



6-1-1999

## Scalia's Sermonette

Michael Stokes Paulsen

Steffen N. Johnson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

### Recommended Citation

Michael S. Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 Notre Dame L. Rev. 863 (1997).

Available at: <http://scholarship.law.nd.edu/ndlr/vol72/iss3/5>

This Essay is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## ESSAY

---

### SCALIA'S SERMONETTE

*Michael Stokes Paulsen\**  
*Steffen N. Johnson†*

We are fools for Christ's sake.

—Justice Antonin Scalia (1996)

I want to hang around and prevent those jokers  
from overruling *Roe*.

—Justice Harry Blackmun (1994)

#### I. INTRODUCTION: AYATOLLAH SCALIA?

Justice Antonin Scalia's flamboyant judicial rhetoric and colorful writing style more than occasionally make headlines. Seemingly alone among the justices, Scalia is the master of the eminently quotable turn-of-phrase, the arresting quip, the provocatively expressed legal argument. Small wonder, then, that Justice Scalia made the front page of *The Washington Post*<sup>1</sup>—and several other papers across the nation—when last spring, shortly before Easter, he declared that Christians “are fools for Christ's sake.”

The context was not a judicial opinion, but a prayer breakfast at the First Baptist Church in Jackson, Mississippi, on April 9, 1996. Scalia had been invited to address a group of Christian lawyers and law students about their common faith. The gist of Scalia's remarks, according to press accounts,<sup>2</sup> was that traditional Christian beliefs are

---

\* Associate Professor of Law, University of Minnesota Law School.

† Associate, Mayer, Brown & Platt, Chicago, Illinois.

1 Joan Biskupic, *Scalia Makes the Case for Christianity: Justice Proclaims Belief in Miracles*, WASH. POST, Apr. 10, 1996, at A1.

2 A public text of Scalia's remarks is not available. Scalia did not make a text available to the press or public through the Supreme Court's public affairs office, perhaps because he did not regard his remarks as a matter of “public affairs” in the sense of involving Court business. Newspaper accounts of Scalia's remarks have relied

often misunderstood, dismissed as unreflective and, even worse, scorned by much of society today.

To illustrate his point, Scalia invoked the subject of miracles. "Reason and intellect," he asserted, "are not to be laid aside where matters of religion are concerned. What is irrational to reject is the possibility of miracles and the resurrection of Jesus Christ." Yet the evident view of "the worldly wise," he continued, is that "everything from Easter morning to the Ascension had to be made up by the groveling enthusiasts as part of their plan to get themselves martyred."

Then, referring to a 1992 account of a priest who reported bleeding wounds, or "stigmata," resembling those Christ suffered, Scalia puzzled: "*The Washington Post* sends out a team of reporters who produce a strangely ambivalent story about this phenomenon. The thought occurred to me: Why wasn't that church absolutely packed with nonbelievers? . . . Why weren't the *Washington Post* reporters, if they couldn't explain the phenomenon, absolute converts?"

Finally, after observing that the disparaging term "cretin" derives from the French word for "Christian," Scalia declared: "To be honest about it, that is the view of Christians taken by modern society. We are fools for Christ's sake. We must pray for the courage to endure the scorn of the modern world."

Despite the fact that Scalia's sermonette was delivered in an extrajudicial context—or perhaps *because* it was made outside the judicial role—Scalia's "unusually sharp remarks" were subjected to a barrage of criticism.<sup>3</sup> In some quarters, Scalia was accused of having a "persecution complex."<sup>4</sup> Court-watcher Stuart Taylor, writing for *The American Lawyer*, likened Scalia to the "whining wimps of victimology" who appear on television talk shows.<sup>5</sup> In a more provocative statement, Taylor charged that Scalia's reaction to *The Washington Post's* journalism was "just a teensy bit reminiscent of the Ayatollah Khomeini's reaction to Salman Rushdie's *The Satanic Verses*."<sup>6</sup> What was "really offensive" about "Scalia's whiny outburst," Taylor declared, "was his flirtation with Christian victimology, which evinced either a quite fatuous persecution complex, or a predisposition to intolerance, or a willingness to parrot unthinkingly the kind of nonsense that is often heard from the likes of Pat Robertson and Patrick Buchanan."<sup>7</sup>

---

on reports from the *Jackson Clarion-Ledger* and the Associated Press, as confirmed by those in attendance.

3 Biskupic, *supra* note 1, at A1.

4 Stuart Taylor, Jr., *Justice Scalia's Persecution Complex*, AM. LAW., June 1996, at 37.

5 *Id.*

6 *Id.* at 37-39.

7 *Id.* at 39.

In an interview for *The Washington Post*, James Dunn, executive director of the Baptist Joint Committee on Public Affairs, echoed a similar sentiment: "This is becoming a modern myth that religion is somehow persecuted in American life."<sup>8</sup>

It's a right-wing litmus test. If you don't say religion is beat up on, then you aren't pitifully correct. Everyone is competing to see who can whine the loudest. . . . If the American people were as anti-religious as everyone says, then a Supreme Court justice wouldn't have the right to run around saying things like that.<sup>9</sup>

