AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

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U.S. Supreme Court Justice Antonin Scalia : a Disaster for Separation of Religion and the State

The recent death of Justice Antonin Scalia of the United States Supreme court has even reverberated in the Australian media. There have been two very different versions of his legacy by conservative Catholic and liberal experts in jurisprudence - The Australian; *February 19, 2016.* But who exactly was this man of influence. Was he a brilliant judge or a clever Jesuit lacking in empathy or both?

DOGS agree with Americans United for Separation of Church and State that whatever his personality, Scalia's legacy is that of a dangerous, radical conservative in matters of Church and State. Although, with his legal 'originalism' he claimed to be interested in the intentions of the original Founders of the American Constitution, he twisted the original concept of separation of church and state to fit the conservative views of his Catholic forebears. Jesuit trained, he turned a hundred years of cases which erected a wall between religion and the state, on their head. This proved extremely deleterious for those fighting for human rights, the environment, freedom Of and FROM religion, and above all, a strong public education system. Unfortunately, his influence has been felt on the Australian legal tradition.

Scalia was appointed to the bench by President Ronald W. Reagan in 1986. He was the longest-serving justice on the current court. For many years, he was perpetually writing dissents when it came to church-state cases. Just one year after joining the high court, for example, Scalia angrily denounced a ruling striking down a Louisiana law requiring "balanced treatment" between evolution and creationism in the state's public schools.

Back then, Scalia could find only one other justice, William H. Rehnquist, to agree with him. In recent times, sadly, Scalia has more allies on the court and is often joining majority opinions, not penning dissents.

Scalia is gone. The eventual retirement of other justices will shift the court in a profound way. And the man or woman sitting in the White House will determine the direction of that shift. If the shift is toward what the founders intended, secular government and state neutrality on matters of theology, the day may come when the United States highest court finally acknowledges that government endorsement of generic, watered-down religiosity honors neither church nor state and consigns it to the dustbin of history.

It is also to be hoped that the Australian High Court will eventually have Justices that go back to a proper interpretation of Section 116 of Our Constitution and implement proper separation of religion from the State and the consequent abolition of State Aid to private, religious schools.

The following are comments on the death of Justice Scalia by Americas United for Separation of Church and State :

https://www.au.org/blogs/wall-of-separation/intelligence-test-justice-scalia-and-the-limits-of-brilliance

Intelligence Test: Justice Scalia And The Limits Of Brilliance

Feb 17, 2016 by Rob Boston in Wall of Separation

Scalia lacked empathy, and he fell down when it came to understanding how his rulings affected the lives of others.

As I sift through the news in the wake of Supreme Court Justice Antonin Scalia's death, there's one word I keep seeing over and over again: Brilliant.

We're told that even if you disagreed with Scalia's extremely conservative views, you must stand in awe of his brilliance, his genius, his searing wit.

Fair enough. I have observed Scalia in action many times at the Supreme Court over the past 28 years. I don't doubt that he was a pretty smart guy.

But I also know that there are different kinds of intelligence, and I suspect that Scalia excelled at some and failed at others.

There is technical knowledge – the ability to learn facts, to gather information and synthesize it and then apply what you've learned to the world around you. There's the ability to present a clever and glib argument. There's the power to project your views with confidence and state what you believe boldly and be able to defend it in the face of a withering counter-argument.

Scalia could do all of those things. Where he failed, I would assert, is in the area of what we might call social or emotional intelligence. Specifically, he lacked empathy, and he fell down when it came to understanding how his rulings affected the lives of others.

When LGBT Americans petitioned the courts for their rights, Scalia couldn't be bothered. His vision of the Constitution didn't encompass them. End of story. When women sought reproductive rights (not just legal abortion but increasingly even access to contraceptives) Scalia applied a cold and narrow formula that failed even to acknowledge the human costs of his actions.

Scalia was a big fan of the idea that government should be able to "honor" our traditions by endorsing religion in a general way. (This concept, by the way, is found nowhere in our Constitution – so much for "originalism.") He didn't seem to understand or to care how various forms of government-sponsored religion infringed on the rights of the people who don't share those views.

The combative jurist even seemed to believe that some overtly religious symbols could have a secular interpretation, something any theologian worth his or her salt would dispute. During an oral argument in 2009, Scalia failed to grasp why anyone would be bothered by the idea of a cross being used as a war memorial. Showing a remarkable degree of cultural blindness, he argued that you see crosses all the time in cemeteries. Peter Eliasberg, an attorney arguing the case for the ACLU, had to explain to him, "It's erected as a war memorial. I assume it is erected in honor of all the war dead. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew."

