The Child Vanishes: Justice Scalia’s Approach to the Role of Psychology in Determining Children’s Rights and Responsibilities

Aviva Orenstein
Indiana University Bloomington - Maurer School of Law, aorenste@indiana.edu

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THE CHILD VANISHES: JUSTICE SCALIA’S APPROACH TO THE ROLE OF PSYCHOLOGY IN DETERMINING CHILDREN’S RIGHTS AND RESPONSIBILITIES

Aviva Orenstein*

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* Professor of Law and Karen Lake Buttrey and Donald W. Buttrey Chair, Indiana University Maurer School of Law. Thanks to Cait Barbas and Audrey Crites for their excellent research and to Molly Hays and Cassandra Fitzwater for able administrative assistance. I appreciate the helpful comments from faculty who attended the Indiana University Maurer Summer Workshop. Thanks especially to Dan Conkle, Victoria Hilkavitch, Joe Hoffman, Sylvia Orenstein, Dan Segal, Steve Sanders, Jim Sherman, Deborah Widiss, and Rebecca Zietlow for insightful comments on various drafts. All mistakes are my own.
INTRODUCTION

This Article explores how Justice Antonin Scalia’s hostility to psychology, antipathy to granting children autonomous rights, and dismissiveness of children’s interior lives both affected his jurisprudence and was a natural outgrowth of it. Justice Scalia expressed a skeptical, one might even say hostile, attitude towards psychology and its practitioners. Justice Scalia’s cynicism about the discipline and the therapists who practice it is particularly interesting regarding legal and policy arguments concerning children. His love of tradition and his rigid and unempathetic approach to children clash with modern notions of child psychology. Justice Scalia’s attitude towards psychology helps to explain his jurisprudence, but more importantly, illustrates how his dedication to tradition, history, and originalism leads to his attitudes towards children and psychology, and raises interesting questions about the role of psychology in legal opinions. The use of children as “posterchildren”—sympathetic representatives of liberal causes—for abolishing the death penalty and curtailing public-sponsored prayer clearly irked Justice Scalia. Additionally, Justice Scalia’s attitudes toward psychology present a fascinating lens for assessing how judicial philosophy and personal proclivity reinforce each other. More broadly, this Article explores how judges should use brain science, social psychology, and clinical psychology in their legal analyses.

It is always a dangerous and potentially disrespectful game to analyze someone’s worldview from afar, all the more so if the person being considered is not alive to contradict you. Therefore, the focus of the Article is on Justice Scalia’s written opinions and, to a much lesser extent, his prolific speech-making, which are all available texts subject to analysis. Justice Scalia’s dissents offer particular insight into his thinking because he did not have to write to please or persuade other Justices; therefore, the opinions expressed in dissent are less varnished or muted. This Article probes Justice

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1 But cf. Brian Leiter, Rethinking Legal Realism: Toward A Naturalized Jurisprudence, 76 TEX. L. REV. 267, 314 (1997) (“[J]udicial opinions are a rich repository of material for the armchair ‘folk’ psychoanalyst. Surely, for example, the astonishing rigidity of Justice Scalia’s constitutional jurisprudence, especially his fear of ‘unconstrained’ judgment or Justice Thomas’s almost pathological incapacity for—or unwillingness to engage—empathetic feelings, both cry out for psychoanalytic explanations.”) (footnotes omitted).

2 See Scalia Book Explores the Man Behind the Justice, NPR (Nov. 12, 2009, 11:55 AM), https://www.npr.org/transcripts/120350132 (“You know, I would think his core essence comes out not so much in the majority opinions, because those are the ones where he has to keep at least four other justices on board . . . .”); Gary Lawson, Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism, 84 U. CHI. L. REV. 2265, 2265 (2017) (“Dissenting opinions gave Justice Antonin Scalia the most freedom to exercise his considerable skills as a writer and were therefore more likely to produce memorable one-liners. They were also the best occasions for him to express his
Scalia’s writings for themes regarding children and psychology without pretending to fully know or understand the man himself.

In Part I, this Article presents Justice Antonin Scalia’s jurisprudence, noting the theme of respect for tradition that permeates his opinions. Justice Scalia’s express statements about psychologists are addressed in Part II, arising largely from Jaffee v. Redmond, a case concerning the federal psychotherapist-patient privilege. Parts III and IV consider the role of psychology in Justice Scalia’s opinions with a particular focus on the psychology of children. Focusing on children’s rights, best interests, and psychological needs, Part III examines Justice Scalia’s opinions (mostly dissents) on issues of paternity, adoption, confrontation, and membership in families where the parents are gay. Part IV addresses Justice Scalia’s opinions (again mostly dissents) on the death penalty for juveniles and in the applicability of establishment-clause rights to high schoolers. Both subjects raise questions about the responsibilities and capacities of children, drawing distinctions between adolescents and adults. Part V presents the key themes and priorities of Justice Scalia’s jurisprudence in the overlap between children and psychology, noting that Justice Scalia’s personal dedication to tradition and hierarchy reinforced his intense skepticism, bordering on contempt, for the notion of children’s rights. Part V also highlights Justice Scalia’s tendency to ignore or demean questions of childhood trauma, essentially erasing the child from the analysis. Instead, he focused on arid legal analysis and championed the rights of parents or the state to direct children’s lives. Finally, Part VI broadens the inquiry to account for some of Justice Scalia’s biting criticisms of the use of psychology in judicial determinations involving children, and briefly raises the question of the role of psychology in law generally for future analysis.

Given Justice Scalia’s role in modern jurisprudence and his engaging mind, these issues are fascinating. They are also deeply relevant, given that three of the last four Justices appointed to the Supreme Court cited Scalia as a mentor and guide in how to interpret and apply the law. As I will argue below, Justice Scalia’s judicial philosophy inexorably leads to the support of parents and the state at the expense of children. When the interests of the state and parents collide, his approach is rife with contradictions and confusion. Modern issues regarding children, such as prohibiting discussion of same-sex unions in elementary school or denying parents the right to treat gender dysphoria in their children, require us to revisit Justice Scalia’s approach to children and their best interests. Though his acolytes may not adopt the same harsh tone towards children or the discipline of psychology, Justice Scalia’s

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approach towards history, tradition, and originalism guarantees that a similar disregard of children’s interests and skepticism towards practitioners of psychology will win the day.

I. JUSTICE SCALIA’S JUDICIAL PHILOSOPHY AND VENERATION OF TRADITION

Justice Scalia sat on the Supreme Court from 1986 to 2016, authoring 337 majority opinions, 385 concurrences, 270 dissents, and 49 dissents or concurrences in part. A father of nine, he credited his wife, Maureen, with raising their children. His jurisprudence emphasized tradition, history, textualism, originalism, and respect for established hierarchy. This Article argues that all of these attributes helped shape his attitudes towards children and psychology.

Justice Scalia was a pugnacious arguer and a strident, sometimes emotional dissenter. He was also a consummate stylist, witty, and full of acerbic zingers. By all accounts, Justice Scalia was personally amiable.

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6 See Terry A. Maroney, Angry Judges, 65 VAND. L. REV. 1207, 1245 (2012) (“Perhaps no one has perfected the art of the angry dissent better than Justice Antonin Scalia.”); Conor Clarke, How Scalia Lost His Mojo, SLATE (July 5, 2006, 3:59 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/how_scalia_lost_his_mojo.html (describing Justice Scalia’s jurisprudence as “equal parts anger, confidence, and pageantry,” noting that his dissents “read like they’re about to catch fire from pure outrage,” and opining that Justice Scalia’s dissent in Planned Parenthood v. Casey “achieved a level of frustrated fury usually reserved for undersea volcanoes and small dogs tied to parking meters”).
7 See, e.g., Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (“The Court’s argument that state officials have ‘coerced’ students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.”); Romer v. Evans, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting) (“[T]he Court’s opinion is so long on emotive utterance and so short on relevant legal citation.”); Grutter v. Bollinger, 539 U.S. 306, 346–47 (2003) (Scalia, J., concurring in part) (claiming that the University of Michigan Law School’s position “challenges even the most gullible mind”); Michigan v. Bryant, 562 U.S. 344, 379 (2011) (Scalia, J., dissenting) (charging that the majority description of the facts “is so transparently false that professing to believe it demeans this institution”); United States v. Windsor, 570 U.S. 744, 794 (2013) (Scalia, J., dissenting) (observing of the majority’s due process argument, “Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe.”); King v. Burwell, 576 U.S. 473, 498 (2015) (Scalia, J., dissenting) (calling the majority’s interpretation of the language of the Affordable Care Act “quite absurd, and the Court’s 21 pages of explanation make it no less so”); Obergefell v. Hodges, 576 U.S. 644, 719 n.22 (2015) (Scalia, J., dissenting) (mocking Kennedy’s majority opinion claiming that even to get a fifth vote, if Scalia had to join an opinion with such bloated prose, he “would hide [his] head in a bag”).
8 See Nadia Klarr, It Isn’t Easy to Be Right—A Young Lawyer’s Tribute to the Late Great Justice, 64 FED. LAW. 7, 7 (2017) (“Infuriating, scathing, cantankerous, smug, and combative, yet larger-than-life,
traveled to India with the notorious RBG, with whom he shared a love of opera, if not a worldview. In a similarly surprising vein, he took Justice Elena Kagan deer hunting. Justice Scalia had a lovely singing voice and led the annual carol-singing at the Supreme Court.

Justice Scalia frequently asserted his belief in democracy, federalism, and states’ rights, advocating federal deference to the states, and judicial deference to the political process. Although in tone and manifest self-assurance he exuded little humility, his avowed guiding principle of being a federal judge was that of servant, not leader, interpretivist, nor policymaker.

In statutory interpretation, Justice Scalia advocated a textual, literalist approach. For Constitutional matters, he focused on and venerated the original meaning of the founders. As an originalist, Justice Scalia consulted historical research to uncover the context of the common law at the time of gregarious, charming, and an intellectual legacy—familiar descriptors of the late justice.” (citing JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA (2010)).


12 I learned this fact from the late, great Honorable Edward R. Becker, who in addition to serving as the Chief Judge of the U.S. Court of Appeals for the Third Circuit, used to travel from Philadelphia to Washington around the Christmas holiday to play piano for the Court’s holiday sing-along. Judge Becker was self-taught and played entirely by ear.


14 This applied to his statutory interpretation as well. Justice Scalia perceived any other approach to interpreting text as undemocratic. As he explained, “To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.” ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF THE UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 23 (new ed., 1997); see also George Kannar, The Constitutional Catechism of Antonin Scalia, 99 YALE L.J. 1297, 1307, 1310 (1990) (quoting Justice Scalia from the 1986 Hearings from the Senate Committee on the Judiciary that “‘the text of the document and what it meant to the society that adopted it’ would always be for him ‘the starting point and the beginning of wisdom,’” and postulating that Justice Scalia’s fervent dedication to textualism reflected a “revival of religious fundamentalism, particularly Christian fundamentalism, as a popular political, spiritual and social ideology”); David M. Zlotnick, BATTERED WOMEN & JUSTICE SCALIA, 41 ARIZ. L. REV. 847, 849 (1999) (describing Scalia’s constitutional methodology as “textualism, faint-hearted originalism, and the clear rules principle”).
America’s founding.\textsuperscript{15} He also engaged in linguistic analysis, often resorting to the dictionary.\textsuperscript{16} Justice Scalia explained that “while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”\textsuperscript{17} Justice Scalia railed that the Constitution is “not a living document . . . . It’s dead, dead, dead\textsuperscript{18}—unchangeable except by proper amendment.\textsuperscript{19} He decried new-fangled constitutional standards that, in his opinion, merely reflected “each Justice’s subjective assessment of what is fair and just.”\textsuperscript{20} Although Justice Scalia’s tone often came across as a smug “I know better than you,” his message, ironically, was one of judicial diffidence and restraint, particularly for federal judges. He preached a brash, loud, and proud form of humility.\textsuperscript{21} Justice Scalia consistently preferred hard rules and bright lines over mushy standards.\textsuperscript{22} Despite his pro-prosecution leanings and a notable punitive streak, Justice Scalia reached landmark pro-defense results in his

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\textsuperscript{16} See, e.g., Crawford, 541 U.S. at 51, 71; David M. Zlotnick, Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology, 48 EMORY L.J. 1377, 1389 (1999) (“For Scalia, the ordinary social and dictionary meaning of individual words is the most important, and often decisive, ingredient of his analysis of a constitutional provision.”).  

\textsuperscript{17} SCALIA, supra note 14, at 24.

\textsuperscript{18} See Zlotnick, supra note 16, at 1380 (“Scalia’s Constitutional Methodology: The Constitution as Cadaver”).

\textsuperscript{19} Burnham, 495 U.S. at 623. The fear that the constitutional command was to be determined by whatever Brennan (or any other liberal justice) had for breakfast was also expressed in Stanford and Simmons, discussed in Part IV. See Lee v. Weisman, 505 U.S. 577, 632 (1992) (“Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.”); Zlotnick, supra note 16, at 1385 (“Scalia believes the greatest danger to the Constitution is the modern Court’s willingness to use open-ended interpretation to implement the Justices’ own values.”).

