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Decisions Dictated By Perceptions: The Influences of Society and Education in Scalia's Originalism[1]

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Prior to this analysis of Justice Antonin Scalia's tendencies in Supreme Court (SCOTUS) adjudication, it is primarily necessary to elaborate upon the condition of the SCOTUS as an institution; secondarily, it is necessary to establish an intellectual foundation from which one may deduce objective observations regarding the quality of a decision rendered in comparison to the ideals of justice and equality. To establish this requires an existential analysis of the adjudication process, which will also take place during this phase of the discussion, and finally, the remainder of this analysis will focus on applying these objective observations to the decisions issued by Justice Scalia on a variety of cases that have come before the SCOTUS; so that we may deduce the quality of these decisions when compared to the foundations that will have been established. Without these initial considerations, the foundation from which one may declare any decision of any justice as "good" or "bad" in reference to the objective ideals of justice and equality will be removed, and the entirety of the proceeding argument unravels. Therefore, careful articulation of these foundational concepts will be necessary for a valid critique of any judicial decision-making, and thus is the relevance between what may seem to be metaphysical critiques of a physical institution; indeed they are inseparable. *What will be the overriding prognostication of this inquiry—and which is examined via an analysis of Justice Scalia specifically—is namely this: if the SCOTUS is to remain an institution which promulgates and adheres to the concepts of justice and equality, that institution* ***must*** *require its adjudicating members to examine each and every case as if they themselves were the party with the most vested and sacred conviction being questioned; viz., through the "veil of ignorance.[2]"*

When one reflects upon the evolution of the multifarious affairs relating to the United States domestically and internationally that arise within

[1] This paper, which won the Abdu Rifai Award at the 2015 KPSA, was sponsored by Dr. Paul Foote.

[2] Stanford Encyclopedia of Philosophy, "Original Position," *The Veil of Ignorance*, http://plato.stanford.edu/entries/original-position/ (accessed February 23, 2015).

the scope of the SCOTUS, one must observe the inarguable impact that this institution has had on the progression or devolution of said affairs, via its decisions. By the declaration of a decision—the mere putting of pen to paper—the SCOTUS can alleviate, create, or otherwise impose burdens or reliefs on the lives of American citizen, and consequently, those members whom constitute the decision-making component of this institution are provided with an arena in which they may interject their own personal inclinations (i.e., beliefs, values, ideologies) within the progression of any issue: "the Supreme Court helps to resolve many of the most important and controversial issues in the U.S., and…shapes government policy in areas as diverse as civil rights and environmental protection."[3] This vast scope and influence, has manifested in monumental national concerns, such as slavery in *Dred Scott v. Sandford*, when Chief Justice Taney declared, "that no person descended from an American slave had ever been a citizen for Article III purposes", and, "only Congress could confer national citizenship."[4] Contemporarily, this influence has been observed in *Lying v. Northwest Indian Cemetery Protective Association*, where the majority concluded, "though the government's [removing traditionally religious ceremonial grounds from a Native American tribe for the construction of a road] would have severe adverse effects on the Indians' practice of their religion, those effects…did not constitute…[a] violation of their beliefs."[5] Indeed, upon an examination of Chief Justice Taney prior to his decision in *Dred Scott*, one would be naïve to believe that he would have voted any differently, and thus is the aforementioned devolution of this particular social affairs by the mere putting of pen to paper by a Justice whom was incapable of viewing the facts of that case through the lenses of impartiality: "the Taney's had been slaveholding planters since the first Taney arrived in Maryland in the 1660's, and at the time of Roger's birth the family ranked among the most prestigious in the country."[6] In the latter case, Justice Antonin Scalia joined the majority in defeating the rights of Native Americans to practice their religion free from the intervention of modern American society; which on its face should be observed as antithetic to the concepts put forward by the Constitution; namely, the advancement of justice and equality for all. With the knowledge of *Dred Scott*—and other similar landmark decisions—in mind when viewing the legal issues of *Lying*, one

[3] Lawrence Baum, *The Supreme Court*, 2nd Ed. (Washington, DC: CQ Press, 1985), 1.
[4] IIT Chicago-Kent School of Law, "OYEZ," *U.S. Supreme Court Media*, http://www.oyez.org/cases/1851-1900/1856/1856_0/ (accessed February 23, 2015).
[5] IIT Chicago-Kent College of Law, "OYEZ," *U.S. Supreme Court Media*, http://www.oyez.org/cases/1980-1989/1987/1987_86_1013 (accessed February 23, 2015).
[6] American National Biography Online, "ANB," *The life of a nation is told by the lives of its people*, http://www.anb.org/articles/11/11-00834.html (accessed February 23, 2015).

