

THE **Federalist** PAPER

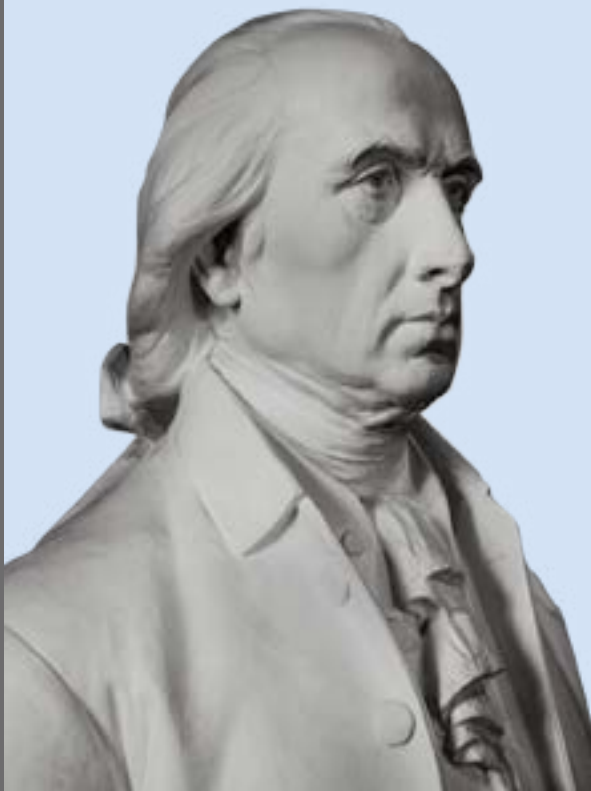
THE MAGAZINE OF THE FEDERALIST SOCIETY • FEDSOC.ORG

Spring 2016

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THE FEDERALIST NO. 78

“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”



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EDITOR'S LETTER

Dear Friend,

Many Federalist Society members are no doubt mourning the loss of one of the organization's most faithful and enduring friends, Justice Antonin Scalia. We hope you will join us in remembering him. A small tribute to him is included in this issue of the *Federalist Paper*.

This issue also showcases some of our events from the past few months. Our Student Chapters have hosted lots of great events at law schools around the country, including the 35th Annual National Student Symposium. The Lawyers Chapters held two regional conferences in January: the Florida and Western Chapters Conferences. Of course, the biggest event of the past few months was November's National Lawyers Convention, held at the Mayflower Hotel in Washington, DC. See inside for photos of these great events.

The Faculty Division held its Annual Faculty Conference in New York City in January, which featured several fantastic panel discussions. The Practice Groups planned and hosted the breakout sessions at the National Lawyers Convention, and they are now planning the next Executive Branch Review Conference. Keep up with Practice Group activities like teleforum calls, the blog, and *Federalist Society Review* articles at fedsoc.org.

Please send any comments or suggestions to katie.mcclendon@fedsoc.org. I look forward to hearing from you!

Katie McClendon



EXECUTIVE BRANCH
REVIEW CONFERENCE
Thursday, May 17, 2016

The Mayflower Hotel
1127 Connecticut Av. NW
Washington, DC 20036

Please join us at our Executive Branch Review Conference, which will focus on Law and Innovation. Register now at fedsoc.org.

NATIONAL LAWYERS
CONVENTION
Thursday-Saturday,
November 17-19, 2016

The Mayflower Hotel
1127 Connecticut Av. NW
Washington, DC 20036

November will be here before you know it, so mark your calendars now for the 2016 NLC. Look for details soon!



Last month, Senator Tom Cotton keynoted the Federalist Society's Barbara K. Olson Memorial Lecture. Cotton noted he's a long-time Federalist Society member:

Back when I was a student and a lawyer, I belonged to the Federalist Society because I believed in individual freedom, constitutional government, the rule of law, and the free-enterprise system.

• Shoshana Weissmann
Senator Cotton Delivers Federalist Society Lecture
 THE WEEKLY STANDARD

The Federalist Society is the intellectual nexus of America's conservative legal establishment. [...] Given the Federalist Society's influence among Republican lawmakers—especially the kind of Republican lawmaker who wears judicial robes—it is very likely that many of their proposals will be implemented if the 2016 election gives the GOP control of all three branches of government.