\textsuperscript{20} Cf. Klar, supra note 8, at 7 (attributing the statement, “It isn’t easy to be right,” and its intended double entendre, as a catch phrase Justice Scalia used to utter to his clerks when he discovered mistakes in their work).

famous confrontation-clause opinions. True to his interpretivist, textual bent, Justice Scalia attempted to apply the Confrontation Clause in the Sixth Amendment literally—an unachievable goal given its vague language and our lack of historical knowledge about what the founders believed.

Justice Scalia claimed to eschew politics and personal predilections, portraying himself as a rational actor, discerning and applying the law rather than promoting his own preferences, a vice he attributed to the liberal wing of the Court. He displayed no post-modern angst about applying law rationally or neutrally, evincing a view of his ability to do so that fell somewhere on the spectrum from naive to quaint to disingenuous. For instance, Justice Scalia opened his dissent in *Obergefell v. Hodges* by stating: “The substance of today’s decree is not of immense personal importance to me.” No, according to Justice Scalia, it was all about democracy and faithfulness to the Constitution.

So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.


24 See George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 19 (2014) (discussing Crawford’s “Flawed Originalism”); see Zlotnick, *supra* note 16, at 1423 (“Occasionally reaching ‘liberal’ results such as this has proven very useful to Scalia. He holds up the contrarian cases as proof that his methodology is politically neutral and constrains judicial discretion.”).

25 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (declaring himself a “faint-hearted originalist” and critiquing nonoriginalism, noting that “[i]t is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society’”); Zlotnick, *supra* note 16, at 1382 (“According to Scalia, substantive constitutional doctrines should be merely the byproduct of the proper application of these neutral methods to specific issues.”). For a critique of Justice Scalia’s notions of neutrality, see Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 HAW. L. REV. 385, 391–92 (2000) (noting the “impossibility of value neutral judging” and noting that “the original meaning of the Constitution and the Republican platform are remarkably similar”).


27 *Id.* at 713 (Scalia, J., dissenting). The extravagant criticism, heated mockery and contempt tell another story. See, e.g., *id.* at 719 (stating that the majority opinion “is couched in a style that is as pretentious as its content is egotistic”).

28 *Id.* at 713 (“I write separately to call attention to this Court’s threat to American democracy.”).

29 *Id.* Justice Scalia portrayed his opponents on the Court as anti-democratic and out of touch with the desires of average Americans. Justice Scalia’s words resonate post-Dobbs. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). On the one hand, it is obvious that Scalia would have voted to overturn *Roe* and would see it as a win for states’ rights. On the other hand, this notion of six justices overruling the will of the majority of Americans could be used as an indictment of *Dobbs*. 
Justice Scalia’s faithfulness to process and legislative deference, however, was selective and demonstrably non-neutral.30 Though conservative in many respects, and a self-avowed preserver of tradition, Justice Scalia was willing to overrule contrary precedent from the Warren Court with little compunction.31 I agree with a commentator who observed that Justice Scalia “changed the way the Supreme Court writes and analyzes its cases and the tone judges and lawyers use to disagree with each other, evincing a pungent anti-elitist populism that, aside from some criminal procedure cases, mostly served his conservative values.”32

Additionally, Justice Scalia regularly advocated for a moral order that reinforced hierarchy and tradition.33 In what might seem like an unexpected

30 See Antonin Scalia and His ‘argle-bargle,’ MSNBC (June 26, 2013, 1:17 PM), http://www.msnbc.com/rachel-maddow-show/antonin-scalia-and-his-argle-bargle (“When it’s the Voting Rights Act and the Affordable Care Act on the line, Scalia doesn’t hesitate to take an axe to ‘democratically adopted legislation,’ approved by the elected representatives of Americans who are able to ‘govern themselves.’ But when it’s the Defense of Marriage Act, Scalia suddenly remembers his affinity for restraint?”); Mitchell N. Berman, Judge Posner’s Simple Law, Reflections on Judging, 113 MICH. L. REV. 777, 784–85 (2015) (book review) (discussing Judge Posner’s criticism of Justice Scalia’s hypocrisy, inconsistency, and selective use of history in District of Columbia v. Heller, a Second Amendment case; Posner accuses that when it suits his conservative leanings, Justice Scalia “jettisons originalism”) (citations omitted); Chemerinsky, supra note 25, at 385 (“[T]here is a disingenuousness to Justice Scalia’s decision-making and a meanness to his judicial rhetoric that I believe are undesirable and inappropriate . . . . What disturbs me about Justice Scalia’s jurisprudence is that by denying that it is making value choices, it pretends that its decisions are a result of a neutral judicial methodology. As a result his value choices are not defended, but rather hidden behind a claim that the results have been discovered not chosen.

31 Justice Brennan observed of Justice Scalia’s argument in Michael H. v. Gerald D., 491 U.S. 110, 138 (1989): “It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents.” Michael H. is discussed in Part III of this Article. See also David A. Strauss, Tradition, Precedent, and Justice Scalia, 12 CARDOZO L. REV. 1699, 1699 (1991) (“During his first Term on the Supreme Court, there was a period of a little over a month in which [Justice Scalia] called for overruling five major precedents. The trend has not abated: last Term he again urged that at least five major cases be overruled . . . .”) (footnotes omitted).


33 See, e.g., Burnham v. Super. Ct. of Cal., 495 U.S. 604, 621–22 (1990); Lawrence v. Texas, 539 U.S. 558, 588–90 (2003) (Scalia, J., dissenting). But see Zlotnick, supra note 16, at 1421 (“Scalia’s real allegiance is simply to preserving ‘traditional American moral values’ at all costs . . . . He strives in his jurisprudence to conserve traditional moral values against legal and cultural change. He is exercised not by the methodology of recent Supreme Court decisions, but by the results.”) (quoting and criticizing as
venue, Justice Scalia repeatedly evoked tradition in *Burnham vs. Superior Court of California*, 34 a personal jurisdiction case that raised the question whether California had personal jurisdiction over a father visiting his children in the state for a weekend. *Burnham* determined that the State of California could exercise its power over the defendant dad. Justice Scalia’s reasoning had nothing to do with the plurality’s modern argument that the father established minimum contacts in California. Instead, Justice Scalia believed that since the defendant dad had received the summons and complaint while he was physically within the territory of California, the issue was easily resolved by “principles traditionally followed by American courts.”35

Other examples of Justice Scalia’s traditionalist approach abound. In *Michael H. v. Gerald D.*, 36 a paternity case discussed in Part III, Justice Scalia noted: “In an attempt to limit and guide interpretation of the [due process] Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”37 In dissenting in *United States v. Windsor,* 38 the Defense of Marriage Act case, Justice Scalia again emphasized the role of tradition, quoting his own dissenting opinion in *Lawrence v. Texas* that “the Constitution does not forbid the government to enforce traditional moral and sexual norms.”39 Similarly, traditional exclusion of women from an all-male state military college in the Virginia Military Institute case did not present an equal-protection problem for Justice Scalia.40

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34 See generally *Burnham*, 495 U.S. 604 (1990) (plurality opinion) (concerning whether the *International Shoe* due process-standard of “minimum contacts” and fairness applied to a defendant who received in-hand service of a non-resident within the jurisdiction). *Burnham* claimed that California had no personal jurisdiction over him because he was a temporary visitor and did not have sufficient minimum contacts with California to render subjecting to that jurisdiction reasonable. The Court agreed as to jurisdiction, but not as to the reasons supporting jurisdiction.

35 *Id.* at 609 (emphasis added). Because in-hand service was traditionally allowed, the standard of “traditional notions of fair play and substantial justice” was satisfied, and there was no need to focus on minimum contacts or fairness. *Id.* (emphasis added). Justice Scalia argued in a plurality opinion that “a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably” satisfied due process. *Id.* at 622.

36 Michael H. v. Gerald D., 491 U.S. 110 (1989). Justice Scalia also observed that a right must be “deeply embedded within our traditions as to be a fundamental right,” *id.* at 125, and insisted that “the asserted liberty interest be rooted in history and tradition,” *id.* at 123.

37 *Id.* at 122.


39 *Id.* at 795 (Scalia, J., dissenting) (citing *Lawrence v. Texas*, 539 U.S. 558, 559 (2003) (Scalia, J., dissenting)).

40 United States v. Virginia, 518 U.S. 515, 520 (1996) (holding that Virginia offered no equal alternative for women and therefore violated the Equal Protection Clause by prohibiting women from VMI). His objections to Justice Ginsburg’s famous opinion rested on Justice Scalia’s support for
Longing and nostalgia for a mythical bygone era are two prominent emotions of one who venerates tradition. As argued below, this longing and nostalgia for a traditional patriarchal family also shaped Justice Scalia’s notions about psychology, parenthood, and childhood.

II. PSYCHOLOGICAL “ARGLE-BARGLE”: SKEPTICISM ABOUT THE RELIABILITY, SCIENTIFIC ACCURACY, AND RELEVANCE OF PSYCHOLOGY

“Psychology” can mean different things in different contexts. To take a leaf from Justice Scalia’s book, I note that the Merriam-Webster Dictionary defines psychology as “the science of mind and behavior.” This general definition can be divided into distinguishable aspects, of which this Article considers three: (1) clinical psychology, which involves individual and group therapy designed to help people in distress (e.g., anxiety, depression, paranoia, obsessive behavior) and to help people maximize happiness and well-being; (2) brain science and developmental psychology, which include academic study of human behavior based on experiments, surveys, and brain scans; and (3) social psychology, which examines how “social influence, social perception, and social interaction influence individual and group behavior.” All three are implicated in this Article and to various degrees traditional single-sex education, his rejection of women as a suspect class, his concern about overreach by the Supreme Court in its power over the states, and what he considered the subversion of democratically legislated institutions of learning. Id. at 570 (Scalia, J., dissenting) (“[R]eversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court.”).

41 Svetlana Boym, Nostalgia and its Discontents, HEDGEHOG REV., Summer 2007, at 7, 9 (2007); Ekaterina Kalinina, What Do We Talk About When We Talk About Media and Nostalgia?, MEDIEN & ZEIT 6, 10 (2016) (discussing nostalgia’s role in rewriting history, allowing people to cleanse their “memory of the oppressive aspects” and “remember gratefully the parochial privacy, slowness and predictability” of life (quoting FRIEDRICH FRITZ STERN, FIVE DECADES I HAVE KNOWN 479 (2006)).


43 See Debra Orenstein, Modern Science, Ancient Wisdom, and A New Theory of Hope, 67 MASORTI 125, 125 (2023) (“Positive psychology seeks to balance the important work of traditional psychology by focusing on spreading and increasing happiness, purpose, altruism, hope, and other positive states and traits.”).

disdained (and in the case of developmental psychology, occasionally used) by Justice Scalia.

Justice Scalia invoked many unusual turns of phrase, often when mocking or dismissing an argument. Among them was “argle-bargle,” which he employed to deride the arguments in *United States v. Windsor.* Justice Scalia charged the majority with being disingenuous, writing that “the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow,” was the imputation that those favoring traditional marriage desired to harm same-sex couples. As I demonstrate below, psychological argle-bargle ranked even lower in Justice Scalia’s estimation than legalistic argle-bargle.

One recurring theme is Justice Scalia’s concern that psychology provides sentimental cover and a foot-in-the-door to those advancing a progressive agenda. This is particularly evident in the juvenile death penalty cases, where he believed that the expansion of cruel-and-unusual-punishment as applied to children was a gateway to banning capital punishment for adults.

### A. Questioning the Value of Psychotherapy

*Jaffee v. Redmond* provides an interesting window into Justice Scalia’s hostility toward clinical psychology, therapy, and its practitioners. *Jaffee* considered whether federal courts should recognize a psychotherapist-patient privilege, and, if so, whether such a privilege applied to social workers. In his dissent, Justice Scalia grudgingly acknowledged that, “[e]ffective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society.” But he argued that the price of losing valuable evidence—in this case, the notes of a social worker—outweighed the benefits of protecting and encouraging psychotherapeutic counseling.

