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An Empirical Test of Justice Scalia's Commitment to the Rule of Law

Gary Lawson

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On January 13, 2001, barely one month after the Supreme Court's decision in *Bush v. Gore*,[1] a group of 554 legal academics calling themselves "Law Professors for the Rule of Law" took out a full-page ad in the *New York Times* that essentially accused the Court's majority of being faithless to the rule of law. In full, the advertisement read:

> BY STOPPING THE VOTE COUNT IN FLORIDA, THE U.S. SUPREME COURT USED ITS POWER TO ACT AS POLITICAL PARTISANS, NOT JUDGES OF A COURT OF LAW
>
> We are Professors of Law at 120 American law schools, from every part of our country, of different political beliefs. But we all agree that when a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five justices were acting as political proponents for candidate Bush, not as judges.
>
> IT IS NOT THE JOB OF A FEDERAL COURT TO STOP VOTES FROM BEING COUNTED
>
> By stopping the recount in the middle, the five justices acted to suppress the facts. Justice Scalia argued that the justices had to interfere even before the Supreme Court heard the Bush team's arguments because the recount might "cast a cloud upon what [Bush] claims to be the legitimacy of his election." In other words, the conservative justices moved to avoid the "threat" that Americans might learn that in the recount, Gore got more votes than Bush. This is presumably "irreparable" harm because if the recount proceeded and the truth once became known, it would never again be possible to completely obscure the facts. But it is not the job of the courts to polish the image of legitimacy of the

* Professor, Boston University School of Law. Lest there be any misunderstanding, this essay is *not* a broad-based attack on the Law Professors for the Rule of Law, either individually or collectively. As for Peggy Radin: in view of her April 23, 2001 letter to the editor of the *New York Times*, *see infra* note 6 and accompanying text, I can only say, in the immortal words of Bugs Bunny, "Of course, you know *this* means *war*."

1. 531 U.S. 98 (2000); *see also* Bush v. Gore, 531 U.S. 1046, 1046 (2000) (Scalia, J., concurring) (granting certiorari and staying the judgment of the Florida Supreme Court).

> Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges.
>
> BY TAKING POWER FROM THE VOTERS, THE SUPREME COURT HAS TARNISHED ITS OWN LEGITIMACY. AS TEACHERS WHOSE LIVES HAVE BEEN DEDICATED TO THE RULE OF LAW, WE PROTEST.[2]

The advertisement singled out Justice Scalia by name for specific condemnation

The charge of faithlessness to the rule of law leveled by the Law Professors for the Rule of Law was made in the context of a single case. An assessment of the charge in that context would require a detailed discussion of *Bush v. Gore*, and that is not my project here. Instead, I use the allegations of the Law Professors for the Rule of Law as an opportunity to take a broader view of Justice Scalia's nearly two decades on the Supreme Court. Specifically, I propose an empirical test of Justice Scalia's commitment to the rule of law measured over the course of his career. Of course, someone who is generally committed to the rule of law could lapse from the path in particular cases, and someone who is generally unconcerned about the rule of law might hew to it, either deliberately or accidentally, on some occasions. My focus is on Justice Scalia's general commitment to the rule of law, not to whether any such commitment was instantiated in *Bush v. Gore*.

The threshold problem with such an inquiry is that the charge, as it appears in the January 13, 2001 advertisement, is too vague to admit as either proof or disproof. The phrase "the rule of law" is one of the most contested concepts in the legal lexicon; there is serious question whether the term even admits of a verbal definition.[3] Indeed, in 1989, Justice Scalia wrote a short article about his philosophy of judging entitled *The Rule of Law as a Law of Rules*,[4] which never defined, either directly or indirectly, what Justice Scalia meant by the rule of law. Accordingly, the 554 signers of the advertisement[5] may each have had a different conception of "the rule of law" in mind when they accused Justice Scalia of disregarding it.

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2. N.Y.TIMES, *554 Law Professors Say*, January 13, 2001, at A7.

3. *See* Gary Lawson, *A Farewell to Principles*, 82 IOWA L. REV. 893, 900-01 (1997); Steven G. Calabresi & Gary Lawson, *Introduction: Prospects for the Rule of Law*, 21 CUMB. L. REV. 427, 428-29 (1991).

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

5. As of April 8, 2002, according to the website at www.the-rule-of-law.com, the number of signatories had risen to 673 members at 137 schools. 673 *Law Professors Say*, *at* http://www.the-rule-of-law.com (last visited Apr. 8, 2002).