Still others thought that a Supreme Court justice *shouldn't* have the right to run around saying things like that—that Scalia's remarks cast doubt on his ability to execute the duties of his judicial office. Clay Chandler, a staff writer for *The Washington Post*, for example, queried whether Scalia's comments weren't "difficult to reconcile with his judicial obligation to regard citizens of all religious persuasions—whether believer or nonbeliever, Christian or non-Christian—as equals under the law."<sup>10</sup> "At issue," declared Chandler, "is whether Scalia's impassioned and remarkably personal defense of Christianity . . . clashed with his sworn duty to impartially interpret U.S. laws, including those pertaining to religion."<sup>11</sup> Barry Lynn, of Americans United for the Separation of Church and State, told *USA Today* that Scalia's speech "clearly undermines public confidence in his objectivity regarding religious controversies."<sup>12</sup> Professor Jamin B. Raskin of American University told *The Washington Post*, "We expect Supreme Court justices to be the most secular of our public servants. That is not to say they can't have religious beliefs. But for good reasons, we are uncomfortable about them flaunting those beliefs." Scalia, Raskin urged, "stepped over the line of what was proper."<sup>13</sup> Stuart Taylor, while acknowledging that other justices, among them Thurgood Marshall and Ruth Bader Ginsburg, have identified with civil rights causes both on and off the bench, nonetheless concluded that Scalia's "Bible-thumping" remarks "hardly inspire confidence in his open-mindedness."<sup>14</sup>

---

8 Biskupic, *supra* note 1, at A1 (quoting James Dunn).

9 *Id.* (quoting James Dunn).

10 Clay Chandler, *Scalia's Religion Remarks: Just a Matter of Free Speech?*, WASH. POST, Apr. 15, 1996, at F7 (Washington Business section).

11 *Id.*

12 Robert A. Sirico, *Scalia's Dissenting Opinion*, WALL ST. J., Apr. 19, 1996, at A12 (quoting Barry Lynn).

13 Chandler, *supra* note 10, at F7 (quoting Jamin B. Raskin).

14 Taylor, *supra* note 4, at 39.

In our judgment, Scalia's remarks—and especially the remarkable reaction they elicited—do indeed have much to say about open-mindedness, tolerance, objectivity, and judicial ethics. But the lessons they teach are precisely the opposite of those urged by Scalia's critics. The reactions to Antonin Scalia's prayer breakfast homily reflect a shocking ignorance about Christian theology and biblical literature, about the First Amendment's protections of freedom of speech and of religion, and about the role of religion (and personal statements about religion) in a pluralistic public square.

The more alarmist reactions to Scalia's statement that "We are fools for Christ's sake," for example, seemed to assume that this was another Scalia Original, rather than an obvious quotation from St. Paul's first epistle to the Christian church at Corinth, in which Paul compared the wisdom of humankind with the wisdom of God. Scalia was scarcely fashioning his imagery from whole cloth, but invoking what is—or should be—a familiar literary reference in Western culture. The pundits' near-universal failure to recognize it ironically validates Scalia's point: the "wise" of this world do not understand, appreciate, or respect Christianity (or religion in general, for that matter). Indeed, they appear to lack even a basic level of education about the literature and beliefs of the most influential religious and cultural tradition in Western history.

But suppose Scalia's remarks were solely the product of his own observations. Does his frank discussion of religion really cast doubt on his ability impartially to execute his judicial duties? Is it really true, as one "practicing attorney and ethics expert who asked not to be identified" chided, that Scalia "shouldn't be saying anything like that because it's going to come up before the court[, and because,] [i]f he's got anything to say about religion or anything else, he should say it in his opinions[, because] [t]hose are the rules"?<sup>15</sup>

We think the answer to these questions is plainly "no." Yet the idea is abroad, at least in some quarters, that Scalia's speech was not only an inaccurate account of the treatment of religion in American public life, but ethically improper. To see why this view is so badly mistaken, it is necessary to explore the several areas of his critics' misunderstandings: Christian theology, judicial ethics, and constitutional law.

---

15 Chandler, *supra* note 10, at F7.

## II. SCALIA'S LITURGY

The critics' first misunderstanding of Scalia's remarks is at the level of theology. Not to put too fine a point on it, Scalia's critics literally did not understand what he was talking about. In fact, the level of raw theological, cultural, and even literary ignorance reflected in their comments is so astonishing as itself to be a scathing indictment of elite culture.

Indicting the media was not Scalia's point, however—and that is part of what his critics missed. Justice Scalia was not launching a public jeremiad against the media and public culture. That indeed might have been newsworthy. Rather, Antonin Scalia, the man, was giving a homily for a prayer breakfast, offering encouragement and support for Christian men and women studying law (the event was sponsored by a student chapter of the Christian Legal Society) and preparing to enter a profession where the values of the Lord and the values of the Law are often seen as conflicting. That, too, might be newsworthy, but not at all in the way that the media pitched the story. Antonin Scalia, the Supreme Court Justice, did not release a public text—if indeed he even used one. Apparently, Scalia did not understand his homily to be addressed to the public at large, but to this particular assembled group.

The Court Watchers, of course, seem to have found in this something sinister: Why no text? What's Scalia up to? What are the implications for the Court? For the presidential election? Such questions are sadly symptomatic of the media's own myopic and self-important view of the world, in which everything is seen through the eyes of a Supreme Court beat reporter. We hate to break the news to the Joan Biskupics and Stuart Taylors of the world: this speech wasn't about you. It wasn't about politics, it wasn't about constitutional law, and it wasn't about social issues. It was about the clash of world views between Christianity and today's dominant culture. It was about the difficulties of being a Christian in a secular world—our culture and, especially, our *legal* culture. It is not surprising that the reporters, like the "worldly wise" generally, missed the point, for Scalia's remarks do not fit into secular society's boxes for understanding the way things work in the world (which, indeed, *was* part of Scalia's point).