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46 *Id.* at 22 (Scalia, J., dissenting).
47 *Id.* at 22 (Scalia, J., dissenting).
48 *Id.* at 22 (Scalia, J., dissenting).
49 *Id.* at 18 (“The Court has discussed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytic counseling. It has not mentioned the purchase price: occasional injustice.”).
privileges narrowly and adopting new privileges cautiously.\textsuperscript{50} He wrote: “The Court today ignores this traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill-defined.”\textsuperscript{51} Applying the privilege, he argued, transformed the evidence rules into “instruments of injustice.”\textsuperscript{52}

Justice Scalia dismissed the helping professions as symptoms of modern moral weakness, implying that they unnecessarily professionalized normal human interactions. He expressed nostalgia for an imagined prior world where emotions were best engaged informally with intimates, not professionals. He queried with a palpable sense of longing:

When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, \textit{inter alios}, parents, siblings, best friends, and bartenders—none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.\textsuperscript{53}

\section*{B. Distrust of Practitioners, Particularly Social Workers}

Justice Scalia bristled at the so-called expertise of therapists, portraying them as liberal shills, hucksters, and charlatans. Despite his avowed concern with the rights and powers of the legislative branch, Justice Scalia was skeptical about special privileges granted by legislatures to therapists. He

\begin{footnotes}
\item[50] \textit{Id.} at 19 (citing United States v. Nixon, 418 U.S. 683, 710 (1974) for the proposition that testimonial privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth”).
\item[51] \textit{Id.} at 19–20. Justice Scalia also raised some related good arguments. First, it is difficult to know the practical effect of shielding confidential communications with psychotherapists. Justice Scalia was certainly correct that the privilege wastes valuable evidence if the person claiming the privilege would have sought counseling anyway without it. \textit{See id.} at 23–24. Also, Justice Scalia rightfully criticizes the Court for not spelling out the contours of the new common-law privilege. \textit{See id.} at 23.
\item[52] \textit{Id.} at 22 (Scalia, J., dissenting).
\item[53] \textit{Id.} Obviously, for equal protection reasons, there could be no mother-child privilege as opposed to a parent-child privilege. \textit{Cf.} Sessions v. Morales-Santana, 582 U.S. 47 (2017) (finding that a distinction between father and mother regarding requisite time in the United States necessary to confer citizenship on child violated equal protection). Four states have adopted some version of the child-parent privilege. \textit{See} Sande L. Buhai, \textit{Toward a Parent-Inclusive Attorney-Client Privilege}, 53 GA. L. REV. 991, 1006 (2019). By way of comparison, in ancient China, one who testified or even informed upon his parents was scorned. \textit{See} Rui Zhu, \textit{What if the Father Commits a Crime?}, 63 J. HIST. IDEAS 1, 10, 16 (2002).
\end{footnotes}
excoriated psychologists and therapists’ guild-like mentality and believed that they had captured the legislators. He suggested that part of state support for the psychotherapist privilege emanated from “political pressure from organized interest groups (such as psychologists and social workers).”\textsuperscript{54} Justice Scalia raised a similar suggestion in the gay marriage and juvenile punishment cases, asserting that a cabal of professional associations subverted democracy and distorted legislation through special-interest advocacy.\textsuperscript{55}

Even while disdaining the value of psychotherapy, Justice Scalia venerated professional hierarchy. In \textit{Jaffee}, he was particularly perturbed by the privilege’s application to social workers, whom he asserted would not have been recognized by the proposed, but rejected, Federal Rules of Evidence.\textsuperscript{56} Justice Scalia questioned “why the psychotherapy provided by social workers is a public good of such transcendent importance as to be purchased at the price of occasional injustice.”\textsuperscript{57}

Similarly, in \textit{Maryland v. Craig},\textsuperscript{58} Justice Scalia did not trust the social workers who made the determinations about trauma. As he said in oral argument: “They were not even all psychiatrists.”\textsuperscript{59} (Actually none of them was.) Later during oral argument, he clarified the status of the professional and asked with incredulity, “You say it was just on the basis of a licensed social worker that said that the child would be too upset?”\textsuperscript{60}

\textsuperscript{54} \textit{Jaffee}, 518 U.S. at 26. Justice Scalia noted the 14 amici briefs, most of which were submitted by various “self-interested” professional organizations. \textit{Id.} at 35–36.

\textsuperscript{55} See \textit{Romer v. Evans}, 517 U.S. 620, 636, 646 (1996) (labeling gay rights activism as “the efforts of politically powerful minority to revise those mores through use of the laws” and stating that gay-rights activists “possess political power much greater than their numbers, both locally and statewide . . . they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality”).

\textsuperscript{56} \textit{Jaffee}, 518 U.S. at 21 (Scalia, J., dissenting) (noting that the psychotherapist privilege proposed by rejected Federal Rule of Evidence 504 was limited to “‘a person authorized to practice medicine’ or ‘a person licensed or certified as a psychologist’”). An anomaly of the Federal Rules of Evidence is that rules of privilege are governed by federal common law in federal cases, whereas state privilege laws, which are overwhelmingly statutory, apply in diversity cases. \textit{See Fed. R. Evid.} 501. The rule makers had originally proposed rules of privilege that Congress rejected, which led to a rejection of the rules entirely. Curiously, in trying to figure out the common law of federal privilege, judges often rely on the rejected privilege rules.

\textsuperscript{57} \textit{Jaffee}, 518 U.S. at 28 (Scalia, J., dissenting).

\textsuperscript{58} \textit{Maryland v. Craig}, 497 U.S. 836 (1990).


\textsuperscript{60} \textit{Id.} at 10:29.
C. Skepticism of Social Psychology

In Lee v. Weisman, Justice Scalia affirmatively and repeatedly mocked the majority’s use of social psychology evidence. Weisman involved an establishment clause challenge brought by a parent whose child’s middle-school graduation included an arguably nonsectarian invocation and benediction offered by a rabbi. Justice Kennedy, writing for the majority, held that the prayer violated the establishment clause, stating that, “[t]he prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.” He mentioned “public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.” Quoting journals of sociology and psychology, Justice Kennedy argued that “[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”

Justice Scalia, in dissent, chided the majority for advancing an establishment clause argument that ignored history and invalidated longstanding American traditions. He wrote, “Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” He added, “The deeper flaw in the Court’s opinion does not lie in its wrong answer to the question

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62 Id. at 580. The invocation thanked “God of the Free, Hope of the Brave,” for America’s diversity, liberty, political and judicial processes, and destiny, and ended with “Amen.” Id. at 581–82. The benediction concluded, “We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.” Id. at 582. I say arguably nonsectarian because the benediction used the language of the prophet Micah, a fact recognized by the court. Id. at 604 n.6. Apparently unbeknownst to the court, the Rabbi also concluded with the Jewish Shehecheyanu prayer, thanking God “who has kept us alive, sustained us, and brought us to this season.” Shehecheyanu, REFORM JUDAISM, https://reformjudaism.org/beliefs-practices/prayers-blessings/shehecheyanu (last visited Sept. 29, 2023).
63 Weisman, 505 U.S. at 598. Justice Kennedy acknowledged that the school did not formally mandate attendance at graduation but found that the students’ “attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory.” Id. at 586.
64 Id. at 593. Justice Kennedy added: “Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.” Id. at 595.
65 Id. at 593 (internal citations omitted).
66 Id. at 632 (Scalia, J., dissenting).
whether there was state induced ‘peer-pressure’ coercion; it lies, rather, in
the Court’s making violation of the Establishment Clause hinge on such a
precious question.” Justice Scalia argued that “the Court replaced Lemon
with its psycho-coercion test, which suffers the double disability of having
no roots whatever in our people’s historic practice, and being as infinitely
expandable as the reasons for psychotherapy itself.”

Justice Scalia vehemently resisted the notion that high school graduates
would be “psychologically obligated” to stand in “respectful silence” for
invocation and benediction, and quoted Justice Kennedy’s language
regarding “public pressure” only to deride it. Justice Scalia dismissed the
psychological studies cited: “As its instrument of destruction, the bulldozer
of its social engineering, the Court invents a boundless, and boundlessly
manipulable, test of psychological coercion.”

Justice Scalia’s dissent is peppered with zingers and negative asides
about psychology. For instance, Justice Scalia critiqued the majority’s theory
of public and peer pressure, which he deemed

almost as intriguing for what it does not say as for what it
says. It does not say, for example, that students are
psychologically coerced to bow their heads, place their
hands in a Durer-like prayer position, pay attention to the
prayers, utter “Amen,” or in fact pray. (Perhaps further
intensive psychological research remains to be done on these
matters.)

No one believes that Justice Scalia was seriously calling for more
“intensive psychological research.” Rather, he was obviously mocking the
reliance on psychology at all. Similarly, in resisting the majority’s notion of
coercion, Justice Scalia wrote, “I see no warrant for expanding the concept
of coercion beyond acts backed by threat of penalty—a brand of coercion
that, happily, is readily discernible to those of us who have made a career of
reading the disciples of Blackstone rather than of Freud.” By dividing
Blackstone’s disciples from Freud’s, Justice Scalia set up psychology as a
system fully outside of law and antagonistic to it, rather than one that could
inform law. Also, Justice Scalia left no doubt that he was on team Blackstone.

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67 Id. at 640.
68 Id. at 644.
69 Id. at 637.
70 Id. at 632.
71 Id.
72 Id. at 642. To be fair, in his concurrence Justice Blackmun did quote Freud. In support of the
argument that nonreligious people or those of other religions might feel excluded, Justice Blackmun wrote:
“Sigmund Freud expressed it this way: ‘a religion, even if it calls itself the religion of love, must be hard
and unloving to those who do not belong to it.’” Id. at 607 n.10 (Blackmun, J., concurring).
Another snarky comment accompanied Justice’s Scalia’s discussion of the cases of prayer in school classrooms. His observation that “whatever the merit of those cases, they do not support, much less compel, the Court’s psycho-journey,” drips with contempt.

Toward the end of his dissent in Weisman, Justice Scalia wrote, “I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays, has come to ‘require scrutiny more commonly associated with interior decorators than with the judiciary.’” Justice Scalia continued, “But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of ‘research in psychology’ that have no particular bearing upon the precise issue here cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing.”

D. Dismissal of Brain Science and Developmental Psychology

In Stanford v. Kentucky, Justice Scalia rejected arguments about developmental psychology and its relevance to punishing juveniles. In Stanford, the petitioners and amici argued that the death penalty fails to deter juveniles because the cognitive skills of juveniles are less developed than those of adults. Relatedly, the petitioners and amici argued that the death penalty fails as a retributive tool. Because juveniles are less mature and responsible, they are also less morally blameworthy.

Justice Scalia was markedly unimpressed by the “array of socioscientific evidence concerning the psychological and emotional development of 16-and 17-year-olds,” offered by petitioners and amici. In rejecting these arguments, he explained, “[t]he battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.”

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73 Id. at 643 (Scalia, J., dissenting).
74 Id. at 636 (internal citations omitted) (citing Am. Jewish Cong. v. Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting)).
75 Id. (internal citations omitted).
77 Id. at 377. Juveniles, less capable of imagining consequences and perceiving their own vulnerability, are less likely to fear death. Id. at 404–05.
78 Id. at 377–78.
79 Id. As an example of such scientific evidence, Justice Brennan cited the Amicus Brief for American Society for Adolescent Psychiatry. Id. at 395 (Brennan, J., dissenting).
80 Id. at 378 (majority opinion).
Justice Scalia also telegraphed that he found not just the messengers but the content of the arguments unpersuasive. He observed: “But as the adjective ‘socioscientific’ suggests (and insofar as evaluation of moral responsibility is concerned perhaps the adjective ‘ethicoscientific’ would be more apt), it is not demonstrable that no 16-year-old is ‘adequately responsible’ or significantly deterred.”\(^{81}\) In his view, none of the studies presented by the American Psychological Association showed that all individuals under eighteen were unable to appreciate the nature of their crimes.\(^{82}\)

Although tone is sometimes hard to analyze off the written page, Justice Scalia’s contempt for the psychological evidence (introduced by the American Psychological Association as amici, among others) and his implication of their indulgence of criminal juveniles shines through. I am not alone in believing that Justice Scalia’s tone was disdainful. Justice Brennan, in dissent, wrote that the analysis “must also encompass what Justice Scalia calls, with evident but misplaced disdain, ‘ethicoscientific’ evidence.”\(^{83}\)

Justice Scalia objected to the reliance on scientific studies not entered into evidence, arguing that the majority was “picking and choosing [the studies] that support its position.”\(^{84}\) Justice Scalia pointed to the Court’s prior rejection of abortion statutes that prevented minors found mature by the Court from obtaining an abortion without parental consent. Justice Scalia argued that “[i]t is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.”\(^{85}\)

Justice Scalia was also critical of the developmental psychological evidence presented in *Brown v. Entertainment Merchants Ass’n*,\(^{86}\) a First-Amendment case challenging California’s law restricting the sale of violent video games to minors.\(^{87}\) Writing for the majority, Justice Scalia held that California’s restriction violated the First Amendment noting that there was no historical or “longstanding tradition in this country of specially restricting children’s access to depictions of violence.”\(^{88}\) Because California could not

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\(^{81}\) *Id.* He denoted as “absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one’s conduct to that most minimal of all civilized standards.” *Id.* at 374.


\(^{83}\) *Stanford*, 492 U.S. at 383 (Brennan, J., dissenting).

\(^{84}\) *Roper*, 543 U.S. at 617 (Scalia, J., dissenting) (“In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.”) (internal citations omitted).

\(^{85}\) *Id.* at 620.


\(^{87}\) *Id.* at 789–90.

