Episode 595: The Constitutional Thought of Justice Antonin Scalia

Guest: Kevin Gutzman

WOODS: Justice Skalia died several days ago, and so we'd like to talk about him: his career, his legacy, his ideas, his importance, all that stuff. I don't know the details surrounding his death. I guess none of us know, and there is something a little bit odd about that. Have you followed any of this about whether or not they're going to have an autopsy?

GUTZMAN: Yeah, I heard that his family didn't want to have an autopsy. You know, he was 79 years old, he was overweight, he apparently smoked a lot, and I find it totally unsurprising that he died.

WOODS: All right, well, I had to get that out of the way just to talk about it. I didn't know if there was anything fishy about it, but I trust you on that. Let's talk about the significance of Skalia. He served a very long time. He was appointed by Ronald Reagan. Now, during Reagan's term he attempted to nominate — or he did nominate Robert Bork, and of course Bork was not confirmed, and he was not confirmed because the Democrats portrayed him as an extremist. He's somebody who would have prevented the civil rights revolution from occurring, which is not true, and he made that clear in his book *The Tempting of America*. But anyway, Bork was just railroaded out of bounds. There was no way he was going to get approved. So how is it that Bork would get rejected but somebody like Skalia would in fact be named to the Supreme Court?

GUTZMAN: Well actually, before I answer that let me just say something about Bork. At his confirmation hearings, Bork was asked one morning what he though of the Supreme Court's decision in the case of Bolling v. Sharpe, which is the case in which the court right after it had handed out Brown v. Board of Education holding that segregating public schools in the states was unconstitutional on the basis that the Fourteenth Amendment Equal Protection Clause banned doing so. And Bolling v. Sharpe immediately after Brown had said that segregating schools in the District of Columbia was unconstitutional because the Fifth Amendment's Due Process Clause meant that you couldn't do so. And of course this is a ridiculous outcome except in an outcome-driven process that really isn't bound by the Constitution.

And so this morning during his confirmation hearing, Bork said, well, you know, I don't agree with Bolling v. Sharpe. So apparently, according to one account of the Bork

confirmation brouhaha, President Reagan's political advisors took Bork aside over lunch and said, well, okay, here's what we're going to do in the afternoon, but while we're at it, you need to say that you misspoke concerning Bolling v. Sharpe and you don't want to be understood as having said that the case in which the court held that you couldn't have segregation in public schools in D.C. was incorrectly decided. And Bork said, well, okay. So in the afternoon, he went back and said, just a point of clarification, I don't want to be understood as having disapproved of Bolling v. Sharpe. There is I think no originalist argument for Bolling v. Sharpe, but Bork yielded that point.

WOODS: So he went back and said — now of course I was — you're a much older guy than I am, Kevin. You probably remember this very vividly, but — that was a shot! Why aren't you defending yourself here? (laughing) I mean, you're not that much older than me. But I was —

GUTZMAN: No, a full decade. You were probably in high school when I graduated from law school, so —

WOODS: Well, I'll tell you; I actually read his book *The Tempting of America* while I was in high school. It was not assigned to me (laughing). I read it on my own. But I didn't follow his confirmation hearings. I was, you know, reasonably precocious as a political observer but not that much. So I didn't know exactly what was going on, so I didn't know about this particular matter. But you're saying that he came back and said, I don't want to be understood as saying what I obviously just did say? I mean, surely the Democrats must have made hay out of that.

GUTZMAN: Not only had he obviously just said it, but it was clearly easy to foresee that he would say that on the ground of his general position concerning how to read the Constitution. So I think there is no other way to understand his afternoon recantation other than it was political. Basically he decided he didn't want to be defending the segregationist side in Bolling v. Sharpe. Of course he could have defended the idea of originalism and applied it to Bolling v. Sharpe, but he didn't want to do that. So again, I don't think we want to understand that Judge Bork was perfectly consistent in his positions. My guess is that he obviously didn't approve of Bolling v. Sharpe, but he thought it was a weak political position to take in 1987, so he made a public statement that he approved of it.