At least one member of the Law Professors for the Rule of Law, however, has specified a conception of the rule of law that permits empirical investigation. Professor Margaret Jane Radin was one of the original signatories to the January 13, 2001 statement. An April 23, 2001 letter to the editor of the *New York Times* identifies her (along with the letter's co-author, Mitchell Zimmerman) as one of the "coordinators of Law Professors for the Rule of Law."[6] The text of that letter, which was addressed to the very different subject of the influence of the Federalist Society, is included here for the sake of completeness:

> Once upon a time, judges were not political animals who thought first about how to advance their political views, and people who came before them expected evenhanded justice ("A Conservative Legal Group Thrives in Bush's Washington," front page, April 18). After a decades-long effort to shape the judiciary to suit the conservative creed, however, we see judges like those involved with the Federalist Society who openly embrace a political agenda.
>
> You quote a "prominent appeals court judge" who insists on anonymity but shamelessly admits that he is not inclined to hire law clerks who don't pass his tests of right-wing political correctness. It is in fact notorious among law students that the Republican judges who dominate the bench apply such political tests, and this – as well as corporate financing – explains much of the "success" of the Federalist Society in our law schools. One is reminded of the days when ambitious students in the former Soviet Union felt that they had to join the Communist Party to advance their careers.[7]

Professor Radin further detailed her formative role in the Law Professors for the Rule of Law in an essay published in 2002.[8]

There is, of course, no reason to suppose that Professor Radin's views on the rule of law track those of any other member of the Law Professors for the Rule of Law, so this article can only test Justice Scalia's commitment to the rule of law by reference to the conception set forth by Professor Radin. Indeed, one purpose of this article is to

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6. Margaret Jane Radin & Mitchell Zimmerman, *Political Tests From the Bench*, N.Y. TIMES, April 23, 2001, at A14.

7. *Id.*

8. Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore?, *in* BUSH v. GORE: THE QUESTION OF LEGITIMACY 110, 112 (Bruce Ackerman, ed. 2002). A perspicacious reader may observe that it was therefore unnecessary to use the April 23, 2001 letter to identify Professor Radin's role in the Law Professors for the Rule of Law. If the reader is truly perspicacious, however, he or she will also recall the reference to Bugs Bunny in this article's star footnote.

encourage other signatories to the January 13, 2001 advertisement to articulate a conception of the rule of law that permits broader testing.

With respect to Professor Radin's position, however, the results are quite definitive: Professor Radin is plainly correct that Justice Scalia has been a clear and determined enemy of the rule of law throughout his judicial career.

In 1989, Professor Radin wrote an article entitled *Reconsidering the Rule of Law*,[9] which contrasted Professor Radin's conception of the rule of law with what she called "the traditional ideal of the Rule of Law," which holds that:

> (1) law consists of rules; (2) rules are prior to particular cases, more general than particular cases, and applied to particular cases; (3) law is instrumental (the rules are applied to achieve ends); (4) there is a radical separation between government and citizens (there are rule-givers and appliers, *versus* rule-takers and compliers); (5) the person is a rational chooser ordering her affairs instrumentally.[10]

This "traditional ideal" probably corresponds reasonably well to the conception of the rule of law implicitly held by Justice Scalia. Professor Radin's article, however, expressly *rejected* this conception in favor of a reinterpretation of the rule of law along the following lines:

> A pragmatic reinterpretation of the Rule of Law . . . would deny that law consists quintessentially of rules at all, as well as the notion that rules are separate from cases and logically pre-exist their application. Such a reinterpretation would also deny the strict division of people into rule-givers and rule-followers, and the conception of judges as rule-appliers rather than rule-makers.[12]

This reinterpretation leads to an identifiable conception of judicial fidelity to the rule of law. Professor Radin explains:

> Independence and impartiality are traditional aspects of the judge's role as a functionary separate from the legislative power; these elements of the Rule of Law are supposed to ensure that judges stay within their task of rule-applying. But independence and impartiality can refer to moral autonomy and a commitment to judgment in light of one's own moral understanding of the nature of community—not just to formal separation from the interests of the legislature or the litigants. . . .

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9. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).
10. *Id.* at 783, 792.
12. *Id.* at 814.

> In such an anti-formalist view of the judge's role, judges are an interpretive community conscious of their obligation to act as independent moral choosers for the good of a society, in light of what that society is and can become.[13]

This reconstruction of the rule of law also has direct implications for constitutionalism:

> In the pragmatic normative understanding, our constitution is not merely a document but rather that which "constitutes" us as a political community. . . . In this pragmatic view of politics, we are always attempting to accomplish a transition from today's nonideal world to the better world of our vision, and it is a transition that never ends. Moreover, our visions and our nonideal reality paradoxically constitute each other: what we can formulate as being better depends upon where we are now, and the way we understand where we are now depends upon our vision of what should be.[14]

It is obvious even on casual observation that Justice Scalia fails to live up to this rule-of-law ideal. Even his most ardent defenders must admit that Justice Scalia is notoriously unwilling to exercise "moral autonomy and a commitment to judgment in light of one's own moral understanding of the nature of community." He is starkly remiss in his obligation to embrace a role as an "independent moral chooser[] for the good of a society, in light of what that society is and can become." And as for making "our visions and our nonideal reality paradoxically constitute each other"—well, one has to wonder how he got past the ABA screeners on that one.