\(^{88}\) *Id.* at 795, 805.
show a direct causal link between violent video games and harm to minors, its law failed to meet the strict scrutiny test applied to limitations on speech.\textsuperscript{89}

Justice Scalia was particularly contemptuous of what he rightfully considered sloppy science. Evaluating the research by psychologists purporting to demonstrate such a link, Justice Scalia wrote, “These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively.”\textsuperscript{90} Furthermore, he stated, “'[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.'”\textsuperscript{91} Justice Scalia dismissed California’s claims that the Act was “justified in aid of parental authority,”\textsuperscript{92} viewing this as government intrusion into individuals’ parenting.\textsuperscript{93} He explained, “While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents \textit{ought} to want.”\textsuperscript{94}

\textit{E. Inconsistencies in Justice Scalia’s Approach}

Justice Scalia was not entirely consistent in his reluctance to use psychological data and research about child development. Writing for the majority in \textit{Vernonia School District 47J v. Acton},\textsuperscript{95} Justice Scalia held that the Oregon school district did not violate the Fourth or Fourteenth Amendment when it required student athletes to submit urine samples to participate in school-sponsored sports.\textsuperscript{96} Unlike in \textit{Stanford},\textsuperscript{97} where Justice Scalia expressed skepticism of psychological insights and contributions by amici, Justice Scalia himself used developmental psychology to support his reasoning that drugs use by school-aged children justified reduced privacy. He observed that, “[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe.”\textsuperscript{98} Furthermore, he stated, “[a]part from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the

\begin{thebibliography}{98}
\bibitem{} Id. at 799.
\bibitem{} Id. at 800 (citing Video Software Dealers Ass’n v. Schwarzenegger, 556 F.3d 950, 964 (9th Cir. 2009)).
\bibitem{} Id. (alteration in original).
\bibitem{} Id. at 802.
\bibitem{} Id.
\bibitem{} Id. at 804 (emphasis added).
\bibitem{} Id. at 664–65.
\bibitem{} \textit{Vernonia Sch. Dist. 47J}, 515 U.S. at 661.
\end{thebibliography}
perception of pain, the particular drugs screened by the District’s Policy have been demonstrated to pose substantial physical risks to athletes.”

Rather than scoffing at the experts, he cited them, quoting the American Academy of Pediatrics amicus, the Journal, *Clinical Pediatrics,* and the *Archives of General Psychiatry.*

It is hard to know what to make of Justice Scalia’s arguments relying on a discipline he obviously disrespected. On the one hand, he cited evidence that supported his argument and resembled the type of evidence that had persuaded fellow Justices in the past. On the other hand, it appears that Justice Scalia engaged in the cynical act of “picking and choosing” among the psychological opinions that he excoriated in *Roper.* Also, it is notable that this is a fairly early case in Justice Scalia’s jurisprudence. Although Justice Scalia never formally disavowed using psychological evidence or even, in this case, child-welfare arguments, over time, he abandoned such arguments.

Justice Scalia used psychology to limit the rights of children but was not willing to listen to psychologists, brain scientists, or therapists to expand children’s rights or limit their responsibilities and punishments. To the extent that children’s interests arise for Justice Scalia, they are paternalistically derived interests that mirror the interests of their parents. For instance, in *Vernonia,* Justice Scalia argued that the school district was permitted to perform warrantless searches on school children because “[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense . . . They are subject, even as to their physical freedom, to the control of their parents or guardians.”

To Justice Scalia, the case was about adult power, not children’s rights. He was attracted to psychological literature only when used for the types of

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99 Id. at 662.
100 Id. at 656.
101 Id. at 661–62.
102 Id. at 662.
103 See infra Part IV (discussing Roper v. Simmons, 543 U.S. 551 (2005)).
105 *Vernonia Sch. Dist. 47J,* 515 U.S. at 654. Justice Scalia also made specific arguments about youth athletics and expectations of privacy. He further singled out student athletes, stating, “Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful.” Id. at 657. Furthermore, he explained that “students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.” Id.
“protections” (detentions and searches) that children did not like. Justice Scalia viewed the school district as standing in loco parentis—a temporary guardian of the child in place of a parent.106

Justice Scalia concluded by noting the school’s interest in protecting children from drug use. He explained, “In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.”107 This obligation of paternalistic care justified less freedom for children but did not result in increased duty to protect children from harm, a duty Justice Scalia rejected in DeShaney v. Winnebago County Department of Social Services.108

III. REJECTING CONSIDERATIONS OF CHILDHOOD TRAUMA

This Part addresses five major opinions in which Justice Scalia dismissed or discounted the trauma experienced by children. Justice Scalia’s responses to assertions about children’s needs and potential trauma reveal recurrent themes of support for family hierarchy and apathy to the lived experience of children. Tellingly, he exhibited disdain for the opinions of child advocates and psychologists who opined about children’s potential or actual trauma.

First, in Maryland v. Craig, Scalia strongly objected to child-victims’ testimony offered by one-way closed-circuit television where the child-witnesses were not cross-examined directly face-to-face by the accused.109 The prosecution had met Maryland’s requirement of showing that the children, aged four, five, and six, would experience serious trauma if they attempted to testify in the same room as the accused, and would become “functionally unavailable.”110 Given the trial court’s individualized findings

106 Id. at 654–55. Justice Scalia noted that the school has no power over a child greater than what a parent would have but that a school’s power “is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” Id. at 655.

107 Id. at 662.

108 DeShaney v. Winnebago Cnty. Dep’t Soc. Servs., 489 U.S. 189 (1989) (holding that the state’s failure to provide a minor child with adequate protection against his father’s violence despite being involved in the child’s welfare, nonetheless, did not violate the child’s due process rights; the state possesses no special duty toward the child even though state social workers and doctors were involved and formed an ad hoc child protection team).

109 Maryland v. Craig, 497 U.S. 836 (1990). The arrangement in dispute allowed the accused to raise questions and objections through closed-circuit televised communication with her lawyer. The jury sat in the courtroom with the judge and the defendants. The attorneys, children, and court personnel were in chambers nearby. The people in the courtroom could see and hear the child-witness, but the children were spared from being in the same room with the accused. Id. at 840–42.

110 Oral Argument, supra note 59, at 0–1:00 (Attorney General J. Joseph Curran presenting the facts of the case).
of potential trauma, Justice O’Connor, writing for the 5-4 majority, approved the process. She wrote that the accused’s right to confront was not absolute and that the assurances of reliability built into the Maryland protocol as well as the public policy of avoiding trauma to children overrode the preference for face-to-face confrontation.

Justice Scalia treated both the focus on childhood trauma and the compromise of what he considered a constitutional absolute as a personal affront. He argued that the majority’s focus on reliability of the testimony was misplaced, contending that the majority’s “reasoning abstracts from the right to its purposes, and then eliminates the right.”

In addition to being outraged that the Court ignored an inalterable constitutional mandate, Justice Scalia also challenged the wisdom and fairness of Maryland’s one-way closed-circuit policy in cases of alleged childhood trauma. He worried that children are easily misled and susceptible to coaching. Additionally, Justice Scalia believed that confrontation was crucial to ferret out lying children. He illustrated the mischief of ignoring the right of confrontation with an emotional and revealing fantasy:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State’s child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, “it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?” Perhaps that is a procedure today’s

111 Craig, 497 U.S. at 860.
112 Id. at 849, 857. O’Connor wrote that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.” Id. at 853.
113 Id. at 862 (Scalia, J., dissenting).
114 Id. at 868–69.
115 Id. at 868 (“Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.”); Id. at 869 (discussing aggressive and misguided investigation techniques that lead to “a child’s distorted or coerced recollections”).
society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.\textsuperscript{116}

Similarly, in oral argument, Justice Scalia said that confrontation was particularly necessary as a truth-seeking device. If the child actually saw his mother in court “and says, hi, mommy[,] then you know that the child—all of this has been suggested.”\textsuperscript{117} Justice Scalia continued in oral argument:

Wouldn’t that be enormously effective in the trial, if the child comes into the courtroom and says, hi, mommy? There’s not even been an opportunity for that in this trial, just on the basis of a social worker who says no, the child would curl up into a ball. You want to put away somebody for 15 years on—on that prediction?\textsuperscript{118}

In the above quotation, Justice Scalia managed to invoke mom, apple pie (basic fairness), and a contempt for social workers as predictors of catastrophe. He posed the rhetorical question to the Maryland Attorney General about whether fifteen years in prison was fair with only the flimsy evidence of an unconfronted, and potentially coached child, alienated from his mother. (In \textit{Craig}, it was not a mother being charged but a daycare worker, and there was evidence of genital scarring on the children.)\textsuperscript{119}

Finally, Justice Scalia minimized the trauma of the children. After the Attorney General of Maryland stated that the various therapists believed that seeing the accused would traumatize the children and make them regress from the progress made in therapy, he added in response to Justice Scalia, “Bear in mind, Justice, they were four, five and six years of age at the time they were called, and—”\textsuperscript{120} Justice Scalia interrupted and said:

I understand that, and that’s something of an emotional trauma. But this woman is going to jail for 15 years. I mean, if you—if you weigh the possible emotional trauma to the child against a 15-year jail sentence, is it—is it—is it hard to come—come to the conclusion which way you should go?\textsuperscript{121}

Certainly, part of what animated Justice Scalia was his dedication to what he perceived as the letter of the Sixth Amendment. This theme of taking

\textsuperscript{116} \textit{Id.} at 861.

\textsuperscript{117} Oral Argument, \textit{supra} note 59, at 26:25.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} at 10:17.

\textsuperscript{120} \textit{Id.} at 11:07.

\textsuperscript{121} \textit{Id.} at 11:12–28. Justice Marshall made a similar point in the argument, saying, “You talk about the trauma for the child. 15 years in prison, there’s a little bit of trauma, too.” \textit{Id.} at 22:46–52.
the Sixth Amendment seriously was later reflected in his line of majority opinions, starting with *Crawford v. Washington*\(^{122}\) in 2004, where Justice Scalia eschewed a reliability analysis and instead emphasized strict adherence to the confrontation process.\(^{123}\) But in arguing for a strict application of face-to-face confrontation, Justice Scalia also demonstrated his contempt for psychologists and social workers, whose assessments he did not credit. He portrayed children as easily manipulated, and clearly resented sacrificing a bedrock constitutional principle for what he deemed the policy of the moment. The constitutional argument was not angst-ridden because Justice Scalia did not fully engage with the pain the children would experience. It might be “something of an emotional trauma,” but he was not going to lose any sleep over it.

In the second case, *Michael H. v. Gerald D.*, Justice Scalia reinforced his dedication to tradition and his disinterest in assessments of children’s best interests. In *Michael H.*, Victoria, the child at the center of the dispute over visitation, was born to Carole when Carole was married to, and living with, her husband, Gerald.\(^{124}\) Gerald was listed as Victoria’s father on her birth certificate, and always claimed Victoria as his daughter.\(^{125}\) However, even the relatively primitive genetic science of 1989 indicated Gerald was not Victoria’s biological father and that it was more than 98% likely that Michael, a neighbor, was.\(^{126}\) Michael sued to establish paternity as a means of gaining visitation with Victoria (he stated no interest in exercising custody).\(^{127}\) Victoria was one year old when the case was first filed, and eight years old when the case came before the United States Supreme Court.\(^{128}\)

The litigants involved in *Michael H.* clearly gave Justice Scalia agita. As he presented the facts of the case (which involved adultery, cohabitation,
and jet-setting models), Justice Scalia snidely remarked: “The facts of this case are, we must hope, extraordinary.”

California’s paternity statute created a presumption that a married man was the father of a child born during the marriage, and thus the California Superior Court would not entertain Michael’s petition or acknowledge the blood-test results. To assist in determining whether visitation would be in Victoria’s best interests, the California Superior Court appointed an attorney and guardian ad litem to represent Victoria, and a psychologist to evaluate Victoria and the relevant adults. The psychologist recommended that Carole retain sole custody, but that Michael receive limited visitation with Victoria until the final determination.

Victoria, through her court-appointed guardian ad litem, asserted that the California statute denied her procedural due process and undermined her fundamental right to maintain a father-child relationship with both Michael and Gerald. The guardian ad litem also argued that by allowing a mother and her husband—but not the child—to rebut the presumption of legitimacy, the California statutes violated Victoria’s right to equal protection.

Michael H. is an important, if confusing case (there was no majority opinion), about constitutional and family law; the focus here, however, is on how Justice Scalia, related—or did not—to Victoria’s rights and needs. In his nineteen-page plurality opinion, Justice Scalia hardly mentioned or even

129  *Id.* at 113. This is one of the several comments in which Justice Scalia displayed disgust for the adults’ lifestyle while simultaneously touting the sanctity of traditional marriage. Justice Scalia stated that “historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.” *Id.* at 123. He further argued that, “Perhaps the concept [of the traditional family unit] can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.” *Id.* at 123 n.3.

130  *Id.* at 113, 115–16. California Evidence Code section 621 provided that a child born to a married woman living with her husband, is presumed to be a child of the marriage, unless he is impotent or sterile. In limited circumstances, this presumption may be rebutted, but only by the husband or wife. Justice Scalia explained that rather than viewing the evidence rule as a presumption, the California law should be understood as expressing a substantive principle: support the integrity of in-tact married families against outside agitators. *Id.* at 119–20.

131  *Id.* at 114–15.

132  *Id.* at 115.

133  *Id.* at 130.

134  *Id.* at 116.

135  *Michael H.* is justifiably famous for the way it treats both procedural and substantive due process. Michael contended that his procedural due process rights prevented the State of California from terminating his liberty interest in his relationship with Victoria without affording him an evidentiary hearing. *Id.* at 119. As to substantive due process, Michael argued that he possessed a constitutionally protected liberty interest in his relationship with Victoria, his biological child with whom he had lived. *Id.* at 121.
considered Victoria. He ignored the psychologist who recommended visitation and dismissed the arguments of the guardian ad litem. Instead, Justice Scalia focused on the doctrinal problem of dueling dads, stating that “California law, like nature itself, makes no provision for dual fatherhood.”