Scalia joined the high court in 1986. One of his first church-state cases was 1987's *Edwards v. Aguillard*, a dispute from Louisiana challenging a state law that required creationism be taught alongside evolution in public schools. The law was struck down 7-2. Scalia was in the minority.

A few months after that ruling came down, I heard Scalia speak at an event in Washington, D.C. A scientist was bothered by his dissent and asked Scalia about it. Scalia seemed oblivious. He refused to accept that creationism is religion, and he truly didn't understand the danger of subjecting millions of children to non-scientific concepts in public schools. (He was, it seems, not so brilliant about science.)

Scalia's church-state views reflected a majoritarian streak. Relegating millions of Americans to second-class citizenship didn't bother him a whit. This self-described "fool for Christ" seemed to have a difficult time understanding why other Americans might not care to join him and why minority rights are just as important as majority ones.

Technical intelligence is great, but it will take you only so far. Truly brilliant people at least try to get into the heads of those who are not like them. Smart people evaluate their own actions, attempt to assess the fallout from what they do and, at some point, ask, "What if there – by the grace of God or otherwise – were to go I?"

A person of true intelligence grapples with these issues. They can keep you up at night; such people know that brilliance lacking at least some degree of kindness, empathy and care for others is of little value.

I don't believe Scalia was ever troubled by such questions. He slept soundly, secure in the knowledge that he was always right and that if his rigid and doctrinaire interpretation of the Constitution meant that a few people had their rights mauled in the process, so be it.

You can call that many things. "Brilliant" isn't one of them.

https://www.au.org/church-state/february-2016-church-state/editorial/government-s-god-scalia-and-the-fraud-of

Government's God: Scalia And The Fraud Of 'Ceremonial Deism'

February 2016
Editorial

U.S. Supreme Court Justice Antonin Scalia believes that nothing in the Constitution prevents the government from endorsing and promoting religion – as long as it's not too specific.

Addressing a crowd at a Catholic high school in Louisiana last month, Scalia asserted that the Constitution does not require the government to be neutral between religion and non-religion.

"To tell you the truth, there is no place for that in our constitutional tradition," Scalia opined. "Where did that come from? To be sure, you can't favor one denomination over another but can't favor religion over non-religion?"

Scalia added that there is "nothing wrong" with ceremonial endorsements of religion by government officials. He asserted that our nation must honor God because God has treated the United States well.

"God has been very good to us," Scalia remarked. "That we won the revolution was extraordinary. The Battle of Midway was extraordinary. I think one of the reasons God has been good to us is that we have done him honor. Unlike the other countries of the world that do not even invoke his name, we do him honor. In presidential addresses, in Thanksgiving proclamations and in many other ways. There is nothing wrong with that, and do not let anybody tell you that there is anything wrong with that." He expressed concern that the courts were trying to "cram" secularism "down the throats of an American people."

For all of his talk about the Constitution, Scalia's speech lacked one thing: quotes from passages in that document that would support his view. He was unable to quote them because there aren't any.

The Constitution is a secular document. It does not appeal to any deity and, despite what many Americans may believe, it fails to single out Christianity for special treatment.

The ceremonial references that Scalia so prizes are mostly of recent vintage. The United States lacked an official motto during most of its existence, although *E Pluribus Unum* ("Out of Many, One") served that function unofficially. In the 1950s, Congress got the bright idea to create an official motto and settled on "In God We Trust" as a slap at the "godless communists" who then ruled our arch-nemesis the Soviet Union.

It was around the same time that the words "under God" were slipped into the Pledge of Allegiance. The original pledge, as drafted by Francis Bellamy (who, by the way, was a socialist!) in 1892, didn't contain the phrase.

Courts haven't taken challenges to these practices very seriously. They tend to label them examples of "civil religion" or "ceremonial deism" and let it go at that. The thinking seems to be that yes, we're not allowed to establish any religion by law – unless it's a pseudo-faith that no one takes too seriously and is watered down to the point that almost no one is offended.

Perhaps that made some sense in 1956. It makes none in 2016. Plenty of people these days are offended by civil religion – and they're not all non-believers. Believers who yearn for an authentic faith know why a one-size-fits-all god who can be downsized so as to fit on a nickel isn't worthy of anyone's worship.

The empty rituals and formulaic expressions of piety found in a mayor's official prayer day proclamation apparently mean a lot to Scalia. They are, he argues, a way of honoring God, and in turn this Supreme Being, pleased at our city hall supplications, will bestow a benevolent hand of protection upon our nation.

The theology is shaky at best – some would argue a bit childish. Regardless, Scalia's generic, government-approved god is not something the founders conceived of. It is a much later invention. The irony is that Scalia, who insists that he is a constitutional "originalist" who sees nothing in the document beyond its words on parchment, has grafted this imaginary concept onto our founding charter.