• Ian Millhiser
The Little-Noticed Conservative Plan To Permanently Lock Democrats Out Of Policymaking
 THINK PROGRESS

Top: A scene of the crowd during a panel featured at the National Lawyers Convention in November.
Middle: Prof. John Eastman speaks with a group at the Reagan Library, where the Ninth Annual Western Chapters Conference was held in January.
Bottom: A panel of speakers at the Second Annual Florida Chapters Conference, held at the Walt Disney World Resort in January.



STUDENT DIVISION



National Student Symposium
February 26 & 27 • University of Virginia School of Law
“POVERTY, INEQUALITY, AND THE LAW”

Panels covered important topics like...

- Capitalism and Inequality
- The Family
- Immigration Restrictions and the Constitution
- The Safety Net and Poverty
- Education Reform and Equality of Opportunity

Speakers included celebrated legal luminaries like...

- Paul D. Clement, Bancroft PLLC
- Hon. Jennifer Elrod, 5th Circuit
- Prof. Amy Wax, Penn Law
- Hon. Clint Bolick, AZ SupCt
- Prof. W. Bradford Wilcox, UVA
- William A. Galston, Brookings





In many ways the 2016 student symposium was like coming home to family. The academic climate of law school is so often hostile to right-of-center views that it was a breath of fresh air to spend a weekend exclusively surrounded by allied law students from around the nation who are passionate about perpetuating the ideals of ordered liberty. Whether exchanging off-the-cuff remarks about panelists or engaging in a discussion about the relative merits of presidential candidates over a cold one at a local Charlottesville bar, it was refreshing to be able to let down the guard that I've learned to keep with new acquaintances in legal academia.

The penultimate moment of fellowship was the Saturday night banquet, where we were treated to reflections on the late Justice Antonin Scalia by renowned litigator and former Solicitor General Paul Clement, a former clerk of the Justice. Alongside personal anecdotes, Clement challenged the narrative that Scalia failed to ultimately persuade the legal community as to the merits of textual originalism. He noted that the prescient Justice was conscientiously engaged in the struggle for the long haul, equipping future generations by investing in his clerks, the Federalist Society, and the generations of law students who will be challenged and influenced by his piquantly cogent opinions, even (perhaps especially) those written in dissent. Justice Scalia's legacy did not die when his pen was silenced. We are his legacy, and the future remains to be written.

—Reflection by Josh Wilson, member of the Chicago Student Chapter



Above left: Presentation of the Feddie Award for Chapter of the Year to Texas Student Chapter President Aaron Reitz. Above right: Prof. Tara Leigh Grove, recipient of the 2016 Paul Bator Award as an outstanding legal scholar under 40.



The Texas Student Chapter poses with Texas Governor Greg Abbott.



Student volunteers greet each other at the National Lawyers Convention.

Profile of Jenny DeMarco

Assistant Director of the Student Division

Jenny DeMarco joined the Fed Soc team in January, and we are thrilled to have the opportunity to introduce her to our members. The Student Division works tirelessly to keep everything running smoothly in our Student Chapters, the heart and soul of the organization. Jenny plays a big part in that effort, and we are excited to have her on the team!

What did you do before starting at the Federalist Society?

I graduated from Providence College in May 2015 with a degree in Health Policy and Management and minor in Political Science. Following graduation, I joined the Heritage Foundation as an intern in the External Affairs Department. In this role, I assisted with various day-to-day aspects of the Heritage internship program, such as processing applications, responding to inquiries regarding admission to the program, and helping to host policy briefings for visiting groups. As part of the program, I also regularly attended a lecture series on our nation's founding principles. This allowed me to expand my knowledge of the founding and how these principles can be applied to many of the issues America faces today.

What does your day-to-day work in the Student Division look like?

As part of the Student Division, much of my role involves providing support to our student chapters and speakers as they work to bring ideas about liberty and the rule of law to law school campuses all around the country. I process the reimbursement requests that are submitted following these events, and I also serve as a resource for questions about organizing events and running a successful law school chapter.

Who is your favorite Founding Father?

My favorite Founding Father is George Washington. Washington was undoubtedly an influential figure in American history. However, his character and sincere love for our great nation are what make him stand out to me. He answered the call to lead the Continental Army, even though he lacked significant



experience and it kept him away from his beloved home for eight years.