Only at the end of the opinion, did Justice Scalia address and quickly dismiss the arguments made on behalf of Victoria. First, in response to Victoria’s due process claim, Justice Scalia asserted without further discussion that “[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.”

The source of parents’ rights are certainly traditional, going back to Roman law and a slave-like theory of paternal ownership of children. In modern times, the right to be a parent has been understood as a right to pass on one’s faith, traditions, and beliefs to the next generation. But Scalia recognized no concomitant rights for children to have a relationship with their parents, expressing zero interest in how such a right would be conceived or the interests it would protect. Instead, he opined:

Even assuming that such a right exists, Victoria’s claim must fail. Victoria’s due process challenge is, if anything, weaker than Michael’s. Her basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem’s belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country.

Because the law provides no mechanism for dual fatherhood, nor do history or tradition support such a claim, the challenge “merits little

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136 Id. at 118. Justice Scalia explained his view (mistaken in my opinion) that extension of rights to Michael would inevitably diminish the rights of Gerald, stating that “to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa.” Id. at 130; see also C. Quince Hopkins, The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States, 13 CORNELL J.L. & PUB. POL’y 431, 437 (2004) (arguing that the ossifying focus on history and tradition in family law cases does not account for evolution of American kinship practices).

137 See, e.g., Antti Arjava, Paternal Power in Late Antiquity, 88 J. ROMAN STUD. 147, 147 (1998).


140 Michael H., 491 U.S. at 130–31.
discussion,” and Victoria had no procedural right to raise the question. Tradition was pitted against “great psychological benefit to a child,” and, no contest, Justice Scalia declared tradition the winner. As an adult, Michael had an arguable interest in access to and dominion over his child, but Victoria could not biologically or socially have two daddies, so there was no deprivation in failing to give her an opportunity to request a relationship with her biological father, with whom she lived for months at a time.

In passing, Justice Scalia noted that the guardian ad litem concluded that an arrangement where Victoria would see both Michael and Gerald would “be of great psychological benefit.” However, Justice Scalia did not engage with this issue and failed to discuss Victoria’s well-being, psychologically or otherwise. He did not dispute the psychological benefit, he simply refused to discuss what he obviously believed was an irrelevant matter.

Justice Scalia’s dispatch of Victoria’s equal protection arguments was equally interesting and revealing. Victoria claimed that her equal protection rights were violated because, unlike her parents, Victoria had no opportunity to rebut the presumption of her legitimacy. Justice Scalia found the equal protection argument “wholly without merit.” He rejected Victoria’s argument that a standard of heightened scrutiny should apply because the State discriminated against her on the basis of her illegitimacy. Justice Scalia maintained that “[i]llegitimacy is a legal construct, not a natural trait. Under California law, Victoria is not illegitimate, and she is treated in the same manner as all other legitimate children: she is entitled to maintain a filial relationship with her legal parents.” But, of course, Victoria was only in this situation because her biological father was not her presumed father, putting her in the special class of children who, in the past, have evoked strict scrutiny.

Regarding Victoria’s equal protection challenge, Justice Scalia found California’s limit that only the married parents could rebut the presumption of paternity to be perfectly rational. According to Justice Scalia, the rule was so crafted to prevent outsiders from “undermin[ing] the integrity of the

141 Id.
142 Id. at 131.
143 Id.
144 Id. There is an interesting if imperfect analogy to the losing argument in defense of traditional marriage (one man to one woman) against charges of unequal protection that goes something like Scalia’s argument about illegitimacy: all men can choose women, and all women can choose men, so there’s nothing unequal about that. Such reasoning harks back to the defense of miscegenation. Blacks were prohibited from marrying whites, but whites were equally prohibited from marrying Blacks. See Loving v. Virginia, 388 U.S. 1, 7–8 (1967) (Virginia argued “that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree.”).
marital union,”145 protecting an intact marriage from outside intrusion. Justice Scalia distinguished Victoria’s claim, contending the following: “When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child—or, more accurately, by a court-appointed guardian ad litem—may well disrupt an otherwise peaceful union.”146

Although protecting marital harmony might be one reason for the presumption of paternity in the common law, Justice Scalia acknowledged that the primary policy arose from “an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state.”147 According to this analysis, the main reason for paternity laws is protecting the interests of children, which, ironically, did not enter into Justice Scalia’s analysis at all. True, Victoria was in no danger of being abandoned. Indeed, the issue was that too many people wanted to interact with her in a parental role. Yet, she did have interests that Justice Scalia ignored. When Justice Scalia ignored the psychologist who recommended Victoria’s contact with Gerald and dismissed the guardian ad litem who did the same, he did not do so out of concern for Victoria’s best interests or any desire to protect Victoria. As with many of the children whose rights Justice Scalia has considered, the child vanished from his consideration.

In the third case, *Reno v. Flores*, Justice Scalia failed to address or even acknowledge the plight of the unaccompanied minors at the center of the case.148 He again displayed hostility to a best-interests analysis. *Flores* concerned the constitutionality of confining non-citizen unaccompanied children whom the government suspected of being deportable. In a change from previous policy, the Immigration and Naturalization Service (INS), absent unusual and compelling circumstances, restricted the release of such children to parents, close relatives, and legal guardians only, and not to other responsible adults or non-profit organizations. The INS’s sole stated reason for the change was to protect the children because it lacked the capacity to

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145 Michael H., 491 U.S. at 131.
146 Id.
147 Id. at 125 (citations omitted).
screen homes for safety; the practical effect was to keep many more children seeking a hearing in detention.

Justice Scalia rejected Respondents’ arguments that the detained children were denied due process, either substantively or procedurally.\footnote{149} He believed that an unaccompanied minor was not, as a constitutional matter, entitled to an “individualized hearing on whether private placement would be in the child’s ‘best interests.’”\footnote{150} Essentially, Justice Scalia argued that once the detention was deemed “not unconstitutional in itself,” there could be no valid argument that such detention is rendered unconstitutional “because it is shown to be less desirable than some other arrangement for the particular child.”\footnote{151} Justice Scalia attempted to show the ridiculousness of applying a best interests standard by resorting to an argument \textit{ad absurdum}. He explained: “Even if it were shown, for example, that a particular couple desirous of adopting a child would \textit{best} provide for the child’s welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child \textit{adequately}.”\footnote{152} Essentially, to argue in favor of unnecessary detention, Justice Scalia raised the prospect of governmentally-mandated parental upgrades for children’s parents who were suboptimal.

According to Justice Scalia, no constitutional problem or abuse of discretion arose when the government’s goal of protecting “the welfare of the juvenile”—its only avowed explanation for the change—was achieved by a system of administrative convenience. The INS was not required to look for home placements for children, even if “other policies would be even better.”\footnote{153} For unaccompanied children suspected of being in the United States illegally who had no close family or legal guardian to take them in, detention was “good enough.”\footnote{154}
Contrary to Justice Scalia’s assumptions, the government detained the unaccompanied children under horrible conditions. The dissent described detentions lasting over a year and “the practice of commingling harmless children with adults of the opposite sex in detention centers protected by barbed-wire fences, without providing them with education, recreation, or visitation, while subjecting them to arbitrary strip searches.” Justice Scalia refused to engage questions about the conditions of the children’s detention, given the district court’s approval of a consent decree requiring remediation of the conditions of the children’s confinement.

Unsurprisingly, Justice Scalia did not address the psychological arguments raised in the amici and Respondents’ briefs that INS detentions impaired children’s physical and emotional development. Citing psychological literature and experts on the effects of children removed from their homes, the amici argued that children who are detained suffer diminished self-worth, harm to their physical safety, deprivation of a sense of family, and absence of individualized guidance and ability to contribute and flourish. Similarly, the Respondents argued that “routinely institutionalizing children endangers their mental health and progress toward productive adulthood.” The Respondents noted that “[l]ong experience has verified the damage detention works upon children’s ability to form close personal relationships, upon their social maturity, performance on intelligence and developmental tests, ability to function in non-institutional settings, and self-concept.”

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155 Satisfied that the INS was “presumably in compliance with the extensive requirements” of the consent decree, id. at 301 (majority opinion), Justice Scalia ignored any arguments about the conditions the children experienced.

156 Id. at 323, 328 (Stevens, J., dissenting) (footnotes and citations omitted). The respondents also noted that visitation was severely limited or non-existent at some facilities. Brief for the Respondents at 13, Reno v. Flores, 507 U.S. 292 (1993) (No. 91–905), 1992 WL 511956, at *13.

157 Flores, 507 U.S. at 296. Justice Scalia noted that “Respondents spend much time, and their amici even more, condemning the conditions under which some alien juveniles are held, alleging that the conditions are so severe as to belie the Service’s stated reasons for retaining custody—leading, presumably, to the conclusion that the retention of custody is an unconstitutional infliction of punishment without trial.” Id. at 301.


160 Id. (citations omitted).
boredom, acute anxiety, fear, depression, and hostility.” Justice Scalia did not dispute any of this; he simply ignored the psychological effects.

The language and word choice of *Flores* provide examples of Justice Scalia’s techniques of child erasure. When arguing that detention was for their protection, Justice Scalia referred to the unaccompanied minors as “children.” However, when rejecting the argument that they deserved an individualized assessment of best interests, Justice Scalia referred to them as “resident aliens suspected of being deportable,” or “alien juveniles.”

Somehow, mistreating resident aliens suspected of being deportable seems less heartless than detaining unaccompanied children when there is someplace better—safer and kinder—for them to stay. In a similar linguistic move, attempting to soften the conditions, Justice Scalia averred that, “‘[l]egal custody’ rather than ‘detention’ more accurately describes the reality of the arrangement.”

The fourth opinion this Part considers is *United States v. Windsor*, in which Justice Scalia expressed hostility to the way proponents of same-sex marriage used arguments about children’s rights to support their position. He resisted the majority’s emphasis on the psychological and personal effects of DOMA on same-sex couples and the majority’s inclusion of their children’s interests. Writing for the majority, Justice Kennedy stated:

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161 Id. at 8–9 (quoting D.B. v. Tewksbury, 545 F. Supp. 896, 904 (Or. Dist. Ct. 1982)).

162 See Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 440 (1996) (“With regard to substantive due process issues, Justice Scalia characterized the class as ‘children,’ vulnerable and subject to the parens patriae power of the INS. But in the procedural due process context, Justice Scalia used the terms ‘aliens’ or ‘alien juveniles,’ signaling a shift in his view of their ability to act on their own behalf.”) (footnotes omitted).

163 Although Justice Scalia’s nomenclature was technically accurate, Justice O’Connor, concurring, wrote separately to support her belief that “these children have a constitutionally protected interest in freedom from institutional confinement.” *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O’Connor, J., concurring) (emphasis added). The dissent similarly spoke of “the detention of harmless children.” *Id.* at 320 (Stevens, J., dissenting).

164 *Id.* at 298.


166 *Id.* at 797–98. *Windsor* involved two women who had been married in Canada and resided in New York. Upon the death of her wife, Windsor sought a federal tax exemption available to surviving spouses. Although New York recognized the same-sex marriage, the federal government’s Defense of Marriage Act (DOMA) excluded Windsor from the definition of spouse, and hence she did not receive the tax exemption upon her wife’s death. *Id.* at 749–51.


168 Justice Kennedy wrote that DOMA “places same-sex couples in an unstable position of being in a second-tier marriage.” *Windsor*, 570 U.S. at 772. Justice Kennedy concluded that “the principal
And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.\(^{169}\)

In dissent, Justice Scalia quickly rejected the notion that DOMA affected the integrity of same-sex families or the well-being of their children.\(^{170}\) Justice Scalia quoted with rancor and dismay the majority’s assertion that federal failure to recognize lawful state same-sex marriages “humiliates” children.\(^{171}\) However, in what seems to be an entrenched pattern of his jurisprudence, Justice Scalia never addressed, let alone refuted, DOMA’s effect on the economic security and, equally important, psychological well-being of the children with same-sex parents.

Fifth, the most stunning rejection of best interests arose in *Adoptive Couple v. Baby Girl*,\(^{172}\) which involved a suit by a non-custodial father, a member of the Cherokee Nation, who contested his daughter’s adoption because he did not receive proper notice under the Indian Child Welfare Act. The South Carolina Supreme Court agreed and ordered Baby Girl, who was then twenty-seven months old, to be placed with her biological father, whom she had never met and who never supported her, though he knew of her existence. The Court reversed and Justice Scalia joined Justice Sotomayor’s dissent, contending that the child should have been given to her biological father. In a separate dissent, Justice Scalia added an interpretive quibble regarding the statute and, more relevant to our inquiry, a final observation:

> While I am at it, I will add one thought. The Court’s opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is “in the best interest of the child.” It sometimes is not; he would be better off raised by someone

\(^{169}\) *Id.* at 774.

\(^{170}\) *Id.* at 772. Later in the opinion, the majority observed that “DOMA also brings financial harm to children of same-sex couples,” citing health insurance and social security surviving benefits. *Id.* at 773. Interestingly, however, the Court primarily emphasized the collateral psychological effect on children—their humiliation, confusion, and isolation that the majority emphasizes.