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cannot help but wonder whether these decisions represent a lack of understanding and compassion, on behalf of those justices, regarding those neither represented within the SCOTUS nor within mainstream America. Moreover, with the observation that these decisions are on their faces contradictory to those circumstances which we have become aware to constitute equality and since this is obviously and explicitly a cornerstone on which the Constitution itself was established, one must wonder where these justices derived their justification for delivering these opinions.

Preceding an examination of the life of Justice Scalia, it is prudent to articulate three ways in which it may accurately be the case that a justice is incorporating their personal inclinations into their decision-making, but preliminarily, it is necessary to elaborate on the phrase "personal inclinations"; as a matter of clarity. Throughout our lives we are constantly exposed to the influences of the external world, whether via our family, peers, or the mere presence of various societal constructs (like religions, etc.), and we internalize them—insofar as they become our epistemological framework—and utilize them in developing our own perceptions/interpretations of the phenomena external and internal to us. In short, it is impossible to avoid the persuasions of family, peers, societal constructs, etc., upon the reflections and perceptions that we utilize in order to establish and evolve our own attitudes, values, and beliefs: our "personal inclinations"—a concept originally articulated by philosopher John Locke: "a child's mind was a *tabula rasa* [blank slate]," and, "a child's nature would develop over childhood [with the] adults surrounding [the] child [potentially having] a very lasting effect on [their] personality."[7] This account, reinforced by modern conclusions in adolescent psychology, is an intuitive account of *how* we come to form our own inclinations, so that now we may better understand the three ways in which a justice *incorporates* their personal inclinations into decision-making: (1) a justice incorporates their personal inclinations when they are unable to view any one or all of the fact(s) of any case through the lenses of impartiality; (2) a justice utilizes their own personal inclinations in deciphering the most pragmatic outcome of the case—their decision is the result of their wanting to advance or diminish some issue that is a part of their personal beliefs of "right" and "wrong"; and, (3) a justice may incorporate their personal inclinations via both, "restraint" and "activism"—these justifications are merely masqueraded in place of the justice's personal inclination(s).

What is not the point of these foundational arguments is the articulation of a type of futility that exists in delivering a purely impartial adjudication; rather to point out what *must* take place in order for an observer

[7] University of Michigan, "The Educationalist," http://www.umich.edu/~ece/student_projects/childrens_lit/Educationalist_Theory.html (accessed February 23, 2015).

to determine the quality of a decision rendered by any Justice of the SCOTUS in the sense of whether that decision was the result of an impartial examination and application of the law, or merely an application of the justice's own personal inclinations in either of the methods aforementioned. Specifically, justices ought to view every case and subsequent legal issues through the "veil of ignorance"—a method of establishing equality articulated by philosopher John Rawls: "to insure impartiality of judgment, the parties are deprived of their personal characteristics and social and historical circumstances."[8] The necessity of mentioning this within the context here is to articulate the fact that if this tool was implemented within the adjudication of *Dred Scott* and *Lying*, it would be formidable to justify the assertion that these expected decisions would be in the slightest way similar to the decisions *actually* issued, and thus is the reason for which these decisions are so obviously antithetic, to the concepts of justice and equality, to those of us whom are not ailed by these "personal characteristics" and/or "societal and historical circumstances." Additionally as was the purpose, there is now articulated a foundation on which an observer of the SCOTUS, specifically the justices therein, may conclude that any decision is more or less compatible with the concepts of justice and equality; via an examination of the decision through the veil of ignorance. Moreover, this method of adjudication is necessitated by the capacity of the SCOTUS to interact with our own personal convictions of the most sacred standing.