To his audience, and to persons literate in matters of religion and culture, Scalia's remarks are familiar—but not any the less uplifting—references to the Apostle Paul's first letter to the Corinthians. Scalia's point, echoing Paul's, was that Christians should not *expect* the world's values to be the same as theirs and that Christians should not mimic the world's values. Much of the first several chapters of Paul's letter to

the Christian church at Corinth is devoted to the theme that the wisdom of the world is rendered foolish in comparison to God's power, and that the message of the gospel—the “good news” of Jesus Christ—will be regarded, wrongly, as foolishness by the wise of this world. It is helpful to read a few full paragraphs to capture the flavor of Paul's letter at this point:

For the word of the cross is to those who are perishing foolishness, but to us who are being saved it is the power of God. For it is written,

“I will destroy the wisdom of the wise,  
And the cleverness of the clever I will set aside.”

Where is the wise man? Where is the scribe? Where is the debater of this age? Has not God made foolish the wisdom of the world? For since in the wisdom of God the world through its wisdom did not come to know God, God was well-pleased through the foolishness of the message preached to save those who believe. For indeed Jews ask for signs, and Greeks search for wisdom; but we preach Christ crucified, to Jews a stumbling block, and to Gentiles foolishness, but to those who are the called, both Jews and Greeks, Christ the power of God and the wisdom of God. Because the foolishness of God is wiser than men, and the weakness of God is stronger than men.<sup>16</sup>

This is one of the most powerfully argued and theologically important passages in Paul's letters. Paul, a lawyer of his day, makes a sophisticated “legal” argument explaining and defending the gospel and distinguishing the case for the gospel of Jesus Christ from the case of its opponents. He proceeds by recognizing, and *embracing*, the fact that the message of Jesus Christ is, from a human standpoint, scandalous. To Jews, the idea that the Messiah would be hung from a cross in humiliation was offensive to prevailing ideas of what the Messiah would be and do: a political leader who would restore the Davidic kingdom. To Greeks (a generic label for those embracing various philosophies not derived from Judaism), the idea that God would become Man, die as a sacrifice for humankind, and rise from the dead to restore a relationship between God and all humankind, is quite simply nonsense. *And it is*: viewed from a human perspective, Christianity is hardly a reasonable-sounding religion.

Paul, a Pharisee, had been not only a skeptic but a ruthless persecutor of Christianity on these grounds. It was only through a personal encounter and transformation that he became first-century Christian-

---

16 1 Cor. 1:18-25 (New American Standard Version).

ity's leading exponent and theological theorist.<sup>17</sup> Paul's point, as expressed in Corinthians, was that God is not subject to Man's criteria of wisdom or sensibility; God is God. If one insists on subjecting God to human criteria, Paul argues, one will never see God as He is. In a sense this is tautological, and Paul recognizes this, but it also explains why the world will be resistant to the life-view of Christians. Paul continues:

Now we have received, not the spirit of the world, but the Spirit who is from God, that we might know the things freely given to us by God, which things we also speak, not in words taught by human wisdom, but in those taught by the Spirit, combining spiritual thoughts with spiritual words. *But a natural man does not accept the things of the Spirit of God; for they are foolishness to him, and he cannot understand them, because they are spiritually appraised.* But he who is spiritual appraises all things, yet he himself is appraised by no man. For who has known the mind of the Lord, that he should instruct Him? But we have the mind of Christ.<sup>18</sup>

Justice Scalia's speech fits squarely within this Pauline tradition. Indeed, the expression that seemed to cause the media critics the most consternation—"fools for Christ's sake"—comes straight from 1 Corinthians 4, where Paul uses it to mock the Corinthians' claims that they already were wise and complete in their knowledge. To think that Antonin Scalia was, in his address to the Christian Legal Society, railing against the media's and the elite culture's treatment of Christians is self-absorbedly to miss the main point. To be sure, Scalia noted the myriad ways in which the world's values and beliefs are different from those held by faithful Christians—and some of these differences are of course quite jarring—but the burden of his remarks was not so much to indict today's culture as to note the proper Christian attitude toward it.

In short, Scalia was attempting not so much to be a *prophet*, railing against a sinful, wicked world, but a *priest*, seeking to help his fellow believers deal with such a world. For Christian law students (and Christian lawyers), the tension between being a Christian and the study and practice of law can be very real. It was surely comforting, perhaps even inspiring, for this Christian Legal Society audience to hear these echoes of the Apostle Paul coming from a man who had reached the pinnacle of the American legal profession, whose opinions very often show great skill in the ways of the debaters of this age.

---

17 See Acts 9:1-22. For a modern historian's account, see PAUL JOHNSON, *A HISTORY OF CHRISTIANITY* 3-5, 35-42 (1976).

18 1 Cor. 2:12-16 (New American Standard Version) (emphasis added).



For such a man to recognize that worldly wisdom, knowledge, and skill are as nothing compared to the wisdom of God was surely a powerful testimony to those assembled to hear him. Indeed, viewed at all charitably, Scalia's remarks demonstrate Christian humility. It is ironic, but not entirely surprising, that the media and pundits—so accustomed to Scalia's barbed wit, his brash style in judicial opinions, his combative and sometimes high-handed style of shredding his opponents' legal arguments—would see in Scalia's prayer breakfast talk the same attributes, rather than the humble confession of a lawyer who, like Paul, recognizes that all such mere human wit and wisdom are as nothing compared to the authority of God.

While the event was not closed-door (just as a church worship service is not), neither was it a public policy speech. Those who took it that way took Scalia's remarks out of their religious, pastoral context—a mistake they probably could not have made but for a rather basic kind of cultural-religious illiteracy and a rather advanced case of mediacentric Washington-policy-itis. In short, they mistook a prayer breakfast for a kulturkampf.

