

# Constitutional Government and Civic Education

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*Justice Antonin Scalia*

I am delighted to be here for the inaugural event of the “Tocqueville Forum on the Roots of American Democracy” — a program devoted to deepening students’ understanding of the philosophical and religious foundations of our Republic. That deepening will not take a whole lot of subterranean work; by all accounts and observations, the current understanding is pretty shallow.

According to a study released last month by the Intercollegiate Studies Institute, American college students are woefully uninformed about this Nation’s history and its founding principles. The study warns of a “coming crisis in citizenship”—which may not be an exaggeration. To recount my own admittedly episodic observation: When I teach a class of constitutional law (I did this frequently, at the University of Chicago and Stanford, before becoming a judge, and I continue to do it in one-shot appearances even today) I usually ask how many of the students have read, cover-to-cover the *Federalist Papers*. I have never seen more than about 5% of the students raise their hands. These are students at that nation’s elite law schools, the best and the brightest men and women, who have a particular interest in law and government. It is truly appalling that they should have reached graduate school without having been exposed to that important element of their national pat-

rimony—the work that best explains the reasons and objectives of the Constitution, and a contribution to human knowledge so profound that it is studied in political-science courses in foreign countries.

One of the ISI study’s findings in particular caught my eye: At several elite schools, including Yale and Georgetown, seniors know less than freshmen about America’s history, government, foreign affairs, and economy. The study calls this “negative learning,” which is of course a euphemism for “getting dumber.” To be fair, one could put an optimistic face upon the finding: perhaps today’s freshmen arrive better educated than the freshmen of three years ago. But even if that were true (and I have no reason to believe it is), it would at least mean that three years of college have not made up for the deficit.

Tonight I want to comment on two aspects of the civic education issue. First, I shall describe the Founders’ views on civic education, to help evaluate how our performance has lived up to expectation. Second, I shall comment on the Supreme Court’s contribution to the coming crisis.

Views representative, I think, of the Founders can be found in Noah Webster’s 1790 essay, “On the Education of Youth in America.” Webster, a zealous patriot, famous lexicographer and educator (a Yale graduate, by the way) stated that

American students must “know and love the laws.” “This knowledge,” he wrote, “should be diffused by means of schools and newspapers; and an attachment to the laws may be formed by early impressions upon the mind.”<sup>1</sup> More particularly, Webster prescribed a course of study rich in American history and government:

“[E]very child in America should be acquainted with his own country. He should read books that furnish him with ideas that will be useful to him in life and practice. As soon as he opens his lips, he should rehearse the history of his own country; he should lisp the praise of liberty, and of those illustrious heroes and statesmen, who have wrought a revolution in her favor. A selection of essays, respecting the settlement and geography of America; the history of the late revolution and of the most remarkable characters and events that distinguished it, and a compendium of the principles of the federal and provincial governments, should be the principal school book in the United States. These are interesting objects to every man; they call home the minds of youth and fix them upon the interests of their own country, and they assist in forming attachments to it, as well as in enlarging the understanding.”<sup>2</sup>

A similar approach was recommended by the other prominent founding-era writer on civic education, Benjamin Rush. Rush, signer of the Declaration of Independence, doctor, educator, and prominent essayist, wrote the following: “From the observations that have been made it

is plain, that I consider it is possible to convert men into republican machines. This must be done, if we expect them to perform their parts properly, in the great machine of the government of the state.”<sup>3</sup> (Webster and Rush, by the way, did not agree about everything. As noted by the editor of a volume of essays on education in the early Republic: “In their disagreement on the role of the Bible in the public schools and in the suitability of instruction in French and the harpsichord for young ladies, Webster and Rush suggest that some educational questions may indeed be eternal.”<sup>4</sup>)

It is fairly clear that what Webster and Rush were recommending was nothing short of indoctrination in republican principles, at least for the young. Thus, a widely shared view of civic education in the early Republic was that our system of education should stop glorifying European culture. Before a broad system of education is to succeed, wrote Webster, “Americans must *believe* and *act* from the belief that it is dishonorable to waste life in mimicking the follies of other nations and basking in the sunshine of foreign glory.”<sup>5</sup> The fear was that educators would glorify a corrupt European culture and would fail to develop our own. Far from mimicking the customs, manners and intellectual fashions abroad, our founders expected us to serve as a model for other nations’ improvement. As Madison explained,

“[t]he American people owe it to themselves, and to the cause of free Government, to prove by their establishments for the advancement and diffusion of Knowledge, that their political Institutions, which are attracting observation from

1 Noah Webster, *On the Education of Youth in America* (1790), reprinted in Frederick Rudolph, *Essays on Education in the Early Republic* 65 (Harvard Univ. Press 1965).