The child, Antonin Scalia, was born in Trenton, New Jersey in 1936[9] to "parents of a more *openly* religious conservative sensibility."[10] Indeed, his parents and subsequently himself adhered to strict Catholic teachings, which under Pope Pius XI, "considered solution[s] to social problems [as lying] not in attention to them, but in the religious renewal implied in a return to the Gospel and the Church."[11] Moreover and undoubtedly related to the Scalia's devotion to Catholicism, is their immediate Sicilian ancestry: he was the only child of Sicilian immigrants, Salvatore Eugene Scalia and Catherine Panaro—"their household was 'small and intense.'"[12] As a professor of romance languages at

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9 The Supreme Court of the United States, "Biographies of Current Justices of the Supreme Court," *Antonin Scalia: Associate Justice*, http://www.supremecourt.gov/about/biographies.aspx (accessed February 23, 2015)

10 Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America* (New York: Henry Holt and Company, 2006), 189.

11 Spring Hill College, "Pope Pius XI," *Critical Comments*, http://www.shc.edu/theolibrary/resources/popes_pius11.htm (accessed February 23, 2015).

12 Lauren Brophy, "The Life and Jurisprudence of Justice Scalia," *Seton Hall University Law School*, May 1, 2014,

Brooklyn College, "Scalia's father…'taught Antonin to value the words of a text and appreciate cast-iron rules…'"[13] As a young man, Scalia attended St. Xavier Military Academy/ High School, which, "had a mandatory ROTC program [and prayer before classes] for all students," and which was a Jesuit academy; an educational trend that Scalia would continue all the way through his University education at Georgetown, where he learned, "not to separate your religious life from your intellectual life. They're not separate." [14] In summary, Scalia's education and rearing from childhood into adulthood can be described as the incorporation of ethnocentric ideologies, which by their very nature color the way in which he views the world, and while these ideologies play no inherent degradation to Scalia's character, the fact that he incorporates these personal inclinations into his adjudication *does* diminish the legal legitimacy he claims that his conclusions are founded upon; but more-so than that, the utilization of these ideologies in the decision-making process has rendered the adjudications of Justice Scalia inconsistent, biased, and contrary to the very essence of the Constitution. The failure to set aside those historical, societal, and/or personal characteristics that prohibits a justice from impartially examining the facts of a case results in decisions that are supremely contrary to these concepts—as exemplified by the decision of CJ Taney in *Dred Scott* which relied on any/all of the three aforementioned methods of incorporating personal inclinations into decision-making— and will be demonstrated as occurring throughout the decisions of Justice Scalia; primarily within three cases: *Romer v. Evans, Lying v. Northwest Indian Cemetery Protective Association*, and *Printz v. United States*; and this will be demonstrated by applying the purported legal reasoning's of Justice Scalia in his relevant opinions in comparison with his personal inclinations, and then applied to the three detailed methods in which a justice may be found to be incorporating their personal inclinations into the adjudication of a case.

Beginning then with *Romer v. Evans* and an examination of the facts of this case in comparison with the personal inclinations of Justice Scalia, one may begin to construct the hypothetical opinion that, in hindsight, would prove to be the ultimate opinion released by the justice. Homosexuality has never been accepted by any doctrine or pronouncement of the Catholic Church, and this has been the standard of considering homosexuality throughout Catholic tradition until the most recent proclamations of Pope Francis demanding tolerance and acceptance; in response to which, Justice Scalia has remarked: "[the Pope] hasn't backed off the view of the Church on [homosexual issues].

http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1444&context=student_scholarship (accessed February 23, 2015).

13 *Ibid. 5.*

14 *Ibid.*, 6.

He's just saying, 'don't spend all our time talking about that stuff.'"[15] A response that inarguably represents his personal conviction: that homosexuals ought not to be regarded by the Church (indeed, the Pope would disagree[16]). This point-of-view was again reflected in an interview with the *Huffington Post*, in which Scalia said, "We do Him [God] honor…in all our public ceremonies…there's nothing wrong with that. It is in the *best* of American traditions…" [emphasis added][17]. Before one can even begin to divulge the legal issues of *Romer v. Evans*, one can prognosticate that, so long as the facts of a case propagate homosexual rights, then Justice Scalia will be opposed to those legal issues' constitutionality. Like CJ Taney, Justice Scalia is blinded by his personal inclinations towards homosexuality, and therefore is unable and/or unwilling to view the facts of this case through the necessary veil of ignorance; which results in their putting pen to paper—a meager task for those to whom this adjudication is not germane. Dissenting in *Romer v. Evans* Justice Scalia says, "the Constitutional amendment before us here is not the manifestation of a 'bare…desire to harm homosexuals'…but is a rather modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority" [emphasis added][18]. The underlined components of this excerpt represents tangible evidence to the fact that Justice Scalia is utilizing the first method of incorporating his personal inclinations into his decision-making: "a rather modest attempt," "seemingly tolerant," and "traditional sexual mores" are each and every one an opinion statement founded nowhere within an examination of any relevant legal authorities. Indeed, these remarks reflect not an appreciation for an unbiased approach at deciphering the law within the framework of the legal issues presented, but that approach's direct opposite: namely dogmatically adhering to a peculiar ethnocentric viewpoint, which prohibits a justice from considering the legitimacy of the claims brought forward by the party with whom they personally disagree. The description of homosexuals as "a politically powerful minority" is intended to degrade their legitimacy, but in the eyes of every rational observer, the opposite is the effect: when minorities are able to impose significant changes to policy on the basis of equality, on what basis does the