### III. FREE SPEECH AND JUDICIAL ETHICS

But so what? The fact that the media crew may have misunderstood the provenance and purpose of Scalia's sermonette does not answer the next question: What is a Supreme Court justice doing making a speech like this (whether or not intended for public consumption)? Is there not something improper here? Do we not, as Professor Raskin asserts, "expect Supreme Court justices to be the most secular of our public servants"?<sup>19</sup> Doesn't making a speech like this give reason to doubt Scalia's objectivity as a judge, at least on matters touching religion?

At least two different lines of thought are at work in these questions, and they are often lumped together indiscriminately. The first line has to do with the propriety of judges' extrajudicial public speeches on matters of general public interest and, therefore, potentially touching on matters that could become lawsuits. (We say "propriety" because we think there should be no serious question about the *legality* of such public expression; judges have First Amendment rights of free expression that certainly are not trumped in this context by the *Model Code of Judicial Conduct*.) The second line of thought has less to do with the fact that judges are engaged in public expression as it has to do with the fact that they are engaged in public *religious* ex-

---

19 See Chandler, *supra* note 10, at F7.

pression. Separating these two strands, it becomes easier to see why the argument of impropriety is flawed.

For openers, we think it clear that judges *constitutionally* are permitted to make extrajudicial statements, including speeches, concerning whatever it is they feel like talking about, as long as they refrain from publicly discussing a pending case or from making statements amounting to campaign promises or pledges as to how they will rule on a particular case or issue. That is the standard embodied in the American Bar Association's 1990 *Model Code of Judicial Conduct*, which states that judges (and judicial candidates) shall not

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or]

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.<sup>20</sup>

Any actual legal restriction on judges' speech that goes beyond this is difficult to square with the First Amendment, as several courts have held.<sup>21</sup>

---

20 MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990). Canon 5A(3) addresses the situation of "judicial candidates." Canon 3E(1) states that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," but the examples and commentary do not suggest that a judge's impartiality can reasonably be questioned on the ground that he or she holds, or has expressed, religious opinions, aside from a case of actual "personal bias or prejudice concerning a party." *Id.* Canon 3E(1)(a) (emphasis added); *see also id.* Canon 4A(1) ("A judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge . . .").

Although the Supreme Court has not adopted any particular code of judicial conduct, federal judges generally are governed by the *Code of Conduct for United States Judges*, which contains analogous rules. *See* CODE OF CONDUCT FOR U.S. JUDGES, Canons 3A(6), 4A, 5A (1996).

21 A few cases have presented the question of whether judicial ethics codes, patterned after American Bar Association models, might violate the First Amendment where used to disqualify candidates for elected judicial posts (or appointed ones, for that matter) from expressing their views of public, including judicial, issues. The recent trend appears to be either to adopt a narrowing construction of the codes, so as to limit them to a prohibition on making a commitment as to how a judge or prospective judge will rule on a case or issue, or else to strike down such codes as unconstitutionally overbroad. *Compare, e.g.,* Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 227-31 (7th Cir. 1993) (holding that state judicial conduct rule prohibiting judicial candidates from announcing views on disputed legal or political issues violated First Amendment), *with* Stretton v. Disciplinary Bd., 944 F.2d 137, 141-44 (3d Cir. 1991) (narrowly construing Pennsylvania's judicial conduct rule that prohibited judicial can-

We think it follows, albeit perhaps less clearly, that it is not improper, in some other sense, for a judge to make such public statements. As long as the judge's extrajudicial remarks neither pertain to a pending case nor involve a commitment as to how he will resolve a particular legal case or issue, the judge has engaged in no act of impropriety concerning his judicial role. In certain contexts—confirmation hearings, for example—we expect and frequently demand to know a judge's or prospective judge's thinking and personal views about a range of subjects, legal and political. There is nothing remotely improper about this; indeed, it is not only proper but affirmatively desirable that the public understand the thinking, world view, and political opinions of prospective judges.<sup>22</sup>

The argument of impropriety is rarely, if ever, employed to assert that a judge's exercise of his rights of free expression involves an *actual* impropriety—that is, one that would give rise to a legal entitlement of a party to disqualify a judge for bias or conflict of interest. Rather, the argument is usually couched in terms of “*appearance* of impropriety.” Nearly all of the tirades against Scalia's sermonette fall into this category. None of the pundits (as far as we are aware) attempts a serious argument that Scalia's religious remarks are actually disqualifying as to his fitness to sit on the bench generally, or to address some category of legal questions (such as religious freedom or abortion issues). Rather, Scalia's remarks are thought to create questions in some minds, or are said to “hardly inspire confidence in his open-mindedness.”<sup>23</sup>

The problem with appearance of impropriety arguments is that, quite frequently, they are all “appearance” and no “impropriety”—and the appearance is in the eye of the beholder (or the accuser). Consider the pair of quotations with which we began this essay. Sitting Justice Antonin Scalia quotes scripture to a prayer breakfast on

---

didates from announcing views on disputed legal or political issues, to avoid First Amendment violation).

22 Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 562-75 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)).

Justice Scalia's more recent remarks, at Catholic University's School of Philosophy, that “there is no right to die” in the Constitution, see *Scalia: ‘There Is No Right to Die’: Supreme Court Justice Criticized over Speech*, CHI. TRIB., Oct. 29, 1996, at A6, come much closer to the line (especially with a case presenting such an issue pending before the Supreme Court), but, in context, probably fall short of a commitment as to how Scalia will rule in a particular case. See also *infra* note 24 and accompanying text (comparing former Justice Blackmun's remarks that he needed to stay on the Court in order to keep the Court from overruling *Roe v. Wade*).