WOODS: Now, I don't remember the order in which Skalia and Bork — okay, so Bork failed. Was Skalia named as the next one? What was the order? How did this all happen?

GUTZMAN: Okay, well apparently it had long been expected in conservative circles that when President Reagan got a chance after Sandra Day O'Connor, an appointment with which he fulfilled his campaign promise to select a woman, he would choose Robert Bork. But what happened was that in 1986 when Chief Justice Warren Burger announced that he was retiring, people in the Justice Department arranged for President Reagan to meet with their two finalists for the position, Antonin Skalia and Robert Bork. And Skalia went in and met with Reagan first, and apparently he

completely won him over, and so when the meeting ended, Reagan told whomever the Justice Department fellow was who was there with the two of them, well, there's our man. And he said, well, no, you're supposed to meet with Robert Bork, and Reagan told him, no, I definitely think this guy is perfect.

So what ended up happening of course was that it was Bork who ended up being the guy whose appointment would have tilted the court significantly in a rightward direction. Skalia was just replacing Warren Berger, who certainly was less conservative than Skalia but still was a Republican kind of moderately conservative fellow, and on the other hand when Bork came up, he would have been replacing Southern Democrat Lewis Powell, who in several cases had kind of found ways to continue the leftward direction of the Supreme Court. And so putting Bork in that position would have made a substantial difference.

Actually, though, it's likely that if Bork had been appointed to the Burger position and then Skalia had come up at the time that Powell was retiring, Skalia's far more ingratiating personality would have had a completely different kind of effect on the public and on the Senate than Bork's rather aloof, condescending, uncomfortable presentation of himself did. And of course it was really Bork's combativeness n the Senate Judiciary Committee that sank his nomination, I think. So that actually was a very unfortunate series of developments, and it led to Anthony Kennedy being presently on the Supreme Court.

WOODS: Because it was thought we don't want to have another Bork fight, but if you got Skalia through, then surely you could get another originalist through, you would think. But yet, if I were a Democrat and I wanted to make life difficult for originalists, oh, I could dig up — not just the case you mentioned — I could dig up all kinds of embarrassing things that an originalist would either have to abandon his principles to reject or commit political suicide by embracing, all the while claiming that I don't necessarily like the outcome but the Constitution as originally understood demands it. It seems like Democrats could just do that constantly, which is I guess why we haven't had an originalist in a long time.

GUTZMAN: (laughing) Well, 1986, when Burger retired, Associate Justice Rehnquist was elevated to replace him, and then Skalia was put in Rehnquist's former place, the Senate was controlled by the Republicans. And then the following year, 1987, when Bork was nominated, the Senate was being controlled by the Democrats. So this was a substantially different context, and, you know, it's entirely possible that Skalia would have been rejected just as Bork was rejected, but I think there's no doubt that Skalia would have, again, made a better case for himself than Bork did. Actually, when this all happened I was in my first year of law school, and I can remember standing in the entryway of the Tarlton Law Library at the University of Texas law school, watching the large monitors they had set up in the foyer as the Senate Judiciary Committee was grilling Bork. And Bork was in the painful position of having to try to conduct intelligent discussions with Joe Biden and Arlen Specter about the Constitution. It was just painful.

WOODS: (laughing)

GUTZMAN: Of course, the two of them were only trying to elicit statements that would make obvious what was obvious to anybody who knew the story ahead of time, and that was that Bork represented a threat to the unlimited legislative authority of the Senate and to the liberal law-making tradition of the Supreme Court. So neither Biden nor Specter, of course you probably recall, came off very well in *Tempting of America*.

WOODS: No. Boy, yeah, after I read that book, I thought I would not want to be on the wrong side of Robert Bork. Whether I agree with him on everything is not in question (laughing). I can think of several other people I would not want to be on the wrong side of. I'd better not say on the air. But anyway, let's talk some more about Skalia, again, bearing in mind that a good 17% of the audience of this show lives in countries other than the United States. So start off by telling people first of all what an originalist is, and then was Skalia a consistent originalist?