[15] Elias Isquith, "Scalia: I believe in the Devil," *Salon.com*, http://www.salon.com/2013/10/07/scalia_i_believe_in_the_devil/ (accessed February 23, 2015).
[16] BBC News, "Catholic Synod: Pope Francis setback on gay policy," *BBC News Europe*, http://www.bbc.com/news/world-europe-29677779 (accessed February 24, 2015).
[17] Shadee Ashtari, "Antonin Scalia Says Constitution Permits Court to 'Favor Religion Over Non-Religion,'" *The Huffington Post* http://www.huffingtonpost.com/2014/10/02/antonin-scalia-religion-government_n_5922944.html (accessed February 23, 2015).
[18] *Romer v. Evans*, 517 U.S. 620 (1996)

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majority have to fear those changes aside from within the demented notion of eventually becoming themselves unequal (an antiquated argument whose origins are found in refusing equality to African Americans). Additionally, it could be remarked that African Americans' and women's rights would not be here without the actions of a "politically powerful minority," and as a result of the fact that no one who is legitimately advancing homosexual equality has the desire to alter "traditional sexual mores"; rather, it is simply the case that they are seeking equal recognition in the eyes of the law. As is the case with recent papal proclamations, Justice Scalia interprets existing doctrines and ideologies in a way that is wholly consistent with his own epistemology, and as a result views any opinion to the contrary as an attack on *him* rather than on his dogmatic inclinations. As a result of his inability to recuse himself from the personal biases that prohibit him from viewing the facts of this case (and similar cases), one may accurately conclude that this dissent represents an instantiation of the first aforementioned method of incorporating one's personal inclinations into the adjudication process. In comparing the purported legal reasoning for his dissent with the ethnocentric framework through which Justice Scalia views homosexual affairs, one would be remarkably simple to believe the claim that, the justification for this dissent was rooted in anything aside from the Justice's own personal beliefs, and by acknowledging that this indeed falls within the criterion specified in the first method of detecting bias, one may accurately conclude that this adjudication was one that is contrary to the essence of the concepts of justice and equality as laid out in the foundational arguments.

After graduating from Harvard Law School and completing a short career in the professional legal sphere, Justice Scalia, "returned to academia to teach at the University of Chicago"[19] in 1977; where he some of his students founded the conservative legal society known as "The Federalist Society." This notion perhaps originated within his tenure as Assistant Attorney General under Presidents Nixon and Ford, but was solidified during these years as a faculty adviser to the Society.[20] These influences, while seemingly trivial *per se*, have ultimately been shown to be reflected throughout the Justice's duration on the SCOTUS—particularly in cases dealing with state versus federal authority. *Printz v. United States* allows for one to accurately isolate this general view of Scalia's regarding the functions of state and federal government. Summarizing, the practical (as opposed to purely constitutional) implications of an affirmative decision regarding this case would have resulted in the federal government's ability to impose firearm regulations—carried out by specified state officials (in this case the state's Chief Law Enforcement Officer). What can generally be classified as a conservative issue of immediate resentment

