for precedent either for utilitarian reasons (such as Scalia advanced regarding predictability and judicial credibility) or for deontological reasons (such as Scalia advanced regarding litigants' rights to equal treatment in the outcome of like cases). These justifications, Kronman notes, arise from "a timeless point of view" in which the past has no "inherent meaning or authority of [its] own."[36] Kronman maintains that this is a mistake and he draws on Edmund Burke to demonstrate the moral claim that the past exerts on the present. Kronman relies on one text in particular, a famous passage from Burke's *Reflections on the Revolution in France*, which concludes,

> By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.[37]

Kronman's extended reflection on this passage—on what truly differentiates us from the "flies of a summer"—leads him to the conclusion that the accumulated, generationally transmitted "world of culture" constitutes our "unique identity as human beings" even more than our capacity for rational thought,[38] and that our "indebtedness" for its cultural constitution of us forms the basis of our moral obligation. "We must respect the past," Kronman concludes, "because the world of culture that we inherit from it makes us who we are."[39]

I have some difficulty with this specific rationale for finding intrinsic value in the past. Although I agree that our accumulated culture is important in our conception of ourselves, our human self-

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[36] *Id.* at 1039.

[37] E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 193 (C. O'Brien rev. ed. 1969), *quoted in* Kronman, *supra* note 35, at 1049.

[38] Kronman, *supra* note 35, at 1064.

[39] *Id.* at 1066.

conception also crucially depends on our freedom from rigid genetic determinism. To pursue the Burkean analogy, if we are not summer flies who live brief lives with no awareness or acknowledgment of our ancestors, we are also not insect drones like ants or bees who are genetically compelled merely to reproduce our predecessors and to die. It may be that this conception of human freedom is illusory; even so, the subjective belief that we are free moral agents is a cherished idealization that is itself part of our transmitted culture. Kronman's conclusion, that we are obliged to respect our cultural past because it constitutes our current identity, becomes trapped in the paradox that our cultural inheritance includes a deep-rooted belief that our distinctive human capacity is our freedom to redefine ourselves. Mark Twain articulated the classic American expression of this ideal: like Huckleberry Finn, we are free and inclined to "light out for the territories."

Though I am thus not persuaded by Kronman's specific reason for valuing tradition, my own account of the virtues of the inclusive, exegetical understanding of past precedent is consistent with and, I believe, a more adequate formulation of his basic claim that the past has intrinsic authority. Our contemporary obligation to the past does not arise because we are constituted by our forebearers. Instead, our obligation to the past derives from the same fundamental principle that comprises our obligation to one another among the living: our commitment to consensual relationships based on mutually acknowledged equality. This conception of equality is not a static command to treat like cases alike. The equality ideal cannot be realized in a single transaction or a series of isolated exchanges but only in an interactive relationship purposefully sustained over a course of time. It finds fullest expression in the ideal of marriage, a voluntary association pledging mutual support, for richer or poorer, in sickness and in health, a loyalty sustained even after death do us part.

This commitment stands against the impulse of the living to override any bonds with past generations or obligations toward the future simply because we are temporarily alive and strong. A society committed to mutually acknowledged equality among all its members cannot adequately acknowledge this commitment by drawing a sharp demarcation between those currently living and those dead or dying or very old, or very young or yet to be born. This does not mean that the living are obliged to subordinate themselves to these others, to submit to their oppression. It means only that we and they are obliged to respect one another equally and—when this command can-

not be fully honored because our needs and theirs are diametrically opposed—to seek ways for the greatest possible accommodation.

Commitment to a consensual egalitarian conception of social relations thus requires loyalty, though not subservience, to the past. Justice Scalia's devaluation of the past, in contrast, follows from the root principle of his jurisprudence—that the strong are entitled to rule. All of us should remember, however, the fate prophesied for those who live by the sword.