Following victory in the Revolutionary War, Washington hoped at last to return to a quiet life with his family. However, because the Articles of Confederation had proven weak and ineffective, he led the Constitutional Convention to ensure that America received the strong foundation it needed. He sacrificed his chance for retirement once again when he was selected to serve as president. Given the ability to define the office, he ensured that the president's power would be limited, and he had to be persuaded to serve a second term. He was a man of integrity who constantly put the country before himself. Washington once said, "I hope I shall possess firmness and virtue enough to maintain what I consider the most enviable of all titles, the character of an honest man." This was what mattered most to him, and America was and is better off because of it.

What are some of your favorite things to do outside of work?

I love reading, both fiction and nonfiction, and particularly anything written by Agatha Christie. As a new resident of Washington, DC, I also love to explore my new city. Between all of the museums, restaurants, and places to see, there is so much to do!

Regional Conferences

The Ninth Annual Western Chapters Conference

Federalism & Freedom

The Annual Western Chapters Conference took place on January 30th at the Ronald Reagan Presidential Library in Simi Valley, CA. The conference theme was *Federalism & Freedom*.

Panel discussions covered a range of subjects, including Federal v. State Power; Federalism, the Environment, Land Use, and Energy Independence; and Federalism and Religious Liberty. The conference also featured plenary addresses by Hon. Scott Pruitt, Attorney General of Oklahoma, and Gov. Pete Wilson, former governor of California.



The Second Annual Florida Chapters Conference





Law, Policy, & Federalism

The Annual Florida Chapters Conference took place January 22-23 at Disney’s Boardwalk Inn at Walt Disney World Resort.

Panel topics included crime & punishment, religious liberty, the environment, and healthcare; each topic was discussed with reference to federalism. Hon. Charles T. Canady of the Florida Supreme Court and Hon. William H. Pryor of the 11th Circuit discussed judging in a special session. The conference luncheon featured an address by Tim Cerio, General Counsel to the Florida Governor, and a conversation on Free Enterprise and Economic Development between Mark Wilson of the Florida Chamber of Commerce and Jesse Panuccio, formerly of Florida’s Department of Economic Opportunity.

2015 National Lawyers Convention

Held at the Mayflower Hotel, November 12-14

"I come to the Federalist Society's annual convention every year, wouldn't miss it." Those are the words of Senator Mike Lee, opening a video that he recorded at the 2015 National Lawyers Convention. Senator Lee opened the convention with remarks on the Role of Congress, setting the tone for the three-day event. Showcase panels throughout the convention explored topics related to the role of Congress, including *The Original View of Congress*, *The Living Congress: Adaptation or Decline?*, and *Changes in Incentives to Address Congressional Dysfunction*. The convention kicked off the Federalist Society's years-long Article I Project, which will involve careful investigation into the proper role of the legislative branch pursuant to Article I of the Constitution, as well as creative ideas about how to restore Congress to its appropriate role in the scheme of U.S. federal governance.

Hosting the annual National Lawyers Convention is, of course, a big part of what the Federalist Society exists to do: bring together like-minded attorneys to discuss pressing issues in our legal and political culture that get short shrift elsewhere in media and academic discussions. For almost 30 years, the National Lawyers Convention has been the preeminent venue for lawyers to come together and hear high-level discussions of legal and political issues from lawmakers, litigators, and laymen, left, right, and center. The 2015 NLC continued this tradition at the Mayflower Hotel in Washington, DC, November 12-14.





“I come to the Federalist Society’s annual convention every year, wouldn’t miss it.” - Senator Mike Lee



“The Federalist Society’s National Lawyers Conventions are a major highlight for Willette and me. They get 5-Stars in our book!”



Governors Sam Brownback (Kansas), Scott Walker (Wisconsin), Pete Ricketts (Nebraska), and Nathan Deal (Georgia) pose for a photograph before taking the stage at the National Lawyers Convention Annual Dinner. They, along with moderator Bill Kristol, discussed federalism and their states' efforts to combat federal government overreach.



