# How to keep Supreme Court justices accountable.

## Entry 10: Who judges the judges.

Akhil Reed Amar June 25, 20162:02 AM

President Barack Obama passes a portrait of Supreme Court Justice Antonin Scalia after paying respects as Scalia lays in repose on Feb. 19 in Washington, D.C.

Brendan Smialowski/AFP/Getty Images

Dick raises important issues, two of which are at the heart of my forthcoming book, *The Constitution Today*, due out in September (and currently available for preorder).

First, Dick wonders about the willingness of professors to criticize justices forthrightly. Here is what I say about that in the book:

> Who judges the top judges?
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> Not the journalists. … Professional journalists generally lack the time, the temperament, and the training to do all that needs to be done to keep the constitutional system honest.
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> If not the fourth estate, then how about the three branches? Of course, inter- and intra-branch checks and balances are crucial parts of our constitutional system—ambition checking ambition, and all that. But it is awkward for lower federal court judges to take it upon themselves to keep their bosses in check. The formal lines of appeal run from bottom to top, not the other way around. More generally, federal inferior court judges are self-interested actors within the larger governmental system, as are state judges, other state officials, and other federal officials. None of these actors has a credible claim to complete independence and disinterestedness.
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> The organized bar surely has a role to play in judging the justices, but lawyers also practice before the court, and those who want to win may aim to please. Winning lawyers generally command higher fees and higher status. These realities blunt the willingness of top lawyers to always speak truth to power—here, judicial power. Besides, the ultimate touchstone for judging the judges (and all other government actors) is the Constitution itself—and how much do most top lawyers really know about the Constitution and all its parts?
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> Enter the constitutional law professor.
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> Although my academic position was not intentionally designed for the

> purpose of judging the judges and keeping them honest, my job does have the right features. I too have life tenure, which enables me to take a long view about both the Constitution and the court (as well as other organs of government). I have had years of training in constitutional law, and I know how the judiciary works. Like the justices, I have been afforded considerable leeway to define my own agenda. Thanks to manageable teaching loads and a generous compensation package—not to mention winter, spring, and summer breaks—I am able to do deep-drilling, time-consuming research, which is difficult for most journalists given the parlous economic condition of the modern fourth estate. I am not a governmental actor seeking to increase the power and privileges of my own coercive branch. Thus, I can credibly adopt a neutral and disinterested stance vis-à-vis competing branches, acting as an umpire of sorts. Because I do not practice law before the justices themselves—because I do not litigate—I do not need to flatter the members of the court in order to put food on my table or win points in a status hierarchy. Instead, I can perform a useful social function by both praising and criticizing the justices as I see fit, as a sincere and relatively disinterested, albeit fallible, professional observer—a true friend of the court. And I can do all this in a public way—sometimes in newspapers and magazines and books aimed at the general public, and other times in more specialized works of legal scholarship designed mainly for lawyers, judges, and other expert governmental officials.

Dick, I had you specifically in mind when I wrote about the awkwardness of a lower court judge taking it upon himself to publicly put the justices in their place; almost no one else in your position does this, but you do, all the time. Are the other lower court judges mistaken in their sense of restraint? Or are you stretching the limits of the role? Did our mutual hero Henry Friendly ever go this far? These are sincere questions, not rhetorical gotchas. I am truly

interested in your thoughts on this.

And speaking of the judicial role, you are quite dismissive not just of constitutional history, but also, apparently, of constitutional text and structure. If you had admitted in your confirmation hearings that judges should spend virtually no time carefully studying "the Constitution, the history of its enactment, its amendments, and its implementation," would you have ever been confirmed? Or would your comments—which seem to me to go far beyond what David Strauss has publicly said, in a purely academic capacity—have been seen as disqualifying by the U.S. Senate, given the proper role of a judge in our constitutional system? Again, this is not a snarky gotcha question: I am sure you have thought about this confirmation-hearing question but I cannot recall ever having seen you address it.