2 *Id.*, at 64-65.

3 Benjamin Rush, *Of the Mode of Education Proper in a Republic*, reprinted in *The Founders’ Constitution* 686.

4 See Rudolph, *supra* n.1, at 41.

5 Noah Webster, “On the Education of Youth in America,” reprinted in, Rudolph, *supra* n.1, at 77.

every quarter, and are respected as Models, by the new-born States in our own Hemisphere, are as favorable to the intellectual and moral improvement of Man as they are conformable to his individual & social Rights. What spectacle can be more edifying or more seasonable, than that of Liberty & Learning, each leaning on the other for their mutual & surest support?"<sup>6</sup>

How politically incorrect these ideas seem in an age that worships diversity and moral relativism. To be willing to train the young in American principles, one must believe, first, that there is such a thing as distinctive American principles (which is necessarily to say that contrary principles are *not* American or—dare I say it—*un*American), and second, that those distinctive American principles are superior to those of other societies. Would anyone, nowadays, expect to hear a public grammar-school principal voicing these exclusionary and un-PC sentiments?

Another focus of the Founders' writings on education was the importance of discipline. The Founders believed that discipline was a necessary ingredient of civic education not just because it created a proper environment for learning, but because it taught respect for the rule of law. "In the education of youth," Benjamin Rush explained, "let the authority of our masters be as *absolute* as possible. The government of schools like the government of private families should be *arbitrary*, that it may not be *severe*. By this mode of education, we prepare our youth for the subordination of laws and thereby qualify them for becoming good citizens of the republic."<sup>7</sup> Webster shared these views:

"Here children should be taught the usual branches of learning; submission to superiors and to laws; the moral or social duties; the history and transactions of their own country; the principles of liberty and government."<sup>8</sup>

And discipline, naturally, required effective punishment. Webster minced no words:

"The rod is often necessary in school, especially after children have often been accustomed to disobedience and a licentious behavior at home. All government originates in families, and if neglected there, it will hardly exist in society, but the want of it must be supplied by the rod in school, the penal laws of the state, and the terrors of divine wrath from the pulpit. The government both of families and schools should be absolute."<sup>9</sup>

Few of us today would reintroduce the rod, (and, I may add parenthetically, few pulpits dwell upon the terrors of divine wrath). But swift and effective punishment of even the non-physical sort has been all but banished from today's public-school classrooms, because of the application of due process clause to school affairs (about which more later) and the *in terrorem* effect of litigation.

It should be apparent from several of the passages quoted above that the founders were as interested in teaching virtue as in teaching civics. This is apparent from Article III of the Northwest Ordinance, enacted by the Continental Congress and reenacted by the First Congress. It read in part: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools

<sup>6</sup> James Madison, Letter to W.T. Barry, *reprinted in 1 Founders' Constitution*, at 690.

<sup>7</sup> Rush, *Public Schools*, *reprinted in Rudolph*, supra n.1, at 16.

<sup>8</sup> Webster, On the Education of Youth in America, *reprinted in Rudolph*, supra n.1, at 67.

<sup>9</sup> *Id.*, at 57-58.

and the means of education shall forever be encouraged.” As Madison put it, “[t]he *virtues* of men are of more consequence to society than their *abilities*; and for this reason, the *heart* should be cultivated with more assiduity than the *head*.” And this could not likely be done, the framers believed, without religion.

I have often thought that one of the foundations for the relative political stability of the West has been the Our Father—and in particular its avowal that we forgive those who have trespassed against us. When I was in high school in New York City there existed an organization called the Catholic Forensic League, in which many of the Catholic high schools would compete in various categories of public speaking: debate, extemporaneous speaking, and oratorical declamation among others. This last category included famous speeches, such as the speech (if I recall its title correctly) of Telemachus to the Gladiators. One of these set pieces reenacted a conversation between a noble Roman and the Bishop of Rome. The Roman, a convert to Christianity, had seen his mother and brother slain before his eyes when Christians who had been invited on some pretext to the Coliseum saw imperial archers swarm into the arena and let loose a hail of arrows into the crowd. The bishop tells the Roman to fall to his knees and say the Our Father—which he does, haltingly when he comes to “as we forgive those who trespass against us.” I remember being mightily impressed by that bit of theater. Now to be sure, Christians have not always honored that avowal, just as they have often disobeyed other injunctions of their faith. But they have often

observed it, so that slaying 20th century Moslem Kosovars because of a Moslem slaughter of Serbs that occurred at Kosovo Polje in 1389 seems to most of us beyond the pale. And of course St. Paul’s letter to the Romans gives the same message: “Vengeance is mine, saith the Lord.” Is there any other good reason—a reason that will appeal to the heart—not to avenge past wrongs?