23 See Taylor, *supra* note 4, at 39.

the general topic of miracles, religion, and rationality—"We are fools for Christ's sake"—and it evokes a firestorm of hostile criticism challenging Scalia's objectivity and fitness. Sitting Justice Harry Blackmun, in 1994, tells a Harvard Law School audience how he would likely vote in future cases involving a particular, hotly-disputed legal issue—"I want to hang around and prevent those jokers from overruling *Roe*"<sup>24</sup>—and nobody bats an eye.

What gives? It seems to us that it is not the fact of expressing a substantive opinion on a public issue, even a legal issue, that gives rise to the "appearance of impropriety" objection on the part of those raising it; it is the particular substantive opinion expressed. It is the fact that Scalia is expressing traditional religious views, and expressing them very seriously, that is thought improper by some.

This raises an important point about First Amendment values: the critics' collective attempt to silence Scalia is a classic instance of viewpoint-based discrimination against the expression of particular opinions or beliefs on particular subjects, a stance completely antithetical to true freedom of expression.<sup>25</sup> What makes Scalia's attackers so squeamish is the fact that religion is being discussed in public, by a public figure, in a personal and unabashed, even evangelical, way. That is not how it's supposed to be done. Religion is supposed to be invoked, if at all, only ceremonially by politicians, the invocation being as vacuous as possible so that we can all feel comfortable with its essential meaninglessness. As Professor Raskin puts it: "We expect Supreme Court justices to be the most secular of our public servants. . . . [W]e are uncomfortable about them flaunting [their religious] beliefs."<sup>26</sup> Scalia's religious speech was startling—especially to those so unfamiliar with his references that the speech struck them as bizarre and dangerous—precisely because it had content and meaning. It did not conform to secular modes of thinking about the

---

24 Jeff Bucholtz, *Justice Blackmun Brings Overflow Crowd to Its Feet*, HARV. L. RECORD, Mar. 11, 1994, at 1 (quoting Justice Blackmun). In fairness to Justice Blackmun, he had notoriously gone on record numerous times in his judicial career as saying that he believed in a constitutional right to abortion, and no abortion cases were then pending before the Court. Similarly, Scalia's "no right to die" comments scarcely surprise anyone familiar with his earlier judicial opinion on the subject, in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292-301 (1990) (Scalia, J., concurring).

25 We say "First Amendment values" rather than the First Amendment itself because we assume that no one seriously suggests that disciplinary action by any governmental body should be taken against Justice Scalia. Rather, the censorship instinct comes from private actors—journalists, pundits, advocates, professors—who are advancing their own censorial viewpoint (which they, too, are free to do). Our point is that such censorial views are antithetical to free speech values.

26 Chandler, *supra* note 10, at F7.

proper content of religious expression by public officials. This was not pasty, cream-of-wheat-consistency politicians' religion-talk. It was genuine Christian exhortation.<sup>27</sup>

Interestingly, Justice Stephen Breyer, just one week to the day after Justice Scalia addressed the Christian Legal Society, addressed an audience gathered in the Capitol Rotunda for the Annual Days of Remembrance, a ceremony commemorating the Holocaust. In a speech extolling the process of reasoned justice employed in the Nuremberg trials, Breyer described himself as a "Jew, a judge, a Member of the Supreme Court,"<sup>28</sup> invoked religious references to Joseph and Deuteronomy, and, in closing, quoted from the Psalms: "Justice and Law are the foundations of Your Throne."<sup>29</sup>

No one has so much as hinted that Justice Breyer's remarks were inappropriate. One might be tempted to distinguish the two speeches on the ground that Breyer's remarks were more "cultural," whereas Scalia's were more "religious," but that distinction is hardly workable. Whether the recitation of the Torah is perceived as more religious or more cultural will invariably depend on the biases of those making that judgment. But a Jew's invocation of the Torah is not less religious than a Christian's invocation of First Corinthians simply because it might be thought less provocative, any more than a Presbyterian's expression of faith is less religious than a Pentecostal's simply because it is less demonstrative.<sup>30</sup>

The idea that a Supreme Court justice's statement of his own religious beliefs is somehow a threat to the First Amendment is simultaneously naïve and itself a threat to freedom of speech and religion. It is naïve because it assumes that a judge somehow becomes less religious

---

27 As Professor Philip Johnson has explained, "'once you start talking about the God of the Bible, then you're talking about a God who makes moral demands and plays a real role in the real world. . . . For many people, it's shocking to hear a Supreme Court justice stand up and say he believes in that kind of God.'" Terry Mattingly, *Justice Scalia: 'Fools for Christ's Sake,'* KNOXVILLE NEWS-SENTINEL, Apr. 27, 1996, at B2 (quoting Professor Phillip E. Johnson of the University of California at Berkeley).

28 Stephen G. Breyer, *Keynote Address for the 1996 Days of Remembrance "Crimes Against Humanity, Nuremberg, 1946,"* Capitol Rotunda, Washington, D.C., Apr. 16, 1996, at 1-2 (manuscript of speech on file with author Steffen Johnson); see also Richard Carelli, *Justices' Faith Could Play a Role in 2 Pivotal Decisions: High Court to Tackle Religion,* CHI. SUN-TIMES, Jan. 25, 1997, at 32.