\(^{171}\) *Id.* at 797 (Scalia, J., dissenting) (“But to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements.”). Justice Scalia dismissed the majority’s “scatter-shot rationales” and rejected the idea that anti-gay malice animated DOMA. *Id.* at 799.

else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.\(^{173}\)

Justice Scalia’s off-hand tone is striking. He commented in a breezy fashion (“While I am at it”) that offered no clue of, let alone insight into, the multiple personal tragedies that haunt this case. A toddler, barely over two years old, was ordered by the South Carolina Supreme Court to leave the only home she had ever known. An adoptive couple lost their daughter whom they raised from infancy. A biological father felt robbed of protections for himself, his daughter, and his Nation. Justice Scalia’s cold-blooded property model of parenthood contrasts with the tone of Justice Alito’s majority opinion, which noted that the state’s order “required her to be taken, at the age of twenty-seven months, from the only parents she had ever known and handed over to her biological father, who had attempted to relinquish his parental rights and who had no prior contact with the child.”\(^{174}\) Justice Sotomayor, writing in dissent, also acknowledged the tragic elements of the case, noting “outcomes that are painful and distressing for both would-be adoptive families, who lose a much wanted child, and children who must make a difficult transition.”\(^{175}\) At the end of her dissent, Sotomayor acknowledged the “anguish this case has caused.”\(^{176}\)

Justice Scalia mentioned law, reason, and policy, but displayed absolutely no sympathy or understanding of what it would mean to wrest a two-and-a-half-year-old from the only home she had ever known. In seeing “no reason in law or policy” to waiver from a strict biological right and statutory analysis, he seemed oblivious and immune to such anguish. The “entitlement” of fatherhood necessarily trumped the “best interest of the child,” which, according to Justice Scalia, we sacrifice on a regular basis anyway. The argument \textit{ad absurdum} that lots of kids would benefit from having different parents than their biological ones regurgitated his point in \textit{Flores} twenty years before,\(^{177}\) a cheap way of dismissing the difficulty and tragedy of the case.

Justice Scalia’s dissent presented a classic example of his preference for rules (biological paternity) over standards (best interest analysis). Beyond that, however, it reflected hearty support for the traditional principles involved, which are grounded in biological parental rights and patriarchy.

\(^{173}\) \textit{Id.} at 668 (Scalia, J., dissenting).
\(^{174}\) \textit{Id.} at 641 (majority opinion).
\(^{175}\) \textit{Id.} at 685 (Sotomayor, J., dissenting).
\(^{176}\) \textit{Id.} at 692.
When Justice Scalia wrote that “parents have their rights, no less than children do,” he understated his own position. A more accurate summary of his position would be that absent egregious behavior on the part of parents, parents possess all the rights as compared to their children. Those rights, which reflect tradition and the “constant practice of the common law,” exist without reference to the best interests of the child. Therefore, any touchy-feely concerns about how the child might psychologically respond would be irrelevant to the analysis.

At first blush, Justice Scalia’s dissent in *Troxel v. Granville*\(^{178}\) seems to present a divergent approach to parental authority. *Troxel*, a case with two concurrences and three dissents, involved the constitutionality of a statute that provided limited grandparent rights to visitation despite the objection of the parent. Justice O’Connor’s plurality opinion concluded that, as applied, a Washington state statute providing that “any person” could petition for visitation rights “at any time” whenever such visitation serves a child’s best interests violated a parent’s due process right to make decisions concerning the care, custody, and control of her children.\(^{179}\) Justice Scalia dissented not because he thought the statute wise or fair, but because he felt the federal courts were overstepping in recognizing a new constitutional principle and creating federal family law. He expressed belief in the inalienable “right of parents to direct the upbringing of their children,” but doubted its Constitutional pedigree.\(^{180}\) Justice Scalia observed that once the courts travel down the road of recognizing such Constitutional rights, it would also have to think of exceptions including “judicially approved assessments of ‘harm to the child’ and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents.”\(^{181}\) Although personally and temperamentally Justice Scalia agreed that parents’ wishes for their children should prevail, he washed his hands of the whole messy inquiry. Supporting parental power in this case would mean delving into a best interests analysis and recognizing a substantive due process right—decidedly not worth it in his estimation. In this respect, one could argue that Justice Scalia’s hostility to courts conducting a best interests inquiry and respect for states’ rights trumped his belief in securing parental authority.

\(^{179}\) *Id.* at 67 (majority opinion).
\(^{180}\) *Id.* at 92 (Scalia, J., dissenting).
\(^{181}\) *Id.* at 93.
IV. EXPLORING THE OBLIGATIONS AND MATURITY OF “JUVENILES”: QUESTIONING WHETHER JUVENILES ARE REALLY SO DIFFERENT FROM ADULTS

The previous Part demonstrated how Justice Scalia discounted or ignored the emotional needs of children. In the juvenile death penalty cases, the child vanishes in another way: he is transformed into a miniature, monstrous, adult. This Part explores the extent to which children differ from adults and deserve special accommodations or protections. American society condones numerous situations where the law consciously treats children differently from the way it treats adults.

For instance, Osborne v. Ohio\(^{182}\) held that the state of Ohio could constitutionally criminalize private possession of child pornography even though private collections of adult pornography are protected by the First Amendment.\(^{183}\) Ohio justified the law based on its compelling interests in protecting the child-subjects, exploring the physical and psychological well-being of minors.\(^{184}\) Justice Scalia joined the majority in Osborne, but pornography seems a special case.

In a series of cases involving punishing juveniles, however, Scalia refused to draw bright lines excusing younger perpetrators from extreme punishment. In Thompson v. Oklahoma,\(^{185}\) the plurality concluded that the execution of defendants under sixteen years old violated the Eighth Amendment, arguing that “Thompson’s punishment as an adult is contrary to the ‘evolving standards of decency that mark the progress of a maturing society.'”\(^{186}\) Justice Stevens, writing for the majority, noted that “[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.”\(^{187}\) Further, he noted, “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much

\(^{182}\) Osborne v. Ohio, 495 U.S. 103 (1990) (holding that private collections of adult pornography are protected by the First Amendment).


\(^{184}\) Osborne, 495 U.S. at 109. The Court noted that child pornography “is harmful to the physiological, emotional, and mental health of the child”—considerations significant enough to create an exception from the constitutional principle of free speech. Id.


\(^{186}\) See id. at 864–65 (Scalia, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (summarizing the plurality’s reasoning). Justice Stevens wrote the plurality opinion joined by Justices Brennan, Marshall, and Blackmun. O’Connor concurred in the judgment. Justice Scalia filed a dissent joined by Rehnquist and White. Kennedy did not participate in the case. As is typical with this line of cases, the crimes are brutal (in this case the victim had been tortured, then chained to a concrete block and thrown in a river) and the juvenile perpetrator thoroughly unlikeable.

\(^{187}\) Id. at 834 (plurality opinion).
more apt to be motivated by mere emotion or peer pressure than is an adult.”

Justice Scalia disagreed with the decision and commenced a line of argument that he advanced in all the juvenile punishment cases. He advocated for the “individualized consideration of their maturity and moral responsibility.” Justice Scalia repudiated the plurality’s “pronounce[ment]” of “a fundamental principle of our society that no one who is as little as one day short of his sixteenth birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime.” In his “age is just a number” argument, Justice Scalia had no trouble treating juveniles as irredeemable, miniature adults deserving death.

Writing for the majority in Stanford v. Kentucky, Justice Scalia addressed the next age cohort, holding that imposition of capital punishment on defendants aged sixteen or seventeen did not violate the constitution or contravene “evolving standards of decency that mark the progress of a maturing society.” Justice Scalia explained that in assessing how societal values might have evolved, the measure should not be the Court’s own subjective sense of decency, but measurable “objective” indications of change. Justice Scalia accused the dissent of arrogating to the Court the decision of decency and “replac[ing] judges of the law with a committee of philosopher-kings.” He sounded four familiar themes: (1) a belief in his own objectivity and an injunction to other justices to avoid imputing their

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189 Thompson, 487 U.S. at 859 (Scalia, J., dissenting).

190 Id. at 863–64.


192 Id. at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). The juvenile defendants were tried as adults for gruesome, sadistic murders and sentenced to death. Petitioner Kevin Stanford—aged seventeen years and four months—raped, beat, and murdered a gas station attendant after a robbery. Petitioner Heath Wilkins, aged sixteen years and six months, stabbed a convenience store clerk in the heart and neck multiple times. Both had previous violent priors, were tried as adults, and received the death penalty. Id. at 365–67.

193 Id. at 369 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”); id. at 378 (“[O]ur job is to identify the ‘evolving standards of decency’; to determine, not what they should be, but what they are. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society’s apparent skepticism.”).

194 Id. at 379.
own moral code to the constitution; (2) the importance of deferring to legislatures;\textsuperscript{195} (3) requiring individualized assessments of each juvenile and not treating juveniles by age category;\textsuperscript{196} and (4) rejecting the child development arguments as unproven and tendentious.

Sixteen years after Stanford, in Roper v. Simmons,\textsuperscript{197} the Court revisited the constitutionality of the death penalty for juveniles, holding that execution of persons under eighteen years of age violated the Eighth Amendment.\textsuperscript{198} Justice Kennedy, writing for the majority, argued that in the time period between Stanford and Roper, a “national consensus against the death penalty for juveniles”\textsuperscript{199} had emerged, and noted a similar trajectory for the consensus against executing people with mental retardation.\textsuperscript{200} In a direct rejection of Justice Scalia’s argument in Stanford, Justice Kennedy noted that the majority’s analysis “returned to the rule, established in decisions predating Stanford, that ‘the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’”\textsuperscript{201} The Roper majority’s open departure from Justice Scalia’s approach in Stanford with its affirmative reliance on the Justice’s own personal notions of cruel and unusual punishment,\textsuperscript{202} was all the more remarkable because of its multiple citations to the penological, psychological, and brain-science literature.\textsuperscript{203}

\textsuperscript{195} Justice Scalia found the Court’s announcement antidemocratic. He believed that if any semblance of societal evolution existed to prohibit executing teenagers (a trend he disputed), then the legislative branch must lead the way. Justice Scalia explained, “It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.” Thompson, 487 U.S. at 865. (Scalia, J., dissenting).

\textsuperscript{196} Stanford, 492 U.S. at 374–75.

\textsuperscript{197} Roper v. Simmons, 543 U.S. 551, 555 (2005).

\textsuperscript{198} Id. at 578.

\textsuperscript{199} Id. at 564. Typical of the murderous juveniles whose cases arrive before the Supreme Court, their conduct is appalling. Simmons “broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious.” Id. at 618 (Scalia, J., dissenting). As the majority noted, “Simmons discussed the crime in advance and bragged about it later.” Id. at 557 (majority opinion).

\textsuperscript{200} Id. at 564 (“Just as the Atkins Court reconsidered the issue decided in Penry, we now reconsider the issue decided in Stanford.”). Ironically, the Supreme Court decided Penry the same day it issued its ruling in Stanford. Kennedy conceded that the change in national consensus concerning executing people with mental retardation was more pronounced than the change regarding juveniles. Id. at 565–66.

\textsuperscript{201} Id. at 563 (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)). Atkins in turn quoted Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion). Kennedy observed: “The Atkins Court neither repeated nor relied upon the statement in Stanford that the Court’s independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment.” Roper, 543 U.S. at 563.

\textsuperscript{202} As O’Connor noted and criticized, “[T]he rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender.” Id. at 588 (O’Connor, J., dissenting).

\textsuperscript{203} Those citations include: “Developmental Review,” “American Psychologist,” id. at 569; the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, id. at 573;
The majority cited three reasons for distinguishing juveniles younger than 18 years old from adults: (1) juveniles are less mature than adults are; (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and (3) juveniles’ characters are “not as well formed,” and “less fixed.” In analyzing the significance of these differences, the majority reasoned that juvenile offenders cannot with reliability be classified among the “worst offenders” deserving death. Justice Kennedy explained: “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” From a penal standpoint, the death penalty is unjust, where “blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”

Justice Scalia, in dissent, was hopping mad. He objected to the rapid reversal. He opposed the focus on modern notions of decency rather than the Eighth Amendment’s original meaning, and rejected the claim that the majority’s analysis was based on constitutional principles or the Constitution itself. Even more galling to Justice Scalia was the majority’s arrogating to and Erik Erikson’s “Identity: Youth and Crisis,” id. at 570. Also, to Scalia’s consternation, the majority cited foreign law, id. at 577 (listing Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China), and Article 37 of the United Nations Convention on the Rights of the Child, which prohibits execution of people under age 18, id. at 576. The United States and Somalia are the only two nations that have not ratified the Convention. Id.

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itself the determination of what counts as cruel and unusual punishment,\textsuperscript{214} rendering it the “subjective views of five Members of this Court,”\textsuperscript{215} and “a show of hands on the current Justices’ current personal views about penology.”\textsuperscript{216}

Similarly, in \textit{Lee v. Weisman},\textsuperscript{217} Justice Scalia saw the majority’s decision to distinguish high school students from adults as absurd.\textsuperscript{218} He noted, “I also find it odd that the Court concludes that high school graduates may not be subjected to this supposed psychological coercion, yet refrains from addressing whether ‘mature adults’ may.”\textsuperscript{219} He explained:

\begin{quote}
I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?\textsuperscript{220}
\end{quote}

Justice Scalia, who favored bright lines and clear rules, nevertheless considered the bright-line age ban for executing minors ridiculous. In his worldview, there certainly existed some seventeen-year-old with sufficient moral agency and personal maturity to be put to death. Similarly, in \textit{Merchants’ Entertainment} and \textit{Weisman}, Justice Scalia questioned arbitrary distinctions based on age, asking how a violent video would affect a sixteen-year-old so differently from a seventeen-year-old, or how a graduating senior hearing a prayer was different from an immature adult.