The Founders stressed that a civic education required the teaching of religious values. Benjamin Rush wrote that “[t]he only foundation for a useful education in a republic is to be laid in RELIGION. Without this, there can be no virtue, and without virtue, there can be no liberty, and liberty is the object and life of all republican governments.”<sup>10</sup> He continued:

“The complaints that have been made against religion, liberty and learning, have been, against each of them in a separate state. Perhaps like certain liquors, they should only be used in state of mixture. They mutually assist in correcting the abuses, and in improving the good effects of each other. From the combined and reciprocal influence of religion, liberty and learning upon the morals, manners and knowledge of individuals, of these, upon government, and of government, upon individuals, it is impossible to measure the degrees of happiness and perfection to which mankind may be raised.”<sup>11</sup>

John Adams wrote that a republic “is only to be supported by pure Religion or Austere Morals. Public Virtue cannot exist in a Nation

<sup>10</sup> Benjamin Rush, Plan for the Establishment of Public Schools, *reprinted in*, Rudolph, *supra* n.1, at 10.

<sup>11</sup> Rush, *Of the Mode of Education*, 1 *Founders’ Constitution*, at 686.

without private, and public Virtue is the only Foundation of Republics.”<sup>12</sup> And, famously, George Washington’s “Farewell Address” warned that our political prosperity depends on religion and morality:

“Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.”<sup>13</sup>

All this was written, of course, in a day when education was generally not a function of the state, but of parents and churches—though it must be noted that even so adamant a separatist as Thomas Jefferson provided for clergymen on the faculty of his state-funded

University of Virginia. Today, of course, civic education at public institutions cannot include religious indoctrination, in even so rudimentary an element of religion as the Ten Commandments. Thus, if the founders are to be believed, our schools can only with difficulty teach morality.

The Founders, of course, did not believe in education for education’s sake. They believed in education for *civil government’s* sake. Even those Founders who spent more time thinking about constitutional government than civic education shared these views: “A popular Government,” James Madison wrote, “without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>14</sup> Indeed, in Massachusetts, the connection between civic education and the republican experiment was made a matter of constitutional law: Chapter VI of that State’s 1780 Constitution provided that “[w]isdom, and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties.”<sup>15</sup> This is, of course, “Republicanism 101.”

If we have lost sight of the founding generation’s vision of civic education, I think it is fair to say that, of late, the Supreme Court has been a factor in the obfuscation.

The Court is partly to blame for law students’ failure to study our legal history and traditions. When we live under a “living Constitution” whose content is determined by current popular

<sup>12</sup> John Adams, Letter to Mercy Warren, reprinted in 1 *Founders’ Constitution*, at 670.

<sup>13</sup> George Washington, *Farewell Address*, reprinted in 1 *Founders’ Constitution*, at 681.

<sup>14</sup> James Madison, Letter to W.T. Barry, reprinted in 1 *Founders’ Constitution*, at 690.

<sup>15</sup> Mass. Const. of 1780, ch. VI, reprinted in 1 *Founders’ Constitution*, at 11. See also John Adams, *Defence of the Constitutions*, in *Works* 6:168, 197 (“Children should be educated and instructed in the principles of freedom. . . . The instruction of the people in every kind of knowledge that can be of use to them in the practice of their moral duties, as men, as citizens, and Christians, and of their political and civil duties, as members of society and freemen, ought to be the care of the public, and of all who have any share in the conduct of its affairs . . .”).

preferences (or more precisely current judicial preferences) rather than the dispositions solemnly adopted by prior generations, law students have little incentive to study our history and traditions. Who cares what Hamilton, Madison and Jay thought?

As for grade-school and high-school students: Here the Supreme Court has had a more direct role in making civic education more difficult—though some of that role, I expect, is inevitable in a system of public education. As mentioned, the Court has subjected public-school discipline to due-process review.<sup>16</sup> Swift and certain punishment is a thing of the past; the process has been subjected to law and to lawyers.