29 Breyer, *supra* note 28, at 6 (quoting *Psalms* 89:14).

30 We applaud both Justice Scalia and Justice Breyer, and we think both justices' remarks were entirely appropriate and encouraging to their respective audiences. Yet it is interesting to note that Breyer's remarks raised nary an eyebrow while Scalia's were subjected to a firestorm of criticism.

simply by not stating his views publicly. If holding religious beliefs somehow constitutes a "bias"—a view inconsistent with the Religious Test Clause of the Constitution<sup>31</sup>—that bias exists whether or not it is expressed publicly. Scalia has strong opinions on a number of issues, a fact of which no reader of his judicial opinions can be unaware. It may even be that Scalia's religious views affect his interpretive method or judicial philosophy (though they certainly do not appear to translate neatly or automatically into "pro-religion" rulings<sup>32</sup>), just as other justices' personal views and opinions doubtless affect their performance as judges. Hiding such views does not mean they do not exist.

But more fundamentally, to assert that a judge's possession or expression of religious opinions is improper is to discriminate against a certain set of views, in violation of everything most dear to the values of the First Amendment. A justice can be a feminist and say so. A justice can be an environmentalist and say so. A justice can be a conservative and say so. But a justice cannot be religious and say so?

In sum, the judicial ethics argument seems a product of either sloppy thinking or a bias against the expression of religious ideas in particular. Or perhaps it is some combination of both; for it does seem that a near-reflexive bias against serious religious belief and expression has a tendency to generate uncommonly sloppy thinking. Was this perhaps part of Scalia's point? His point about the response of secularists to miracles and reports of miracles is in part a description of ingrained bias affecting intellectual judgment: Why *isn't* the proper response to a reported miracle to investigate the phenomenon with an open mind, and, if it cannot otherwise be explained, to be

---

31 U.S. CONST. art. VI, cl. 3; *see* *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399 (9th Cir. 1995) (Noonan, J.) (rejecting argument that Judge Noonan must recuse himself, because of his strongly held religious beliefs, from a case involving abortion, on the ground that the argument is inconsistent with the Religious Test Clause of Article VI). Judge Noonan's opinion rejects any suggestion that "fervently-held" religious beliefs are somehow distinguishable from those "lukewarmly maintained," for purposes of the Religious Test Clause: "A moment's consideration shows that the distinction is not workable. . . . No thermometer exists for measuring the heatedness of a religious belief objectively. Either religious belief disqualifies or it does not. Under Article VI it does not." *Id.* at 400.

32 *See, e.g.,* *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Smith*, which substantially diminished the level of constitutional protection afforded the free exercise of religion, is perhaps Scalia's most notorious majority opinion, and the only one that produced a near-unanimous act of Congress seeking to vitiate the holding through enactment of enhanced statutory protection for religious exercise. *See* Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1994)) (RFRA). The constitutionality of RFRA is currently before the Court. *See Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996).

willing to accept it as true? Why isn't an attitude of *a priori* rejection of the possibility of miracles, the supernatural, and religious truth considered narrow-minded and anti-intellectual? The answer is that the anti-religious bias in our elite culture *does* produce unclear thinking: unclear thinking about religion, unclear thinking about judicial ethics, and—as we shall see—unclear thinking about the constitutional law of religious freedom of expression.

#### IV. IGNORANCE, INTOLERANCE, AND RELIGIOUS LIBERTY

Scalia's point was not to indict the secular media and elite culture. But at least one of *our* points is. With a kind of ironic reverse-english, the media's and pundits' reaction to Scalia's speech actually tends to prove the point they (wrongly) thought Scalia was trying to make: that religious persons and religious ideas have suffered outrageous mistreatment at the hands of the secular media and the elite culture. When opinion-makers do not understand, or attempt to understand, religious ideas and values, their treatment of them will inevitably be insensitive, wooden, and riddled with shallow stereotypes and misconceptions. The charge that Scalia's speech violated some standard of judicial ethics also turns out to backfire: the charge reduces to a bias against judges' personal-capacity expressions of religious opinions, but not of other opinions. When opinion-makers possess a reflexive bias against religion (perhaps fed by ignorance), they will tend not to recognize their own discrimination as such.

Such attitudes, we submit, are affirmatively destructive of First Amendment religious liberty. Ignorance about religion breeds intolerance of religion, which exerts a downward gravitational pull on the protection of religious liberty. In short, ignorance drags liberty. Worse, once the value of religious liberty and religious ideas is degraded, religious expression comes to be treated as suspect, leading to the degradation of its status as a constitutional right.

If these attitudes were confined to the media, it would be bad enough. Unfortunately, however, such attitudes are prevalent not only among reporters and columnists, but among bureaucrats charged with administering government programs and, with distressing frequency, judges charged with the interpretation and enforcement of First Amendment rights. Even if Scalia had been engaged in "flirtation with Christian victimology,"<sup>33</sup> there is surely a grain of truth in the proposition that religious ideas are treated disparagingly by modern society. One need look no further than the scornful columns

---

33 See Taylor, *supra* note 4, at 39.

of Stuart Taylor, Joan Biskupic, and Clay Chandler for evidence of such treatment. But one finds further support in the stories of cases that have ended up in the courts. Several of these stories parallel the story of Scalia's speech: religious expression, misunderstood or feared, is singled out for discrimination.