Federalist Society Board member and Georgetown Law professor Nicholas Quinn Rosenkranz interviews political commentator Kirsten Powers about her new book *The Silencing: How the Left Is Killing Free Speech*. They talked about the so-called illiberal left's campaign to suppress freedom of speech, especially on college campuses.



Profs. John McGinnis (far left) and Robert George (far right) debated the resolution *The Constitution is designed for a moral and religious people and it's wholly unsuited for the government of any other* in the annual Rosenkranz Debate, named for Prof. Rosenkranz's (middle right) family. 11th Circuit Judge William Pryor (middle left) moderated.



“Truly, a city upon a hill cannot hide.” A city’s virtue and character is decided by the strength of character of its citizens. What a country displays to the world depends on the choices made by its people. Taken from the Sermon on the Mount, this was the theme of Senator Tom Cotton’s Barbara K. Olson Memorial Lecture. Framed by a tribute first to Barbara Olson herself, and then to the character and example of his wife, Cotton spoke of the need for American citizens to align themselves with the pursuit of virtue if there is to be hope for the future of this country. As I listened, I was reminded of the promise this country represents. Often it has been imperfectly fulfilled, yet the promise and the possibility of what the United States could be is a goal that should continue to inspire us. Senator Cotton reminded his listeners that each citizen must strive to live a well-ordered life, seeking virtue and character in the small choices every day. In that way, we can hope to offer that character in service to a government “of the people,” and build a country that is itself, worthy of both living and dying for.

—Reflection by Bethany Spare, member of the Texas Student Chapter, Submissions Editor of the Texas Review of Law and Politics, and student volunteer at the 2015 National Lawyers Convention

FACULTY DIVISION

The 18th Annual Faculty Conference

Fri-Sat • Jan 8-9 • 2016 • NYC • Times Square • Sheraton

The 18th Annual Faculty Conference, held on January 8-9, 2016 in New York City in partnership with the Association of American Law Schools (AALS) annual meeting, drew over 140 law professors. An additional 425 people watched the live stream from our webpage. For the first time the conference was held in an AALS hotel and fully cross-listed in the AALS program. The outgoing and incoming AALS president also opened the conference with welcoming remarks, and a significant number of faculty unaffiliated with the Society attended a variety of our panels.

The conference included panels on “The New Chevron Skeptics,” “Upward Redistribution, Government Policy, and Rent Seeking,” and “American Multiculturalism: Its Force and Limits

from 1776 to Today.” Our annual luncheon debate featured Gus Hurwitz (Nebraska-Lincoln Law) and Geoffrey Manne (International Center for Law and Economics) facing off against Adam Candeb (Michigan State Law) and James Speta (Northwestern Law) on whether the FCC has legal authority to implement net neutrality. Daniel Lyons (Boston College Law) moderated.

For the seventh year, the Conference also served as a forum for competitively selected papers as part of our Young Legal Scholars Paper Competition. Winners Tara Leigh Grove (William and Mary Law), Jeremy Kidd (Mercer Law), coauthors Randy Kozel and Jeffrey Pojanowski (both of Notre Dame Law), Ozan Varol (Lewis & Clark Law), and Ilan Wurman (Winston &

Strawn) presented their papers to assembled faculty and received comments from Thomas Lee (Fordham Law) and James Lindgren (Northwestern Law) while Saikrishna Prakash (UVA Law) moderated. Other faculty members, particularly junior faculty, took advantage of four additional panels dedicated to works-in-progress to obtain feedback on their scholarship.

Overall the conference proved quite successful, and the high quality of discussion among panelists highlighted the Society’s continuing commitment to academic rigor and productive debate.

Visit fedsoc.org/events to find audio and video recordings of the panels.

Faculty Conference Presenters: Professors Mary Anne Case (left), John McGinnis (center), John Eastman (right).





Federalist Society Founder, Senior Vice President, and Faculty Division Director Lee Liberman Otis with Professor David Bernstein at the 2016 National Lawyers Convention. The Faculty Division organized and sponsored several events for faculty and aspiring faculty at the convention, including a very well-attended Roundtable on Adjunct Teaching.

The Times Square Sheraton, where the 18th Annual Faculty Conference took place.



Teleforum Calls

The Federalist Society's fifteen Practice Groups plan and host frequent Teleforum Conference Calls. These calls allow us to conveniently bring expert commentary to our members nationwide at little cost.

