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Law School Report

Supreme Court Justice ANTONIN SCALIA
makes an original case

Back *to* basics

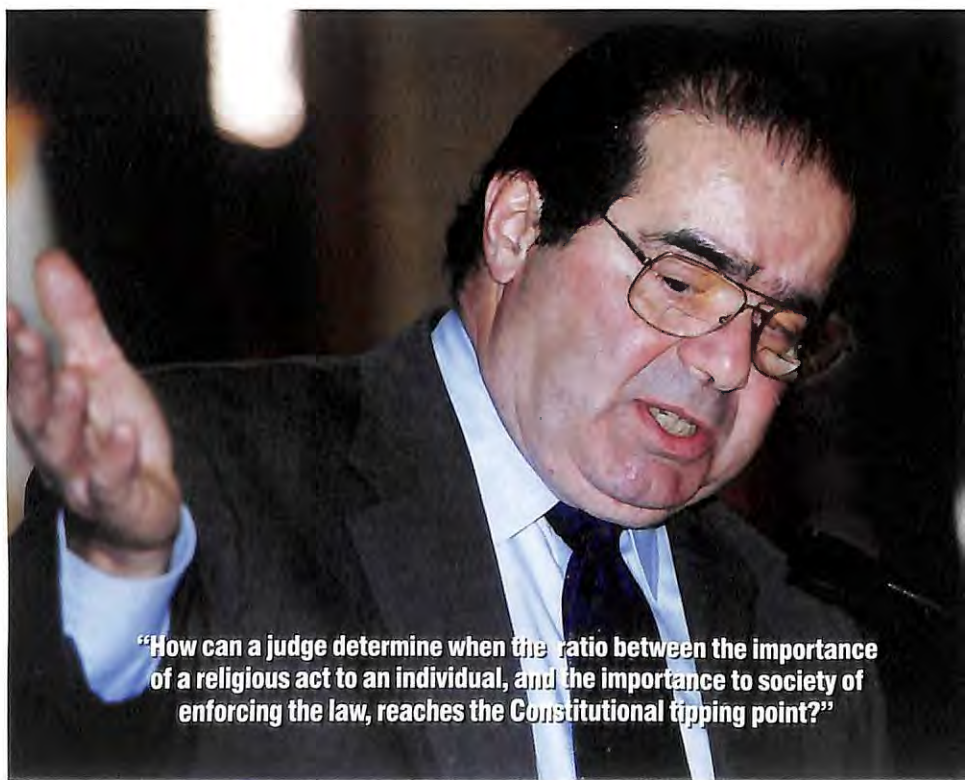
The U.S. Supreme Court's foremost "originalist," who bases his decisions on the premise that he will not read into the Constitution more than the Founding Fathers intended, was the featured speaker March 13 at a luncheon in his honor at the Hyatt Regency Buffalo.

An overflow crowd that included more than 130 law students and 45 judges heard Scalia, nominated to the nation's highest court by President Ronald Reagan in 1986, defend his position on that issue with analysis, example and a healthy dollop of wit.

His appearance was sponsored by Chabad House of Western New York and the UB Law School. Ilene R. Fleischmann, associate dean for alumni and communications, served as master of ceremonies. Nearly 1,000 tickets were sold for the event.

In his 40-minute speech and in a question-and-answer session that followed, Scalia was consistent in arguing that the Constitution "says what it says, and no more than that." He cited what he called the "three supporting pillars" of Constitutional construction: the text; the tradition in which the text was written ("Where the text is ambiguous, it is to be understood as it was understood when written"); and the principle of immutability ("We have an enduring Constitution, not a living one").

He spoke of a Texas case, *Texas Monthly v. Bullock*, concerning whether the Establishment Clause of the First Amendment contravened a state law that exempted doctrinal publications from the state sales tax. That case was decided by "the application of formulaic abstractions," he said. "Now, I have nothing against formulaic abstractions, otherwise



"How can a judge determine when the ratio between the importance of a religious act to an individual, and the importance to society of enforcing the law, reaches the Constitutional tipping point?"

known as rules. But those formulaic abstractions ought to be derived from the text of the Constitution, or in cases where that is unclear, the practice that we have applied to those texts."

He quoted a priest in his Jesuit high school as justification for applying what Scalia called the "Shakespeare principle" to judicial interpretation. Father Tom Matthews, in the midst of a student's criticism of *Hamlet*, stopped the boy and said: "Mister, when you read Shakespeare, Shakespeare is not on trial – you

are.” Likewise, Scalia said, “the prudent jurist does not judge traditions, he is judged by them.”

For example, he said, the Supreme Court has upheld the constitutionality of prayers said at the beginning of a legislative session, saying that in light of their long tradition, such prayers do not violate the Establishment Clause. “These traditions are the raw data from which opinions should be derived,” Scalia said, “much as the conditions of nature are the raw data from which the laws of physics are derived.”

Scalia also cited *Oregon v. Smith* – “my most popularly acclaimed opinion,” he noted wryly, because within two years Congress sought to overrule it. The case involved two men who had been fired from their jobs as drug counselors because, as members of the Native American church, “they had been going up into the hills and using peyote on weekends, and this did not seem to be a very good thing for a drug counselor to be doing.” The men sued after being denied unemployment benefits, claiming that the Free Exercise Clause “permits any person to follow his conscience as to what he must do, and the state cannot prevent him from doing that unless there is a compelling state interest for doing so.” What the court ruled against, Scalia said, was “the notion that all laws are subject to a religious exception – that it is up to the courts on a case-by-case basis.”

The crux of the case, he said, was this question: “How can a judge determine when the ratio between the importance of a religious act to an individual, and the importance to society of enforcing the law, reaches the Constitutional tipping point?”

“The Establishment Clause does not say that any person may disregard a law that goes against his religious belief. That’s a very different thing” from the proscription of government establishment of religion.

In another case, *Goldman v. Weinberger*, the issue was whether an Air Force captain who is Jewish can be denied the right to wear a yarmulke. The U.S. District Court ruled that there was a compelling state interest at stake – a position with which Scalia said he agrees. In this case and others, he argued that it is up to state legislatures, not judges, to decide these questions.

During the question-and-answer period, he referred to a copy of the Constitution that he kept in his breast pocket. He spoke in strong terms of the split between the constructionist and originalist camps of Constitutional interpretation. “People who believe in a ‘living Constitution’ say, ‘That is not what it used to mean, but it means that now.’ People did not used to think that way.



Justice Scalia and Associate Dean Ilene R. Fleischmann.



Justice Scalia greets his friend David B. Filvaroff while Rabbi Noson Gurary looks on.

And we are not going to last another 200 years if we keep thinking that way. Once you depart from that (originalist) understanding, you leave it up to the Supreme Court to decide what the Constitution ought to mean.”

And as a practical consequence of that attitude, he said, “You are going to find that selection of judges for the court becomes a very political hot potato. Every time you need to appoint a new Supreme Court justice, you are going to have a mini-plebiscite on what the Constitution means.”