\textsuperscript{214} Id. (citations omitted) (“Worse still, the Court says in so many words that what our people’s laws say about the issue does not, in the last analysis, matter: ‘[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’”).

\textsuperscript{215} Id. (Scalia, J., dissenting).

\textsuperscript{216} Id. at 629.

\textsuperscript{217} Lee v. Weisman, 505 U.S. 577 (1992). This case is also discussed in Part II.

\textsuperscript{218} Id. at 638 (Scalia, J., dissenting).

\textsuperscript{219} Id. at 639.

\textsuperscript{220} Id.
V. FINAL THOUGHTS ABOUT JUSTICE SCALIA’S JUDGING AND QUESTIONS ABOUT RELYING ON CHILD PSYCHOLOGY IN JUDICIAL DECISION-MAKING

A. Debunking the Myth of the Neutral, Unbiased Judge

Justice Scalia’s opinions at the intersection of children and psychology reveal that Justice Scalia displayed and enforced strong policy proclivities in his opinions beyond his “neutral” interpretive approach to statutes and the Constitution. These policy preferences include venerating tradition, buttressing hierarchy, and harshly punishing wrongdoers.221 If we needed more evidence that judges are neither neutral nor unbiased (I doubt we do), Justice Scalia’s writings discussed in this Article make that point resoundingly.

Relatedly, Justice Scalia remained confidently assured of his own neutrality and consistency—something that the science of psychology might have taught him to be a bit more skeptical about. Ironically and poignantly, Justice Scalia ferociously rejected psychology—the very source that proves that everyone has biases, and that neutrality is a pipe dream. Justice Scalia constantly accused other Justices of being result oriented and trying to impose their own agendas, but always exempted himself from that sin—a classic case of projection. Indeed, a Freudian might conjecture that Justice Scalia’s fear of exploring his own biases explains some of his hostility to the academic discipline of psychology and to therapy.

At moments, Justice Scalia demonstrated a stunning level of lack of self-awareness (the classic example being his avowed indifference to how law defines marriage in Obergefell in which he wrote, “it is not of special importance to me what the law says about marriage”).222 Psychology, particularly personal therapy, provides an important road to self-awareness. It is a road Justice Scalia distrusted and clearly declined to travel.

But aside from judicial and quasi-personal observations, there is much more that we can learn from examining the nexus of children and psychology in Justice Scalia’s jurisprudence. In the following subparts, this Article imagines applying Justice Scalia to Brown v. Board of Education; highlights tensions and contradictions in Justice Scalia’s approach, demonstrating their currency in today’s social debates; and suggests some directions for the law’s future use of psychology.

221 Of course, interpretive methods that venerate history and tradition are bound to reinforce a conservative outlook, particularly if the applier of that method is prepared to annul recent precedent.

B. Brown v. Board of Education as a Test Case

When thinking about the Supreme Court, psychology, and children, one cannot help but consider Brown v. Board of Education, the seminal civil rights case overruling the doctrine of “separate but equal.” Brown held that public schools’ segregation based solely on race deprived minority children of equal educational opportunity, violating the Equal Protection Clause of the Fourteenth Amendment, even if the facilities and other factors were equal (which, unsurprisingly, they never really are).

Many others analyzing Justice Scalia’s jurisprudence have questioned whether, if true to his values, interpretive method, and proclivities, Justice Scalia could have supported the unanimous holding in Brown. Given the centrality of Brown to modern American life and civil rights, this is an essential question. Apparently, Justice Scalia was asked about it so often that he would respond, “Waving the bloody shirt of Brown again, eh?” Justice Scalia argued that his approach was indeed compatible with Brown, both because of the history of the Thirteenth and Fourteenth Amendments, which could “reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat

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224 Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
225 Brown, 347 U.S. at 491–92 (reviewing the history of separate but equal and noting that in all the graduate school cases “inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications”).
227 See Vanita Gupta, Oppose the Confirmation of Judicial Nominees Who Decline to State Brown v. Board of Education Decision Was Correctly Decided, LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 13, 2019), https://civilrights.org/resource/oppose-the-confirmation-of-judicial-nominees-who-decline-to-state-brown-v-board-of-education-decision-was-correctly-decided/# (“Although affirming the widely supported holding of Brown does not in itself make someone qualified to serve a lifetime position in the federal judiciary, it must be considered a minimum qualification.”).
the races equally,"²²⁹ and because he allied himself with Justice Harlan’s dissent in *Plessy*.²³⁰

Because there is no mention of segregation in the Fourteenth Amendment, and racial segregation was the norm when the Fourteenth Amendment was passed,²³¹ Justice Scalia’s reliance on textual analysis does not support the holding in *Brown*.²³² The same is certainly true for arguments based on history, tradition, or democracy.²³³ Further complicating any originalist approach is that public education for Blacks was non-existent at the time of the Fourteenth Amendment’s drafting.²³⁴ The Court in *Brown* candidly observed that “we cannot turn the clock back to 1868 when the Amendment was adopted,”²³⁵ thus thoroughly distancing itself from the dubious historical approach Justice Scalia advanced decades later.

Instead, the unanimous, ten-page *Brown* opinion relied on policy considerations, which, of course, Justice Scalia deplored as a basis for judicial decision-making. What’s particularly interesting for this inquiry is that the polices all relied on child psychology and therapeutic notions of the effect of stigma on learning. *Brown* explained: “To separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may

²²⁹ *Id.* at 172–73; see also *Rutan v. Republican Party*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (rejecting the “customary invocation” of *Brown* to refute his originalist approach and arguing for “the role of tradition in giving content only to ambiguous constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”); ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 88 (2012); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995) (arguing that “school segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment”).

²³⁰ See *Turner*, *supra* note 228, at 173 (criticizing Justice Scalia’s application of originalism as unpersuasive and noting the curiosity of relying on Justice Harlan who “believed in racial hierarchy, endorsed white supremacy, and rejected the idea that African Americans were the social equals of whites—as authority for the proposition that *Brown* is consistent with originalism”).

²³¹ See *id.* at 172–73.

²³² See Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995) (discussing the political and social context in which the Fourteenth Amendment was drafted and ratified and observing that “[i]t is inconceivable that most—indeed even very many—Americans in 1866–68 would have endorsed a constitutional amendment to forbid public school segregation”). *But see* McConnell, *supra* note 229, at 955 (arguing that Brown could be justified by an originalist approach).

²³³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954), *rev’d* 349 U.S. 294 (1955). Indeed, even the Court itself acknowledged that the reargument in *Brown*, which was “largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868,” that the history was “[a]t best . . . inconclusive.”

²³⁴ *Id.* at 489–90.

²³⁵ *Id.* at 492.
affect their hearts and minds in a way unlikely ever to be undone.”

The unanimous court deemed “separate educational facilities” as “inherently unequal” because of their deleterious effect on children’s self-concept and self-confidence. The Court also noted that “[a] sense of inferiority affects the motivation of a child to learn.” In a single footnote, the Court cited psychological literature about the effects of prejudice and segregation on children’s development and learning. Nothing in Scalia’s jurisprudence indicates that he gave a jot for children’s feelings or expressed any concerns about the effects of stigma. It is hard to imagine that even if Scalia could harmonize his originalist approach with the result in Brown, that he could have supported the reasoning, based on the Court’s cursory importation of and reliance on child psychology.

C. Highlighting Tensions and Contradictions in Justice Scalia’s Approach to Children and Psychology

This Article has noted some contradictions in Justice Scalia’s approach to children and psychology. For instance, although Justice Scalia granted primacy to parental privilege in Michael H. and Adoptive Couple, he allowed state family law to override parents’ desires by allowing grandparent visitation against parents’ wishes in Troxel. The child is always at the bottom of the hierarchy, but the rights of parents and the rights of the state sometimes vie for precedence. As another example, Justice Scalia generally advocated for bright-line rules and opposed individualized standards but made an exception when it increased the opportunities to punish juveniles.

The tensions in Justice’s Scalia’s approach to children and psychology remain confounding and relevant today. Two current social issues in 2022, (1) mentioning sexual orientation to elementary-school children and (2) medical treatment of gender dysphoria in children, display many of the same themes and contradictions that arose in Justice Scalia’s disdain for children and rejection of psychology. Florida’s Parental Rights in Education Act

236 Id. at 494.
237 Id. at 495.
238 Id. at 494.
239 Id. at 494 n.11. The quality of the psychological studies cited in Brown has been questioned by many scholars. See, e.g., William D. Blake, “Don’t Confuse Me with the Facts”: The Use and Misuse of Social Science on the United States Supreme Court, 79 Md. L. Rev. 216, 230 (2019) (“Even by the scientific standards of the mid-twentieth century, the research cited in Brown was not particularly well-designed.”).
240 Actually, there is even a contradiction between these two cases. Adoptive Couple focused on biological parenthood while Michael H. refused to acknowledge biological parenthood. What Justice Scalia’s two opinions have in common in these cases is disregard for the experience or feelings of the child at the center of the case.
(otherwise known as the “don’t say gay” law) prohibits “instruction” in school on sexual orientation or gender identity to children in kindergarten through third grade and prohibits such instruction in older grades if it is “in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”

Governor Ron DeSantis hailed the bill, noting that “[p]arents’ rights have been increasingly under assault around the nation, but in Florida we stand up for the rights of parents and the fundamental role they play in the education of their children.”

Psychologists immediately commented in a way that would have certainly irritated Justice Scalia, that the “don’t say gay” law would harm children psychologically. The American Psychological Association wrote that the bill would stigmatize, marginalize, and potentially cause serious harm to children who realize they are gay.

Another source of stress and potential trauma arises from children not seeing families like theirs or even being able to talk about their queer parents in school. Such consideration of stigma and interference with learning hark back to Brown. To some extent, parental interest and state policy coincide (certainly Governor DeSantis would argue that the law empowers parents), but certainly not all parents, including those in same-sex unions, those with kids who identify as queer, and those who love and support such parents.

Treatment for gender dysphoria reveals the fault lines in Justice Scalia’s approach even more starkly, presenting a direct conflict between parents and states. Arkansas’s 2021 Save Adolescents from Experimentation Act, passed over the Governor’s veto, prohibits medical doctors from prescribing treatment for gender dysphoria, such as puberty blockers to those younger than eighteen. Additionally, the act prohibits doctors from referring families for gender dysphoria treatment out-of-state. Plaintiffs sought a

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242 Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education, FL. GOVERNOR (Mar. 28, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/ (“Parents have every right to be informed about services offered to their child at school, and should be protected from schools using classroom instruction to sexualize their kids as young as 5 years old.”).
243 Kim Mills, APA President Condemns Florida’s ‘Don’t Say Gay’ Bill, AM. PSYCH. ASS’N (Mar. 9, 2022), https://www.apa.org/news/press/releases/2022/03/florida-dont-say-gay (“Prohibiting classroom discussion on these topics sends the message that identifying as LGBTQ is inherently wrong, stigmatizing and marginalizing children who may realize their difference at a young age. Psychological research has shown that increased social isolation and stigma can lead to depression, anxiety, self-harm and even suicide.”).
temporary injunction arguing that the law discriminated against transgender children, violated parental rights, and intruded on doctors’ free speech.\textsuperscript{246} A unanimous panel of the U.S. Circuit Court of Appeals for the Eighth Circuit upheld a trial court’s temporary injunction of the ban, and the full trial is underway.\textsuperscript{247} The Eighth Circuit found substantial evidence that Arkansas’s law “prohibits medical treatment that conforms with the recognized standard of care,” and reasoned that, “[b]ecause the minor’s sex at birth determines whether or not the minor can receive certain types of medical care under the law, Act 626 discriminates on the basis of sex.”\textsuperscript{248}

As with the “don’t say gay” bill, psychologists and pediatricians decried the ban on gender affirming treatments.\textsuperscript{249} What was different from the “don’t say gay” bill, however, was that legislators voted to override not only the advice of the psychologists and medical doctors, but the medical wishes of parents. The case of gender dysphoria in children and their desire for gender reaffirming treatment highlights an underdeveloped tension in Justice Scalia’s jurisprudence and in conservative attitudes toward children and families in general. Parental privilege is honored in the extreme—except when it clashes with conservative social values, and then the state, acting contrary to medical and psychological authority, declares that it is “protecting children.”\textsuperscript{250} Some states have chosen to wrest the time-sensitive and difficult decisions about puberty blockers away from parents, even when medical advice would support such therapy. One thing remains consistent: the advocates of both bills don’t care how the child feels or what the child wants. Tellingly, this is not true of those opposing the ban, who called a trans teen to testify about his experiences.\textsuperscript{251} The child has vanished, and the state


\textsuperscript{247} At the time of this writing, the trial has begun in the Little Rock District Court. \textit{See id.}


\textsuperscript{250} Pierson, \textit{supra} note 248 (quoting the ACLU argument that “[r]esearch shows that denying gender-affirming care to transgender youth contributes to depression, isolation, eating disorders, self-harm and suicide”).