[19] Brophy, *Life and Jurisprudence of Justice Scalia*, 9.
[20] *Ibid, 10.*

when challenged is the right to bear arms, but I am not prepared to make the claim that this is what solely drove Justice Scalia's decision in *Printz*. Rather, this decision appears more likely to represent the second method in which a justice may incorporate their personal inclinations into the decision-making process: with pragmatic foresight, Justice Scalia viewed an outcome in favor of *United States* as one unfavorable to the concept of federalism that he had come to love during his study of history at Georgetown[21], and during his participation within The Federalist Society at the University of Chicago. Therefore rather than impartially viewing the facts, Justice Scalia formulated what would be the best possible outcome, and sought legal justification for that conclusion secondarily. Justice Scalia is the master legal sophist—seeking out arguments that support his conclusions and discrediting or ignoring those that do not: "even assuming that newer laws represent an assertion of the congressional power challenged here, they are of such *recent vintage* that they are not probative of a constitutional tradition"[emphasis added].[22] Consequently, Justice Scalia found that, "the Brady Act's direction of the actions of state executive officials is not constitutionally valid…the Court's jurisprudence makes clear that the Federal Government may not compel the states to enact or administer a federal regulatory program"[23]—which of course has been done regardless of this decision.

The decision of Chief Justice Taney in *Dred Scott* was accurately classified as a "restraintist" approach to adjudication—since he deferred responsibility to the Congress—but this type of restraint should be called what it is in actuality, not what it theoretically seeks to be: activism through restraint. The phrase, "activism through restraint," is denotative of the tangible impacts that, by refusing to act for whatever justification that can accurately be referred to as "restraint," has been created by the SCOTUS' majority putting pen to paper and creating real-world obstacles, inequalities, and, in most cases, insurmountable burdens on Americans. The tragedy that occurs simultaneously with this activism represents the disconnect between justices that more worried about upholding "cast-iron rules" than they are about the literal livelihood of those whom their decisions are directly impacting. This restraint is instantiated in *Lying v. Northwest Indian Cemetery Protection Association*, where the Court's majority deferred to the Secretary of Agriculture and the United States Department of the Forestry, whom, "reject[ed] the…recommendation that [a] road not be completed through the Chimney Rock area because it would irreparably damage the sacred areas, and also rejecting alternative routes outside the National Forest, the Service selected a route through the Chimney

[21] *Ibid., 6.*
[22] *Printz v. United States*, 521 U.S. 898 (1997).
[23] *Ibid.*

Rock area…"[24] The desecration of Native American religious sites cannot logically be viewed as restraint on behalf of the SCOTUS; rather, the effects of this decision constituted the exact opposite of restraint (namely activism under the banner of restraint), and is grounds for classifying this decision within the third criterion with which a justice may incorporate their own personal inclinations into adjudication. The majority in this instance failed to adequately investigate the claims being made by both parties through the necessary veil of ignorance, and therefore this decision, although academically classified as "restraintist," constitutes an assertion of the justices' choice to remain silent; and this silence indeed has an active effect. That choice is reducible to personal inclinations, because for whatever the reason, the refusal to intervene on behalf of those whom are being viewed unequally within the eyes of the law constitutes a representation of some personal inclination as to why they made that choice to restrain in the first place. Indeed, it is an affront to the essence of the Constitution for justices to masquerade a decision under the banner of "restraint" while cowardly hiding from dealing with the real issue(s) that have tangible affects in the day-to-day lives of Americans.

The SCOTUS is the U.S.'s primary protection for the transcendent conceptions of justice and equality within our society and policies, and as such, the adjudicating members therein must maintain the highest standards; and their decisions ought to be made through the veil of ignorance as opposed to in pursuit of their own personal inclinations. When adjudication occurs outside the blindness of personal inclination, tangible and very real and active consequences occur. For SCOTUS to retain its expected impartial reputation, it must demand its members view every case and the legal issues therein as if they *were* the parties affected: it must recognize the equal right of every human to be justified under the eyes of the law —a conclusion supported by a patterned increase, since 2000, in those whom, "disapprove of the way the Supreme Court is handling its job."[25] Without accountability, the personal inclinations of justices like Antonin Scalia will continue to cascade down upon the American people like decisions rendered by a monarch or dictator; especially considering their inability to be removed through elections. The SCOTUS' unique position and scope allows for this control, more so than any of the other coordinate branches of government whom merely provide the SCOTUS with the tools necessary for its members to shape policy in a way that they best see fit. This realignment of SCOTUS' values must take place not solely for the sake of this institution, but for the integrity of the entire U.S.'s justice system.

[24] *Lying v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439 (1988).
[25] Gallup, "Job Approval," *The Supreme Court,* http://www.gallup.com/poll/4732/Supreme-Court.aspx (accessed March 2, 2015).

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