I myself do not think that constitutional history is the be-all and end-all. But here is what I do say about this in the new book:

> It might be asked why the current generation of Americans should ever resolve any genuinely difficult and important modern issue by paying close attention to words penned and deeds done long ago by now-dead men.

> Despite—or perhaps because of—their age, the Constitution's text and traditions provide important sources and resources for modern constitutional conversation and contestation. This old text and the history of its implementation furnish a common vocabulary for our common deliberations—a shared national narrative that can facilitate social cooperation and coordination for a diverse and highly opinionated populace. Also, many of the difficult issues faced by modern constitutional decision-makers are in fact surprisingly similar to those faced by their predecessors, because today's constitutional institutions

> lineally descend from the Founders' institutions. Presidents still sign and veto bills, the Senate still remains the judge of its own elections, the House continues to enjoy the power of impeachment, and so on.

> Modern interpreters should attend to various elements of the Constitution's original intent not because these old unwritten understandings always and everywhere tightly bind us today, but rather because we can learn from our constitutional predecessors. The evils that they lived through—that they experienced firsthand at epic moments in American history such as the Revolution and the Civil War—can help us understand why they put certain things in the text, to spare us from having to suffer as they suffered. Various rights emerged from real wrongs, wrongs we ignore at our peril.

> Simply put, the written Constitution is often wise—typically, wiser than judges acting on their own steam—because the document distills the democratic input of many minds over many generations. More ordinary people voted on the Constitution in 1787-88 than had ever voted on anything else in world history. In saying yes to the Constitution that year, everyday people up and down the continent wisely insisted that a Bill of Rights be added—a Bill in which the phrase "the people" appears no fewer than five times. Later generations of ordinary Americans mobilized to enshrine in this terse text an end to slavery, a sweeping guarantee of equal birthright citizenship, an emphatic commitment to protecting civil rights against all levels of government, and radical expansions of the rights of political participation—to blacks, to women, to the poor, to the young, and more. These were epic democratic achievements, and they are all worthy of profound respect by today's Americans. We, the people of the twenty-first century ignore the collected and collective wisdom of this old and intergenerational text at our peril.

Dick, when I wrote these words about how the Constitution is typically "wiser than judges acting under their own steam" please know that I did in fact have you specifically in mind. (In fact, I think about you often!) You are a truly wise man. But the Constitution itself is vastly wiser than any one of us—even you!—and your failure to appreciate this democratic fact is not wisdom, but hubris. And in saying this to you bluntly, here and now, I think I am also refuting your thought that academics are afraid to take on judges directly.

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# How the founders were wiser than modern judges.

## Entry 19: Constitutional lessons.

Akhil Reed Amar June 27, 20166:24 PM


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Mark, I promised earlier to discuss the Fourth Amendment. Perhaps I can also, in the process, respond to Dick's pointed questions to me. (I am still hoping he might, in turn, answer the questions I posed to him.)

Dick asked whether I have "succeeded in changing judicial behavior." Well, I

am doing what I can, and I am grateful for the sustained and respectful judicial attention that my scholarship has received from justices and judges across the spectrum. (Much of my work has been directed at institutions other than courts, and here, too, I am pleased by the response. For a few metrics, both judicial and nonjudicial—Supreme Court citation numbers, congressional invitations to testify, presidential commendations, and the like—see here and here.)

Mark, before we get to the Fourth Amendment, let me say a couple of things about two other doctrinal areas that have been hot topics of late. First, voting rights. The Constitution speaks of the right to vote in no fewer than five clauses—all five postdating the Civil War. I have written lots about the text, history, structure, and context of these provisions and about closely related issues of legislative and electoral-college apportionment. Justices from across the spectrum—including Justice Ruth Bader Ginsburg in her epic dissent in the 2013 *Shelby County v. Holder* case, and Justices Samuel Alito and Clarence Thomas in this term's *Evenwel v. Abbott* decision—have apparently found my analyses useful and have seen fit to cite them favorably. In recent years, Dick has begun to see the light on voting rights and the grave threat posed to them by voter ID laws and other partisan attempts to make voting more difficult than it should be. Unfortunately, by his own admission, Dick failed to see the light earlier in the 2007 case of *Crawford v. Marion County* when he wrongly upheld certain unjustified voter ID laws. (When the case reached the Supreme Court, the majority followed Dick's lead, alas.) In 2013, Dick admitted that he goofed in *Crawford,* and he is to be commended for this candid confession of error. More recently, he wrote a widely hailed dissent reflecting his newfound wisdom. By contrast, I and many other voting scholars were right all along on this topic, and I believe we were right precisely because we had studied with care the constitutional history of voting rights in America, including all five amendments, the related