We offer just one such case by way of illustration: *Settle v. Dickson County School Board*, to which we give the subtitle "Jesus Christ Gets a Zero."<sup>34</sup> *Settle* is an absolutely amazing case of fear and misunderstanding of religious expression. A ninth grade English teacher assigned her students the task of choosing a topic for, and writing, a research paper. The students could choose any topic they wished, so long as it was "researchable"—in the sense that students would be required to make use of at least four secondary sources, like books, encyclopedias, magazines, or pamphlets—as well as "interesting" and "decent."<sup>35</sup> The teacher accepted topics on reincarnation, witchcraft, black magic and the occult, and spiritualism (ghosts and supernatural encounters with the deceased), as well as topics ranging from the *Pony Express* to a 1920s jazz singer.<sup>36</sup>

But the teacher rejected Brittney Settle's topic: "The Life of Jesus Christ." There was some question about whether Brittney had given the teacher fair notice, as she had changed her topic between the sign-up and the initial outline stages, but that was not the teacher's explanation (at least not at first). Rather, the teacher said, addressing the topic of the life of Jesus Christ was "not an appropriate thing to do in a public school" because of its religious nature. It "was inappropriate because . . . it was dealing with her personal religion, her personal Savior."<sup>37</sup> The student stood firm in her desired topic, and the teacher stood firm in her refusal to permit it, meaning that the debate was played out in the principal's office with Brittney's parents. The teacher defended the distinction between other papers that had been accepted on the ground that reincarnation, spiritualism, and the occult do not address religious topics. The teacher and principal also refused to permit Brittney to modify the topic to address "psychological and scientific aspects of Jesus Christ." Brittney turned in her paper

---

34 53 F.3d 152 (6th Cir.), *cert. denied*, 116 S. Ct. 518 (1995); see Nat Hentoff, *A Zero for Jesus in a Public School*, WASH. POST, Jan. 26, 1996, at A23. In the interest of full disclosure, the reader should note that Professor Paulsen was counsel for Brittney Settle in her unsuccessful petition for certiorari.

35 *Settle*, 53 F.3d at 153.

36 *Id.* at 159 (Batchelder, J., concurring).

37 *Id.* at 154.



on the life of Jesus Christ, and the teacher refused to read it, assigning her a grade of “zero” for failure to complete the assignment.<sup>38</sup>

Antonin Scalia has it easy; life tenure means never having to say you’re sorry. Brittney Settle was stuck with a zero on (as our parents used to say) her “permanent record.” The superintendent, school board, and federal courts backed up the teacher and principal. Why? In part, the explanation is that, by the time the matter got to litigation, the teacher had come up with several additional reasons why she had turned down Brittney Settle’s topic, including the procedural argument of lack of notice (which seems distinctly disingenuous, under the overall circumstances). That argument was sufficiently shaky that the teacher felt compelled to reinforce it with at least five others that the courts identified. Among them was the assertion that Brittney’s strong personal belief in Jesus Christ would make it difficult for her to write a dispassionate research paper; that Brittney “knew a lot about Jesus Christ,” and therefore “could produce an outline without doing any significant research, and thus defeat the purpose of the exercise”; and that “the law says we are not to deal with religious issues in the classroom.”<sup>39</sup>

The evidence suggested that (to put it mildly) the teacher may have applied some of these criteria selectively. In this regard, the pretextual explanation we like best is the teacher’s assertion that it would be impossible to find four sources on the life of Jesus Christ, as “all of the sources that you [are] going to find documenting the life of Jesus Christ derive from one source, the Bible.”<sup>40</sup> (Matthew, Mark, Luke, and John? “Q”? There is, of course, a rather notable abundance of secondary literature on the life of Jesus.) We don’t know whether it is worse to hope that this was clumsiness in fabricating a pretext or to believe that the teacher really thought her statement to be true. It is discouraging to think that a community’s respected ninth grade English teacher is, apparently, either lying or in need of a remedial education of her own. It is also discouraging to see school officials rallying to support such actions by their teachers.

The courts’ actions in upholding the school district’s position at first appear somewhat easier to explain: they didn’t want to get involved in supervising paper topics for junior high school English classes. Both the district court and the court of appeals basically adopted holdings of broad deference—extremely broad, on these facts—to school officials’ judgments. The Sixth Circuit held that all of

---

38 *Id.*

39 *Id.* at 154-55 (quoting the school teacher, Ms. Ramsey).

40 *Id.*

the reasons given by the teacher “fall within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students, *even the reasons that may be mistaken*.”<sup>41</sup>

The deference argument is a fair one. But it is hard to imagine a court taking such an unequivocally hands-off approach if the subject been something other than traditional religion. Suppose, for example, Brittney Settle had been a young lesbian who proposed to chronicle the history of the gay and lesbian movement, but the teacher had rejected her proposal on the ground that “dealing with sexual orientation—personal sexual preference” is “just not an appropriate thing to do in a public school.”<sup>42</sup> Or suppose Brittney were a member of a racial minority group and proposed to write a paper on the evils of racial segregation, but the teacher refused her request on the ground that Brittney’s own racial identity or her strong personal belief in ending racism would make it difficult for her to write a dispassionate research paper. Suppose the teacher had said to Brittney, “Since you’re African-American, you obviously know a lot about racism, and I won’t allow you to write about it because you could prepare an outline without much work and therefore defeat the purpose of the assignment.” Perhaps the outcome would have been the same, but we doubt it.<sup>43</sup> Certainly, the courts would not have responded so charitably to a teacher and school district that defended their actions on the ground that “the law says we are not to deal with issues [of racism] in the classroom.”

The interesting part of the *Settle* story is thus the attitudes toward *religious* expression in particular that the case reveals—at each level of the dispute. Why did the teacher initially recoil at Brittney Settle’s choice of a paper topic? Why should religious expression have been treated with such unique suspicion or hostility? The answer, perhaps, is that an entire generation of educators has come of age since the School Prayer and Bible Reading cases of the early 1960s and learned

---

41 *Id.* at 156 (emphasis added).