\textsuperscript{251} DeMillo, \textit{supra} note 246 (quoting Arkansas Attorney General’s explanation of the ban on gender affirming treatment: “This is about protecting children”), https://www.pbs.org/newshour/politics/first-trial-over-state-ban-on-trans-youth-care-begin-in-arkansas.

\textsuperscript{252} Jo Yurcaba, ‘\textit{Changed My Life’}: Trans Teen Testifies Against Nation’s First Ban on Gender-Affirming Care, NBC NEWS (Oct. 20, 2022, 11:24 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/changed-life-trans-teen-testifies-nations-first-ban-gender-affirming-c-rcna53284 (quoting the
overrules parental authority and decision-making, making the paeans to empowering parents seem hollow.

D. Noting an Overdetermined Jurisprudence: How Justice Scalia’s Attitudes About Psychology and Children Naturally Arose from His Approach to Judging

Justice Scalia cherished tradition and upheld hierarchy, so, not surprisingly, he advocated for the state to recognize and support traditional hierarchy within the family. His jurisprudence harks back to premodern times before psychology became a discipline, and religion and literature were the chief instructors on human behavior.253

Justice Scalia bristled when children were granted power over authority figures or could somehow get their parents in trouble. He expressed the concern in Adoptive Couple, that the majority “needlessly demeans the rights of parenthood.”254 Relatedly, Justice Scalia portrayed parents as an essential source of wisdom and moral values. For example, in Jaffee, Justice Scalia evoked the helpful and beneficent advice of “mom” as superior to that of a psychotherapist.255

In Justice Scalia’s jurisprudence, children are mere objects who are acted upon. We never heard from Victoria in Michael H. about her preferences regarding her biological father, though both the guardian ad litem and psychologist suggested contact, a fact that Justice Scalia ignores. The toddler in Adoptive Couple was too young to voice an opinion, but Justice Scalia ignored the indisputable evidence that wrenching that child from the only home she had ever known would be harmful. Indeed, Justice Scalia argued ad absurdum in Adoptive Couple and Flores that if the government inquired too closely into a child’s best interests, many families would be disbanded.256

Justice Scalia’s preference for rules over standards also supported his aversion to the multi-part, malleable “best interests” standard. The government should have a minimal role in monitoring children’s upbringing, especially because the best interests standard was so indeterminate, clunky, and intrusive. Yet, because support of the historical death penalty was

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253 See, e.g., William Shakespeare, Hamlet act 3, sc. 2, l. 254 (“The lady doth protest too much, methinks” provides an example of denial and overcompensation.).
256 Adoptive Couple, 570 U.S. at 668 (Scalia, J., dissenting).
particularly important to him, Justice Scalia advocated for an individualized assessment of maturity standard in criminal cases over the easy-to-apply rule of age limitations. The pattern is that Justice Scalia individuated juveniles’ maturity for purposes of punishment or protective limitations on conduct; however, he elided any inquiry into the individual child’s needs when it came to protecting them from governmental or parental intrusion or examining children’s rights or psychological needs.

Justice Scalia reinforced the rewards and prerogatives of the majoritarian culture and empathized with the powerful, whose traditional top-dog status was being questioned. He also empathized with the victims of juvenile crime and others affected by policies he disliked.257 In Craig, Justice Scalia focused on the Confrontation Clause, which he fervently believed could tolerate no exceptions accommodating traumatized children.258 Instead, in a fairly maudlin fashion, he postulated an imaginary child who accused his parents of awful, false crimes, but who would come clean given the right dose of confrontation. Justice Scalia went so far in empathizing with the parents that he adopted a parental voice, and persona as if he were talking to a child: “‘[I]t is really not true, is it, that I—you father (or mother) whom you see before you—did these terrible things?’”259 By contrast, no such empathy was expressed for the actual child-victims molested by a daycare provider.

257 For example, in Romer, Justice Scalia empathized with the Colorado voters who wanted to limit gays’ rights to challenge homophobia in their towns. Justice Scalia expressed concern for the “people of Colorado,” who wish to maintain their distance from a homosexual lifestyle they find morally abhorrent. Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting). See Chris Edelson, Judging in a Vacuum, or, Once More, Without Feeling: How Justice Scalia’s Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson, 45 AKRON L. REV. 513, 549 (2012) (discussing Justice Scalia’s empathy for the majority in Romer). Similarly, as one biographer recounts, Justice Scalia empathized with the child of the Polish factory worker who suffered because that child did not benefit from affirmative action. JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 160 (2010) (quoting an interview with Justice Scalia in which the Justice said, “But I certainly felt that the Lewis Powells of the world were not going to bear the burden that they were creating [with affirmative action]. It wasn’t their kids. It was the Polish factory worker’s kid who was going to be out of a job.”).

258 Justice Scalia’s hostility to compromising constitutional principles to accommodate the emotional and psychological needs of vulnerable victims was on full display in another Confrontation Clause case. In Giles v. California, 554 U.S. 353, 376 (2008), he wrote: [W]e are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Frimmers adopted and Crawford described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women?

Giles presents another example of Justice Scalia’s concern that policy issues regarding vulnerable populations (women and children) would be used to undermine constitutional principles and traditional rules.

By hooking his wagon to history, tradition, and the democratic process, favoring legislative action, and eschewing balancing tests, Justice Scalia inevitably devalued the interests of children. Though independently scornful of psychology and dismissive of children, his analytical approach dovetailed with and cemented a narrow view of children’s rights and robust contempt for psychology. The interrelationship between Justice Scalia’s general jurisprudence and his particular hostility to psychology and children is important given Justice Scalia’s outsized influence on the conservative wing of the Court. Will those Justices who hew to Justice’s Scalia’s legal philosophy find themselves taking positions that ignore children and demean psychology and its professionals?

E. Thinking About the Role of Psychology in Law

Setting aside Justice Scalia’s dismissive attitudes towards childhood trauma and his disdain for therapists and the discipline of psychology, one must acknowledge that Justice Scalia raised some valid concerns about the proper use of psychology by courts. Justice Scalia excoriated the methodology of some courts that gleaned psychological research for arguments that supported particular positions and cherry-picked favorable studies (something he himself did in the juvenile punishment cases). He was correct in expressing concern about courts’ supporting their arguments with psychology literature that judges did not have the requisite background to evaluate or interpret. Specifically, the arguments about peer pressure in Weisman seemed attenuated and the science in Entertainment Merchants was

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261 See Deana Pollard Sacks et al., Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae ‘Experts’ in Brown v. Entertainment Merchants Association, 106 NW. U. L. REV. 1, 12 (arguing that the amici supporting the state’s position were much more expert than those representing the video merchants and that courts should be cognizant of the experts’ level of peer review, experience, reputation, and knowledge).
just bad. Giving Justice Scalia his due, however, does not mean that his extreme hostility to psychology was accurate or warranted. Instead, it raises the important question of how, if at all, law should be informed by psychology.

Certainly, we rely on psychology to imagine what types of evidence jurors can handle, or whether to give a special instruction on cross-racial identification. We rely on experts to help project an individual’s future dangerousness in sex-crime cases or a child’s best interest in custody cases. Yet, there are many places where the law ignores or even resists established insights from psychology. Psychologists tell us of the flaws of eye-witness identification, yet the evidence rules systematically promote such testimony as the gold standard. Assumptions about human behavior abound in law, for instance, regarding how long someone remains in the “heat of passion” for the purposes of involuntary manslaughter. Those types of assumptions permeate the evidence rules as well. Scholars express chagrin about the dubious folk wisdom explaining some hearsay exceptions, such as the excited utterance or the dying declaration, which clearly conflict with established psychological precepts. Similarly, psychology casts doubt on the structure of character evidence, particularly impeachment for the “character of untruthfulness,” a category psychologists find laughable. The question is whether we care. Does law or legal analysis have to comport with established psychological principles and best practices?

It is unquestionably dangerous for courts or parties to search Google Scholar to find supporting evidence without the ability to fairly evaluate or contextualize the studies cited. To the extent that the psychological arguments emanated from expert amici, such as the American Psychological Association, that concern is less valid, though Justice Scalia clearly suspected

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265 See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1298–99 (2012) (“Given the limited time for deciding a case and the limited research resources available to the judiciary, judges and Justices are institutionally ill-equipped to evaluate questions of psychology, social science, physics, or medicine. And, consequently, when Justices deal in matters outside their expertise, they are more likely to make a mistake.”).
that such professional associations were motivated by a self-interested agenda.266

Future inquiry, ideally with the help of psychologists, should explore whether there is a principled way to incorporate psychological studies and brain science into our substantive law and procedural rules.267 For instance, it might make sense to distinguish employing experts for general framework evidence from using them to opine on individual applications of scientific principles.268 And such an inquiry would extend to other social sciences,269 and the level of deference due to trial courts upon finding such social or legislative facts.270

Considering children in particular, we should question how advances in child development should influence the law by elucidating notions of best interests, effects of trauma, culpability, and the requisite maturity to exercise rights responsibly.

CONCLUSION: PUTTING THE CHILD FRONT AND CENTER

This article has argued that Justice Scalia exhibited disinterest, occasionally bordering on wanton disregard, for accommodating or even acknowledging children’s psychological needs. He was skeptical of children’s experience of trauma (as in Craig where the children’s trauma was cited as the reason to use closed circuit TV instead of face-to-face

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266 See Jaffee v. Redmond, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting) (noting the large number organized professional groups submitting amici briefs supporting a therapist privilege and noting that: “There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.”); Blake, supra note 239, at 252 (“When the Justices do invoke science, other normatively troubling patterns emerge. Liberal Justices are more likely to cite science than conservative Justices. The decision to cite science is one that polarizes Justices on the Court’s left and right. Rather than letting scientific knowledge mitigate a Justice’s ideological proclivities, the data indicate Justices on both ends of the spectrum resort to scientific arguments to bolster their underlying worldviews.”).


268 See David L. Faigman et. al., Group to Individual (G2i) Inference in Scientific Expert Testimony, 81 U. CHI. L. REV. 417, 417–18 (2014) (“[S]cientists generalize while courts particularize. A basic challenge for trial courts that rely on scientific experts, therefore, concerns determining whether and how scientific knowledge derived from studying groups can be helpful in the individual cases before them.”).

269 See Blake, supra note 239, at 241 (analyzing the Supreme Court’s opinions dealing with science by discipline, finding political science number one, and psychology number two).

confrontation). Because he found the inquiry into trauma or best interests irrelevant and uninteresting, he erased the child as an independent actor, and the child vanished from Justice Scalia’s analysis or concern. When Justice Scalia discussed children at all, he often portrayed them as troublemakers who committed atrocities or upstarts who demanded independent rights, thereby disrupting traditional hierarchies in the family and society. Children’s needs seemed to matter only as a means of justifying increased state or parental power over them.

As an examination of his opinions across various constitutional, family law, and other cases reveals, Justice Scalia rejected a social structure where children receive a respected voice or protected interest equal to or greater than their adult caregivers. Justice Scalia expressed deep skepticism of and hostility to the science of psychology and to therapeutic notions generally and as applied to children (although he occasionally cited psychology and its practitioners to support his positions).

Justice Scalia’s approach involved talking about children, not to them. Protecting children was an important value, only second to punishing them. That protection, however, was dominated by a worldview that prioritized state and parental power, historical mores, traditional values, and an avowed (if inconsistent) privileging of legislative over judicial determinations. These attitudes toward children and psychology are an inevitable outgrowth of Justice Scalia’s general approach to judging. Current debates about gender-affirming treatment display how one can tout protection while ignoring the needs of children and the rights of parents at the same time. Therefore, Justice Scalia’s opinions reveal the connection between his attitudes to psychology and children on the one hand, and a historical, traditional, legislative-focused, and self-proclaimed neutral approach to judging on the other.

Justice Scalia’s hostility to psychology invites us to engage with questions of how law, lawmakers, and judges should rely on and interact with psychology. It also reminds us to follow the advice from Justice Douglas in Yoder, who noted with disapproval that “we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child.” Justice Douglas wrote that “I disagree with the Court’s conclusion that the matter is within the dispensation of parents alone.” Before concluding that fifteen-year-old Amish children need not attend school past

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271 See supra Part III


273 Id. at 244 (arguing that “on [the] important and vital matter of education, I think the children should be entitled to be heard”). But see Emily Buss, What Does Frieda Yoder Believe? 2 U. PA. J. CONST. L. 53, 54 (1999) (arguing that “the State will do more harm than good if it plays an active role in eliciting children’s religious views”).
the eighth grade, Justice Douglas insisted that someone should ask them what they think.

Justice Scalia favored an approach where children should not be heard, and argued instead for a robust focus on parental choice and governmental prerogative—so long as it supported traditional values. In doing so, his opinions highlight questions of children’s rights, raise difficulties when parental and government interests collide, and question the value and appropriateness of psychology in law. For many, his approach serves as an object lesson in favor of listening to children and the professionals who try to protect them.