Republican Government Clause, the hugely important and interrelated Voting Rights Act of 1965 and its legislative history, and companion Warren court cases elaborating the relevant constitutional principles. So here is one concrete illustration of how a wise judge (or a professor, or citizen seeking wisdom) can become wiser by carefully studying some of the very constitutional sources Dick now pooh-poohs.

Next, consider the Second Amendment and the related provisions of the 14th Amendment making the Bill of Rights applicable against state and local governments. Although I have never owned a gun and I favor a strong package of sensible gun-control laws, I have explained in great detail in books, in scholarly articles, and even right here in ***Slate*** that the relevant constitutional materials do support a federal constitutional right to have an ordinary handgun in one's home for self-protection. When I first started writing, my scholarly views ran counter to the mainstream of judicial and academic thought. Today, many scholars have embraced views similar to mine, and our scholarly views have become settled judicial doctrine. In the most recent Supreme Court decision to address the issue in detail—a decision from Dick's hometown, coincidentally—my scholarship was favorably cited by justices on all sides: six times by Alito in his majority opinion, twice by Thomas in concurrence, and once by Justice Stephen Breyer in dissent. Here, too, Dick's track record is more mixed. Several of the gun-related things that he has said casually from the bench and has written in pop pieces over the years reflect a lack of familiarity with the relevant constitutional history. Not just founding history, but Reconstruction history and the history of recent state constitutional provisions that are pertinent in considering both enumerated and unenumerated rights in America. So, here is another example of why it pays to study with care some of the very materials Dick is now mocking.

Which brings me, Mark, to the Fourth Amendment. The Fourth Amendment

simply does not provide for the exclusion of evidence except, perhaps, in very special circumstances. This point is clear from its text, history, and structure. The exclusionary rule is also suboptimal deterrence policy: It provides windfalls to the guilty and no remedies to the innocent. If the cops know you are innocent, the exclusionary rule is no help. We need tort law and property law to protect persons' rights to themselves and their stuff; and once we have the proper set of property and tort laws in place—laws against unreasonable government officials and agencies—the exclusionary rule is unnecessary and affirmatively mischievous. Crime victims are hurt by the exclusionary rule, and needlessly so. Oh, and the seeming paradox that is giving you whiplash, Mark—a court that this term read Fourth Amendment rights broadly and the remedy of exclusion narrowly—is no paradox at all. Judges will be more willing to construe Fourth Amendment rights broadly if the extreme sanction of exclusion is used sparingly or not at all: Precisely because the "remedy" of exclusion is so troubling, many judges are inclined to deny that the Fourth Amendment was violated in a close case where an obviously guilty criminal defendant is seeking a get-out-of-jail-free card. Conversely, judges will be more willing to read the Fourth Amendment's rights guarantees broadly if the beneficiaries of these rulings are in general innocent civil plaintiffs rather than guilty, and perhaps violent, criminal defendants.

Here too, we can learn from the founders, who were wiser than modern judges have been in acting on their own steam and without proper constitutional support for their adventures. In general, the court has been moving in my direction over the last two decades, trimming back exclusion using a wide variety of doctrines. My views about Fourth Amendment rights and remedies have not always prevailed in court, but in five Fourth Amendment cases over the past quarter-century, justices from across the spectrum have favorably invoked my scholarly work.