42 *Compare Gay & Lesbian Students Ass’n v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) (holding that when state university funds student organizations, it may not discriminate among otherwise eligible recipients on content-based or ideological grounds), *with Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269 (4th Cir. 1994) (stating that university may not, absent compelling justification, discriminate against recipients of student funding on content- or viewpoint-based grounds, but avoidance of Establishment Clause violation constitutes compelling interest justifying such discrimination if recipient would use funds to express religious viewpoints), *rev’d*, 115 S. Ct. 2510 (1995).

43 *Cf. Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (state university may not deny funding to otherwise eligible publication on the ground that the publication advocates racial segregation).

a shorthand—and inaccurate—version of First Amendment law, along the lines of “no religion in the schools.” Ignorance of the law leads to hostility toward religion, rather than simply the absence of government-sponsored religion. Moreover, “no religion in the schools” becomes more than an incorrect principle of law to be obeyed; it becomes a mantra concerning what is desirable and what is undesirable. Religion has *no place* in school (or in the public sphere generally) because it is—in the words of Brittney’s teacher, “not an appropriate thing to do in a public school.”<sup>44</sup>

It is a slippery slope from ignorance of religion to suspicion of religion to hostility toward religion. The final step, of course, is suppression of religious expression and religious ideas by government officials, and the more-than-occasional ratification of such suppression by the courts. Ignorance of religion itself becomes a tool in that process: reincarnation, black magic, the occult, and witchcraft do not address religious ideas, but “The Life of Jesus Christ” does. There do not exist four sources on the life of Jesus Christ. It is somewhat startling that any ninth grade teacher would say such things. It is incredible—but extremely instructive—that the principal, the superin-

---

44 *Settle*, 53 F.3d at 154. It should go without saying that the study of religion, like the study of philosophy, history, and language, has a place in public school classrooms. (Indeed, the teacher’s own actions in permitting other students to write on spiritualism, reincarnation, and magic suggest that even she would concede as much.) As the Supreme Court has explained:

[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

*School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1962). This *should* go without saying, but unfortunately it no longer can be assumed. It is by now a commonplace observation that religious references have been excised almost entirely from public school texts and public school curricula. See, e.g., Michael W. McConnell, “*God is Dead and We Have Killed Him!*”: *Freedom of Religion in the Post-modern Age*, 1993 BYU L. REV. 163, 180-81 & nn.63-64 (collecting authorities documenting the absence of even references to religion in public education); McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 162 (1986).

If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least that the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not ‘neutral.’ Studious silence on a subject that parents may say touches all of life is an eloquent refutation.

*Id.*

tendent, the school board, a federal district judge, and three court of appeals judges would all go along.

There are literally scores of similar cases that illustrate the point equally well: students being hauled to the principal's office for praying in the cafeteria or publicly stating a belief in God, student Bible study groups being refused permission to meet on the school lawn or an empty classroom during lunch hour or before or after school, religious groups being excluded from privileges solely on account of their religious identity.<sup>45</sup> There are certainly enough examples so that those who make this point cannot be dismissed as "whining wimps of victimology."<sup>46</sup> To the contrary, these are only the victims who have fought for their rights in court.

The critics of Scalia would, evidently, prefer that such persons exercise their right to remain silent. Any other course, in their view, is "whining," a "right-wing litmus test," or simply introduces inappropriate topics into public discussion. Such reactions are deeply instructive about the state of society and the present condition of religious liberty, in terms of the public atmosphere in which issues of religion and religious freedom are debated, litigated, and decided. One of the more ill-reasoned criticisms of Scalia's sermonette, raised by a few critics, is that the fact that a Supreme Court justice is allowed to make such a speech proves that religious freedom is alive and well in America and therefore disproves Scalia's point.<sup>47</sup> True, an Antonin Scalia may say what he wishes—and receive "merely" a tirade of scorn. But that does not make what Scalia said less real for others. The Brittney Settles of the world often may *not* say what they wish.

---

45 For a partial list, see the examples collected in Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 658-70 & n.22 (1996). There are also several reported cases very much like *Settle*, both in their facts and in their results. See *DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744, 749 (E.D. Mich. 1992) (second grade student forbidden from making show-and-tell presentation about her participation in church choir), *aff'd without published opinion*, 1 F.3d 1240, 12 F.3d 211 (6th Cir. 1993); *Duran v. Nitsche*, 780 F. Supp. 1048, 1052-55 (E.D. Pa. 1991) (student forbidden from making classroom oral report on "The Power of God" in fulfillment of assignment to prepare a presentation on some variation on "The Power of \_\_\_\_"), *vacated and appeal dismissed*, 972 F.2d 1331 (3d Cir. 1992); *Guidry v. Calcasieu Parish Sch. Bd.*, 9 Religious Freedom Rep. (Church-State Resource Ctr.) 118 (E.D. La. 1989) (high school class valedictorian forbidden from speaking at commencement because of her expressed intention to mention her personal religious beliefs in her address), *aff'd on jurisdictional grounds sub nom. Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1990).

46 See Taylor, *supra* note 4, at 37.

47 See, e.g., Chandler, *supra* note 10, at F7 (quoting Eliot Minberg, legal director of People for the American Way).

These cases are also instructive about the circumstances in which committed religious believers of all kinds—Christians, Muslims, Jews, Hindus, Rastafarians, and others—find themselves today, in relation to the nation's elite institutions. Justice Scalia's comments were addressed to his coreligionists, Christians, in noting the existence of such attitudes and suggesting the proper Christian response: to reject the so-called wisdom of the worldly wise, in favor of the foolishness of faith in God.

One must indeed question the wisdom, and spirit of tolerance, of those who would find in such remarks something to be feared, ridiculed, condemned, and extirpated.