We hosted a total of 144 teleforum calls in 2015 with a total of 13,123 live callers. We recorded most of these calls to be released as podcasts, which are downloaded thousands of times.

Our most popular calls of the past year were commentaries on the Supreme Court's blockbuster cases, *King v. Burwell*, *Horne v. USDA*, and *Obergefell v. Hodges*.

Other popular calls included Victor Davis Hanson's discussion of foreign policy, a debate over birthright citizenship, commentary on the Iran Deal, and discussions of provocative new books.

Calls are open to all Federalist Society members, and anyone can download a podcast once it is posted on our website. Please join us by becoming a member or by visiting our website.

Blog Posts

Members of the Practice Groups' Executive Committees regularly contribute to the new FedSoc Blog and find other experts willing to contribute their insights into law, legal policy, and legal news.

The relaunched blog has had more than 50,000 views of hundreds of posts, with our most popular posts being viewed by thousands of readers.

Our most popular posts thus far have been discussions of cases on the Supreme Court's docket this term, including posts on *Puerto Rico v. Sanchez-Valle*, *Fisher v. UT*, and *Evenwel v. Abbott*.

Besides Supreme Court commentary, our posts have included discussions of regulatory news, executive actions, and the legal implications of the Rams' planned move to Los Angeles.

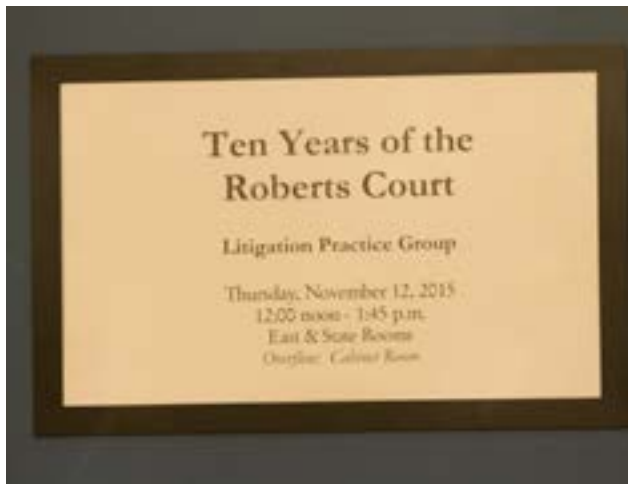
Bookmark fedsoc.org/blog and check the blog regularly for bite-sized legal news and commentary from top experts in the field. If you'd like to contribute, email Tim Courtney at timothy.courtney@fedsoc.org.

National Lawyers Convention Panels



Tuan Samahon, John Baker, and Adam White participate in Practice Group breakout panels.

Each Practice Group planned and executed a breakout panel at the 2015 National Lawyers Convention. Panels covered a range of topics, from Congress' role in environmental regulation to the Obama administration's record of protecting religious liberty.



Steven Duffield, Jan Crawford, and Hon. Carlos Bea participate in the Litigation Practice Group's panel.



Eileen O'Connor, chair of the Administrative Law & Regulation Practice Group, introduces that group's panel.



Member Profile: John Malcolm

The Federalist Society is fortunate to have not only a large number of dues-paying members, but many longtime members who are actively engaged with its efforts. John Malcolm, Senior Legal Fellow and Director of the Meese Center for Legal and Judicial Studies at the Heritage Foundation, has been a loyal member for decades, and he agreed to answer a few questions for us:

How did you get involved with the Federalist Society?

I was a young Assistant United States Attorney in Atlanta. Sometime in the early 1990's, our new U.S. Attorney, who knew I was a conservative, had just been asked to serve as Chairman of the brand new Criminal Law Practice Group. He asked me to assist him as Events Chairman, and I accepted. I was immediately given a lot of responsibility, got to meet some fascinating people, and was completely hooked.

At the first national convention I attended, I remember how thrilled I was that former Attorney General Edwin Meese agreed to speak at our breakout panel on the overfederalization of crime. I consider it kismet that over 20 years later, I head up the Meese Center at Heritage.

What has your involvement looked like over the past twenty years?