GUTZMAN: Well, in America we have a tradition of telling ourselves that we have a republican government that was founded through popular consent; that is, that we have a federal constitution that was created by a, for its time, very, very republican process involving popular elections in all the states to popular conventions whose sole purpose was to vote yes or no on a proposed constitution. And the theory underlying that of course was that it was the people who were establishing this government and that the government would take the form the people thought they were establishing.

But what's come to be the case, especially in the 20th century came to be the case, is that the federal officials, especially federal judges but also members of Congress and presidents, have felt free to act as if the Constitution, rather than reflecting the people's considered judgment, were just a kind of protean object that they could remake as the day's political imperatives dictated so that they could justify whatever governmental project they might want to take, regardless of the fact that the original understanding of the Constitution was that it created a highly limited government and it would leave the federal system highly decentralized.

This is unsurprising, of course, in light of the fact that the American Revolution had been made in the name of — well, the slogan was, "No taxation without representation," but really what that meant was in the name of republican self-government through local legislative elections. So what Skalia stood for was the attempt to revivify the old idea that the government was supposed to be the kind of government that the people had agreed to in the 18th century, and that meant it was going to be decentralized, and Congress would have limited legislative authority in particular.

So Skalia, in standing for this, actually reflected the programmatic imperatives of the president who appointed him, Ronald Reagan, and the constitutional views of Reagan's second attorney general, Edwin Meese. Meese before — I believe it was before Skalia's appointment gave the very widely discussed speech, called "Tort of Jurisprudence of

Original Intent," and what Meese said in that speech was that it was inappropriate for federal judges constantly to be remaking the Constitution to comport with the latest imperatives of liberal academics and the Democratic Party essentially.

Actually, this wasn't a phenomenon that had only been noticed by American conservatives. There was a widely discussed 20th century book by a British scholar, in which that scholar referred to the Supreme Court as a perpetual constitutional convention. I would say he actually understated what the court was doing, because of course a constitutional convention you can only propose a new constitution, and the court was in the habit by 1986 of just constantly remaking the Constitution.

So Meese said what I was saying earlier, essentially that in order for the U.S. government to have republican legitimacy, it had to reflect in its structure the considered consent of Americans when they first agreed to it under the Article VII process of state-level ratifications. And Skalia was first a prominent proponent of these kinds of ideas when he was a prominent academic. Then he was a prominent proponent of these ideas when he was a lower level federal judge, and finally he stood for one version of what is called, again by Meese, "jurisprudence of original intent," or by Skalia and others, "originalism."

One thing that Skalia did that was very significant was that he took a leading role in establishing a group called the Federalist Society for Law and Public Policy. This is a kind of open forum for conservative and libertarian legal discussion, discussion of legal and constitutional issues in American law schools originally. When it was founded it was three of the most prestigious American law schools, but by now it's got chapters essentially in every American law school. And what it does is provide a place for discussion of ideas like the ones I've been describing in American law schools. So you're not going to find a lot of people on American legal faculties who stand for this idea of a limited role for federal judges and a decentralized model of federal government, but through the Federalist Society, people in law schools are able to hear arguments like this from academics and practitioners.

WOODS: Yeah, can I jump in on that if I may, because I've had the good fortune of speaking at a whole bunch of Federalist Society chapters, and you're right. First of all, a lot of these events are very well attended. They will hold a lot of them at lunch time and give away free food, so people will show up for that. They'll host debates, which arouses curiosity. People like to watch debates. But it gave me an opportunity to speak to a lot of audiences. I've spoken on a lot of topics, but I spoke at Columbia Law School about the arguments, the constitutional and historical arguments for state nullification — to a packed room at Columbia Law School. I went up and just very matter-of-factly presented this, and not one of them asked me a question afterward. They had never, never heard anything like this, so I felt kind of good about exposing them (laughing), you know, giving them this opportunity to be exposed to fresh ideas. But I hadn't known about Skalia's role in all that.