Disturbing Dissent: Scalia And Thomas Use AU Graduation-In-Church Case To Blast Separation Yet Again

Jun 17, 2014 by Simon Brown in Wall of Separation |

The reality is that church-state separation cannot exist in the real world without at least some assistance from the courts. The religion clauses of the First Amendment are a mere 16 words long. It's up to judges to interpret those words. That's what makes this noble principle so fragile.

It is becoming increasingly clear that the right wing of the U.S. Supreme Court is openly hostile toward the constitutional principle of church-state separation.

In May, the high court narrowly ruled in *Town of Greece v. Galloway*, a case sponsored and litigated by Americans United, that the governing board of Greece, N.Y., may invite Christian ministers to make invocations in the name of God or Jesus Christ at its monthly board meetings – all with the approval of elected officials.

That appalling opinion was authored by Justice Anthony M. Kennedy and supported by Chief Justice John G. Roberts along with Justices Samuel A. Alito, Antonin Scalia and Clarence Thomas.

Seemingly unsatisfied with the damage caused by *Greece*, Scalia and Thomas apparently felt the need to explain once again why they think coercive religious activities on the part of government are not actually the same as an establishment of religion.

Yesterday, the Supreme Court once again considered an AU-sponsored case – *Doe v. Elmbrook School District*. The school district had sought review of a July 2012 decision in which a 10-judge panel of the 7th U.S. Circuit Court of Appeals struck down a Wisconsin school district's use of an evangelical megachurch to hold commencement ceremonies.

Fortunately most of the high court had no interest in hearing the case, which meant a victory for AU. But not Scalia and Thomas, who wanted to take the case or order the appeals court to reconsider its decision.

In a seven-page dissent, Scalia asserted that the *Elmbrook* case is not fundamentally different from *Greece*. Citing Kennedy's opinion, Scalia contended that holding a public school graduation in a church is not equivalent to government endorsement of religion.

In a truly callous moment, Scalia also wrote that the sensitivities of a handful of people are not the concern of the U.S. Constitution.

"*Town of Greece* made categorically clear that mere '[o]ffense . . . does not equate to coercion' in any manner…," he said. "It is perhaps the job of school officials to prevent hurt feelings at school events. But that is decidedly not the job of the Constitution."

What Scalia and Thomas failed to grasp is that the plaintiffs in *Elmbrook* were not just some bunch of overly sensitive Richard Dawkins disciples. In fact, all students and parents who attended graduations at Elmbrook Church were subjected to a barrage of fundamentalist Christian propaganda. Students received their diplomas underneath an immense Christian cross. Parents and children sat in pews filled with Bibles and hymnals, "Scribble Cards for God's Little Lambs" and church promotional cards that asked them whether they "would like to know how to become a Christian." The church's lobby was filled with evangelical pamphlets and postings, many of which were aimed at children and teens.

That hardly sounds like the passive presence of materials simply left over from church services.

Like Kennedy in *Greece*, Scalia also focused on "tradition" as a justification for government-sponsored religious activity. In his *Elmbrook* dissent, Scalia argued that early public schools used church buildings for school functions.

"As demonstrated by [*State ex rel. Conway* v. *District Board of Joint School Dist.*], the Wisconsin case mentioned above, public schools have long held graduations in churches," Scalia said. "This should come as no surprise, given that '[e]arly public schools were often held in rented rooms, church halls and basements, or other buildings that resembled Protestant churches.'"

In fact, there is no evidence of any consistent historical practice of public schools using churches for graduations. And in any event, just like Kennedy in *Greece*, Scalia seems to think that the America of today is the same as it was in the 19th and even early 20th centuries. The *Conway* case did indeed hold that having a public school graduation in a Wisconsin church is not government endorsement of religion.

(The case also upheld the giving of prayers at public school graduations, a practice the Supreme Court struck down in its 1992 decision *Lee v. Weisman.)*

That case was decided in 1916, a time when women could not yet vote, African Americans were subjected to Jim Crow laws and a Jewish man, Leo Frank, had recently been lynched by a Georgia mob after being falsely accused of rape.

Does Scalia honestly think nothing has changed in 100 years? And would he advocate for a return to slavery, simply because it was an American “tradition” for more than 200 years?

The reality is that church-state separation cannot exist in the real world without at least some assistance from the courts. The religion clauses of the First Amendment are a mere 16 words long. It’s up to judges to interpret those words. That’s what makes this noble principle so fragile.

If it were up to Scalia and Thomas there would be almost no separation at all. It’s pretty frightening knowing that two judges who think that way sit on the most powerful court in the land.

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