I have served as Chairman of the Criminal Law Practice Group on two different occasions, including for the past several years. I have only missed a couple of the national lawyers conventions (due to unavoidable business trips) and have attended the Southern and Western Leadership Conferences (both of which are terrific!) several times.

I also attended one of the biennial separation of powers conferences, which are co-taught by my good friend Prof. John Baker and Justice Antonin Scalia. During this trip, I went on a fly fishing expedition with

the Justice. It was one of the first and only times I have gone fly fishing, and my wife Mary Lee kept reminding me that, whatever I did, I should not hook the Justice. Thankfully, I didn't.

When Mary Lee and I lived in Atlanta and Los Angeles, we hosted summer events for Federalist Society students working at local firms. And I have also had the pleasure of giving speeches and engaging in debates at the national convention and traveling to speak at lawyers and student chapters across the country over the years.

Do you have any favorite Fed Soc memories?

I have several outstanding memories connected with the Federalist Society. I have met many of my closest friends and colleagues through the Federalist Society. Perhaps my favorite memory was a small party that my wife and I hosted at our home for Justice Samuel Alito and his wife Martha-Ann when he was guest teaching a seminar at Pepperdine Law School. The party was sponsored by the Los Angeles Lawyers Chapter, and the Alitos could not have been more gracious. They came early, stayed late, spoke with everyone, and posed for innumerable pictures.

In addition to the close friendships I have formed with several of the staff members of the Federalist Society, I had the privilege of working as General Counsel of the U.S. Commission on International Religious Freedom when Leonard Leo was USCIRF's Chairman. He is one of the most talented and hard-working people I have ever met.

I can truly say that the longstanding association I have had with the Federalist Society and the friendships I have made along the way have enhanced every aspect of my life.



Law and Innovation

Thanks to a generous grant, the Federalist Society has just launched a new project that will explore the relationship between law and innovation. We are assembling working groups that will discuss key aspects of the relationships between law and innovation, focusing on how law can avoid hampering and instead enable innovation. These groups will produce papers highlighting their findings, and they will consult on other projects that will explore some of the same themes. We hope that the end result of this years-long process will be a better understanding of how law can help fuel innovation.



Article I Project

The Federalist Society has traditionally focused its efforts on the judiciary and the executive branch. With this new project, we turn our attention to the legislative branch, whose powers were granted in Article I of the U.S. Constitution. Rather than offer policy ideas, the Federalist Society will seek to formulate a guiding philosophy for the legislature and its members, urging them to apply timeless principles even as they confront modern challenges.

Check out Philip Wegmann's interview with Federalist Society President Gene Meyer in [Here's Why This Legal Society Is Examining How Congress Works](#) at [The Daily Signal](#).

IN MEMORIAM



When Justice Antonin Scalia joined the Supreme Court in 1986, I was in his first group of law clerks. Many conversations started out with the justice asking a clerk's views on something or other. After the clerk spoke for a while, Justice Scalia would often respond, "That can't possibly be right. What about the Smith case?" or "What about section 203(b) of the statute?" or "What about the First Amendment?"

One key to being an effective clerk was understanding what this meant. It didn't mean, "You're an idiot for even suggesting such a thing." It meant, "Argue with me. Tell me why your view is right and I'm wrong."

One of the underappreciated facts about Justice Scalia, you see, is that he was a New Yorker. He grew up in Queens. New Yorkers are considerably more prone than most other Americans to say what's on their mind. But they're not trying to end a conversation, they're trying to start one. Because of course New Yorkers love to argue.

There was more to Justice Scalia's "That can't possibly be right" than just love of argument, though.

Many years later, I'd get the occasional call from a recent law graduate getting ready to interview for a clerkship with Justice Scalia asking my advice. I'd warn the caller about the coming questions and "That can't be right" or "That's all wrong" response from the justice, mention the New Yorker thing—then explain the deeper purpose I thought this type of response served.

Above all, Justice Scalia wanted his clerks to feel comfortable arguing with him because he wanted us to feel comfortable telling him if we thought he was making a mistake.

So he wanted his clerks to be in the habit of defending our views (if they were defensible). Shrinking violets or diplomats or flatterers who'd wilt or be overly deferential, rather than standing up to him if they thought he was wrong, wouldn't help him get the case or the law right.

And he was remarkably open to reconsidering his own views whenever he got a good argument from one of us.