I am hardly the only scholar to have written on Fourth Amendment rights and remedies. In particular, my work in this area owes a special debt to the late Telford Taylor's scholarship. (Interestingly enough, Dick, Taylor was a scholar in the Ben Kaplan tradition, having practice law for many years before joining the academy; I too wish there were more Telford Taylor types in today's academy.) Taylor's scholarship was prominently mentioned this term by Alito in *Birchfield v. North Dakota*, a case about blood and breath testing of suspected drunk drivers. My own Fourth Amendment scholarship also explicitly builds on an excellent 1981 article, "Rethinking the Fourth Amendment," that was written by a member of the University of Chicago law faculty at the very same time that you were still on the full-time faculty, Dick! The article, citing Taylor again and again, makes some truly powerful points about constitutional text and history—some of the very sources you have said are virtually irrelevant. Over the years, this article has in fact also been cited a couple of times by the Supreme Court—which also cuts against your idea that the court pays no attention to law professors. The article was written by a law professor named Richard A. Posner. Any relation?

Dahlia, I still owe you a few thoughts about Justice Anthony Kennedy's affirmative action opinion, so please stay tuned.

***Read the previous entry.*** **/** ***Read the next entry.***

# What Justice Anthony Kennedy might have been thinking on affirmative action.

## Entry 24: Three theories of a swing justice.

Akhil Reed Amar June 28, 20165:35 PM


Students protest in support of affirmative action outside the Supreme Court during the October 2013 *Schuette v. Coalition to Defend Affirmative Action* hearing in Washington, D.C.

Andrew Burton/Getty Images

As we break our breakfast (and go back to the fast, I guess), I wanted to say

a few words in response to Dahlia's elegant and incisive critique of Justice Anthony Kennedy's opinion for the court in the Texas affirmative action case *Fisher v. University of Texas at Austin* (*Fisher II*). She found the opinion rather "confusing," filled with "rigor[ous] … mushiness."

Here are three takes on the Kennedy opinion in response.

*Take One (the Cynic)*: This is just the sort of opinion one might expect from a swing justice who wants to keep his options open in future cases. We saw similar stuff from previous swing justices like Sandra Day O'Connor and Lewis Powell. On the one hand, the *Fisher II* opinion can, in the future, be limited to its unique facts, involving the general background of the University of Texas' uncontested Ten Percent Plan: Affirmative action was OK on this day, in this time, at this place, and in this way, but not in other situations of Kennedy's choosing. (If the swing justice is so inclined and the court's makeup allows it.) On the other hand, if the future swing justice would like to swing left rather than right, the *Fisher II* opinion can become a base from which further doctrinal expansion and evolution might occur: Strict scrutiny is evidently not fatal to affirmative action, in fact, and nondeferential review may involve rather more judicial deference than previously thought. (The deference, like the devil, is in the details, and the details are ultimately to be assessed by the swing justice.)

*Take Two (the Shrink):* This is classic Kennedy. Sonorous and soaring, full of high-minded earnestness—and, of course, dignity—but at times gauzy and hard to understand in all its twists and turns. The opinion is especially awkward because Kennedy is trying to faithfully follow a landmark 2003 case in which he personally dissented, *Grutter v. Bollinger*. But what's up with his pointed citation to the *dissent* (by Justice Ruth Bader Ginsburg) in *Fisher I*, a case Kennedy himself authored only a few years ago—involving the very same parties as the case at hand?

*Take Three (the Generous Reader):* The opinion reflects the intrinsic difficulties of affirmative action policy and affirmative action doctrine. Modern affirmative action is about history, about past governmental and societal discrimination, about black America in particular. But to openly admit all this is to risk stigma, stereotyping, and backlash. So instead we talk the happier talk of "diversity" in which no fingers of blame are pointed at past actors and actions, and fewer uncomfortable things are said or strongly implied about why these policies might be necessary.

I myself am inclined to the third take. Perhaps it's because I have always been a fan of Justice Kennedy's, even though we do not always agree. Candidly, I just plain like him as a human being, and I am thus inclined to think that his music, like Wagner's, is actually better than it sounds.

And speaking of liking people, it has been such great fun to breakfast with you all; you are a truly dazzling breakfast club! Thanks again for inviting me.

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