These intuitive observations are confirmed by more precise empirical tests. Professor Radin's account of the rule of law is driven by two major influences. The first is a conception of rules drawn from the work of Ludwig Wittgenstein,[15] and specifically a rule-skeptical interpretation of Wittgenstein[16] made famous by Saul Kripke in his

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13. *Id.* at 817.
14. *Id.* at 816.
15. *Id.* at 797:
> A Wittgensteinian view of words, and of the rules containing them, suggests that there is no such thing as traditional formal realizability, or in other words, that the traditional formalist conception of rules is wrong. The Wittgensteinian view of rules may be characterized as both a social and a practice conception. It is a social conception because in this view rules depend essentially on social context, and it is a practice conception because rules also depend essentially on reiterated human activity.

16. Radin, *supra* note 9, at 797-99.

classic work *Wittgenstein on Rules and Private Language.*[17] Indeed, Professor Radin's article uses the word "Wittgenstein" or "Wittgensteinian" ninety-six times (111 times if one counts "id." citations to Wittgenstein). She also cites Kripke and Richard Rorty, another philosopher loosely in the Wittgensteinian tradition, eight times each. Her second major influence is the work of Robert Cover,[18] who is mentioned sixteen times (eighteen if one adds in two "id." citations).

We can now empirically evaluate Justice Scalia's commitment to the rule of law using basic WESTLAW search techniques involving "OPINIONBY(Scalia)" and various concepts keyed to the rule of law. The results are consistent and revealing:

References to Wittgenstein: 0.

References to "Wittgensteinian": 0

References to Richard Rorty: 0.

References to Saul Kripke: 0.

This last result is particularly remarkable; even *I* have cited Saul Kripke.[19]

Professor Radin's more recent essay on *Bush v. Gore* suggests material for a broader search. That essay emphasizes that the assumptions underlying the so-called "traditional ideal" of the rule of law "are part of a worldview that has been undercut by thinkers from Kant to Habermas."[20] A search for "OPINIONBY (Scalia) & Habermas" generated no matches. However, research reveals that Justice Scalia *has* relied upon Immanuel Kant! In *Morgan v. Illinois*, the Court held that jurors who would always impose the death penalty for capital murder could not, as a matter of constitutional law, be considered impartial.[21] Justice Scalia, in dissent, objected that under this holding, "[t]hose who agree with the author of Exodus, or with Immanuel Kant, must be banished from American juries . . . because they do not share the strong penological preferences of this Court."[22]

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17. SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982).

18. *See* Radin, *supra* note 9, at 814-15.

19. *See* Lawson, *supra* note 3, at 896-97. Of course, I have also cited Bullwinkle, *see* Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L.J. 1309, 1311 n.11 (1991), but never mind.

20. Radin, *supra* note 8, at 124.

21. 504 U.S. 719 (1992).

22. *Id.* at 752 (Scalia, J., dissenting) (citing IMMANUEL KANT, THE PHILOSOPHY OF

Whether invoking Kant in support of capital punishment counts as letting "our visions and our nonideal reality paradoxically constitute each other" is left to the reader.

Obviously, one cannot check for references to every thinker after Kant and before Habermas without reading all of Justice Scalia's opinions in full, but in order to assure that my test was not overly narrow, I also conducted some further random searches. "OPINIONBY(Scalia) & Merleu-Ponty" yielded no hits. "OPINIONBY(Scalia) & Heidegger or Husserl or Camus" yielded no hits. In fact, I have not found a single case in which Justice Scalia has *ever* relied on the work of a modern philosopher in the Wittgensteinian, existentialist, or post-structuralist tradition!

Further inquiry confirms these stark results. "OPINIONBY(Scalia) & Cover" turns up sixty-one hits, some with multiple references, but not one of those references was to the work of Robert Cover. And, most tellingly of all, Justice Scalia has never cited Margaret Jane Radin, even though she was once cited by an opinion that dissented from a majority decision authored by Justice Scalia.[23]

Those persons who have regarded Justice Scalia as an exemplar of the rule of law need to take account of these findings. I hope that this article will spur further empirical work along these lines. As for Professor Radin: I'm sure that she will be eager to pass these results along to the Senate Judiciary Committee for appropriate hearings—unless, of course, she feels a stifling chill from the Federalist Society and its corporate sponsors.

LAW 198 (W. Hastie. trans., 1887) (1796)).

23. Stanford v. Kentucky, 492 U.S. 361, 392 (1989) (Brennan, J., dissenting) (citing Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1036 (1978)).