Which brings us to what truly made him a great justice—namely, the point of all these arguments.



Justice Scalia was one of the greatest legal thinkers, analysts and writers ever to sit on the high court, and also a warm, generous man with a wonderful sense of humor—occasionally, perhaps, just a little too good.

Yet his most important and enduring contribution was to re-establish the view that the Constitution is a form of law—that its meaning, like that of other legal texts, is knowable, that understanding its meaning starts with reading what it says, and that it's the job of judges to read it, figure it out and follow it.

Back when Justice Scalia first joined the high court, law school professors and justices almost uniformly believed no person of even ordinary intelligence could hold such a naïve view. Rather, they proclaimed that the Constitution's meaning was largely indeterminate, that the justices themselves created its meaning.

Justice Scalia changed this dramatically. When one of the nation's most powerful intellects, and one of the greatest writers to ever sit on the Supreme Court, took the view that the Constitution was a law, when he made arguments based on the Constitution's original meaning—and when

he demolished arguments based on other considerations—the impact was huge.

It changed the entire legal conversation.

The idea that the Constitution and other laws are knowable and binding on judges and justices is the foundation for rescuing the entire legal and constitutional enterprise. Because if the Constitution or other laws have no intrinsic meaning and are just whatever the judges say they are, how can anyone follow them? And why should we?

All of us who worked with Justice Scalia—his clerks, his friends and colleagues on the court—are mourning our loss. But as we do so, we should reflect on his crucial legacy: reviving for the modern era a way to understand the Constitution that takes it seriously as a legal document. Like the republic the Constitution's Framers gave us, this legacy is ours—if we can keep it.

—*Lee Liberman Otis, Founder, Senior Vice President, Director of the Faculty Division, and one of Justice Scalia's first law clerks (reprinted with permission from her reflection in the New York Post, the views expressed here are her own)*

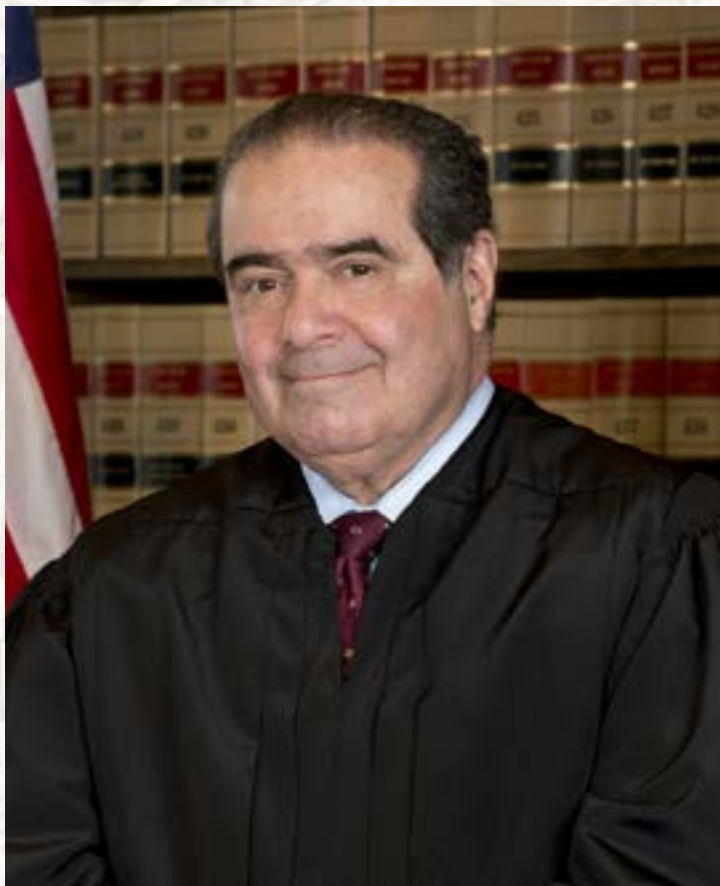


The Supreme Court bench. Black fabric is draped on Justice Scalia's chair in his memory.

The Federalist Society
for Law and Public Policy Studies

1776 I Street, N.W., Suite 300
Washington, D.C. 20006

IN MEMORIAM



Justice Antonin Scalia
1936-2016

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