The Court has invoked the First Amendment to restrict public educators' ability to determine what students should learn. In one case, the Court held that a school board's decision about what books to hold in its library is subject to federal-court review. Once a school has placed a book in its library, the Court held, the First Amendment prohibits the school from removing that book because of *its content*—which is of course the only sound pedagogical reason for either acquiring or getting rid of a book.<sup>17</sup>

But the due-process and First-Amendment restrictions upon public education must take second and third place in the competition for obstruction of civic education. The winner—the Court's most destructive line of decisions relating to civic education—is the line of decisions involving the religion clauses. As I have mentioned, the Founders believed morality was essential to the well-being of the Republic, and they believed that religion was the best way to foster morality. Religious values were therefore central to the Founders' aspirations

for civic education. This is not an anachronistic view, either; it is well reflected in the current sense of society. For example, when the Ninth Circuit Court of Appeals struck down the Pledge of Allegiance as unconstitutional under the religion clauses, the Senate unanimously, and the House with only five dissenters, strongly criticized the decision. (We subsequently vacated the Ninth Circuit's decision on standing grounds.)

Yet the Supreme Court has adopted the demonstrably unhistorical view that the Constitution forbids—not merely the favoring of one religion over another—but even the favoring of religion in general over irreligion. In *Lee v. Weisman*, it held that a principal could not invite a rabbi to deliver a benediction at a middle school graduation—a rigorously nondenominational benediction, given that the rabbi was speaking to a middle school in the Bible Belt—because of the “subtle coercive pressure[s]” (in favor of religion, presumably) that such a benediction would produce.<sup>18</sup> Never mind that the practice is as old as public graduation ceremonies themselves.<sup>19</sup> In *Santa Fe Independent School District v. Doe*, the Court held that student-led, student-initiated prayers at a high school football game violated the Establishment Clause.<sup>20</sup> In short, the Court has rejected as an establishment of religion a public preference for religion over irreligion, when a preference for religion over irreligion is central to our history and traditions. At best, the Court has shown great hostility towards the Founders' vision of religion as way to foster civic virtue. At worst, the Court has actively obstructed the fulfillment of that vision. Either way, we can all appreciate the irony of the Court's interpreting the docu-

<sup>16</sup> See, e.g., *Goss v. Lopez*, 419 U. S. 565 (1975).

<sup>17</sup> *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U. S. 853 (1982).

<sup>18</sup> *Lee v. Weisman*, 505 U. S. 577 (1992).

<sup>19</sup> *Id.*, at 632 (Scalia, J., dissenting).

<sup>20</sup> *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290 (2000).

ment upon which our constitutional republic is based to prevent public endorsement of the kind of civic virtue necessary to our constitutional democracy's survival.

Some of the Court's interference is, as I have suggested, inevitable. I do not think the Ten Commandments are so narrowly sectarian as to be beyond honoring in our public buildings and our public schools. But the Our Father assuredly is. In other words, education by the state cannot possibly have the religious content our framing generation found conducive to the public good. This is one of many reasons why government should not be hostile to private religious education.

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I gather it is a requirement of a talk like this one to quote at least once from *Democracy in America*. So I shall conclude the keynote address of the inaugural event of the Tocqueville Forum with some Tocqueville. Tocqueville observed:

"[T]he origin of the Americans, or what I have called their point of departure, may be looked upon as the first and most efficacious cause to which the present prosperity of the United States may be attributed. The Americans had the chances of birth in their favor; and their forefathers

imported that equality of condition and of intellect into the country whence the democratic republic has very naturally taken its rise. Nor was this all; for besides this republican condition of society, the early settlers bequeathed to their descendants the customs, manners, and opinions that contribute most to the success of a republic. When I reflect upon the consequences of this primary fact, I think I see the destiny of America embodied in the first Puritan who landed on those shores, just as the whole human race was represented by the first man."<sup>21</sup>

I'm with Tocqueville, in that I attribute the prosperity of America to our forefathers' virtue and intellect being passed down from generation to generation. I hope that through programs like the Tocqueville Forum, educators manage, despite formidable obstacles, to impress upon today's students a better knowledge and appreciation of our philosophical and religious heritage.

*Antonin Scalia graduated in 1957 from the Georgetown University College of Arts and Sciences after studying government and is now an Associate Justice of the Supreme Court of the United States.*

<sup>21</sup> Alexis de Tocqueville, *Democracy in America* (1835).