GUTZMAN: Yeah, Skalia was one of the founders, and I too have spoken at several Federalist Society chapters. In fact, I'm scheduled to be addressing the same topic as you just mentioned at the University of Virginia law school later on this semester.

WOODS: How appropriate.

GUTZMAN: Yeah, so actually, there's also new information about that, which is going to make this kind of interesting. But anyway, so when I was in law school at the University of Texas law school from 1987 to '90, I was the chapter president one year of the Federalist Society chapter there, and I think that what I heard from Federalist Society members and from academics associated with the Federalist Society and so on shaped what I thought about the Constitution strongly, and actually I would attribute much of my later career to the influence of the Federalist Society in the first place. So I think that Skalia's role in founding the Federalist Society and his ongoing nurturance of that society and his frequent public addresses on related topics have played a substantial role in changing American constitutional culture.

Skalia's influence extended beyond conservatives as well. So today prominent liberals like Cass Sunstein and Akhil Amar at Yale are prone to start by asking what was the original understanding. In fact, Jack Balkin has — also at Yale now, although formerly of my own legal alma mater, University of Texas — has tried to formulate an alternative kind of approach to originalism to Skalia's, and I guess imitation is the sincerest form of flattery. In other words, where when Skalia came on to the court and Rehnquist was elevated to Chief Justice, Rehnquist had been a kind of — actually, he was commonly called "the Lone Ranger," because he I think set the record for most solo dissents, 8 to 1 solo dissents in the history of the Supreme Court.

By the time Rehnquist and Skalia were done, by the time Skalia died this weekend, this had come to be not only the predominant position among conservatives but one with which essentially all liberal constitutional thinkers had to deal as well. So this is a complete change in the way that the constitutional culture was framed. And again, although this was ultimately Reagan's responsibility and Meese was the one who formulated it as a matter of public debate first, Skalia was the chief exponent of this approach to these questions for the whole three decades he was on the Supreme Court.

WOODS: I guess we should say something about particular decisions. He had a very long tenure, and he wrote many opinions. Are there particular opinions of his that, let's say, either you are especially fond of or that were particularly noteworthy in one respect or another?

GUTZMAN: Well, boy, there are several things that he did that were extremely important. Of course he was in the majority in Bush v. Gore. Ultimately that was the Supreme Court intervention that short-circuited the highly partisan Florida Supreme Court's attempt to remake the outcome of the presidential election in Florida so that Al Gore would be the winner. He also wrote the majority opinion in the Heller case, in which for the first time the Supreme Court held that the Second Amendment

established an individual right of gun ownership, which you might have thought was obvious, but there you go.

Skalia was the author of the majority opinion in Johnson v. Texas. I think actually this highlights the chief shortcoming of his approach to the Constitution, because in Johnson v. Texas of course what he did was that he held that there was a constitutional right to burn the American flag and that this was enforceable through the Incorporation Doctrine against state governments. I of course have long held that the Incorporation Doctrine was just completely unfounded. Skalia didn't actually dispute that point. In fact, in one infamous instance, he said, well, we're not going to refight the Incorporation Doctrine, so what kind of originalism is that? But in any event, that was obviously a very important decision of his.

He also wrote the court's majority opinion in the Smith case I guess about 25 years ago now, in which, faced with a couple of fellows who were members of the Native American Church whose rights included consumption of peyote and who were asserting it through the Incorporation Doctrine, again, a free exercise claim involving an insistence that they were exempt from a generally applicable ban on peyote use because it was part of their religion, they said, Skalia for the court wrote that where there was a generally applicable, facially neutral statute that had a negative impact on someone's religious expression this did not violate the Free Exercise Clause, that the Free Exercise Clause was about statutes that targeted particular religious practices and obviously that wasn't what was going on in the Smith case.

So people were actually surprised, given Skalia's well known devotion, his very pious Catholicism, the fact that this was reflected in his family life very clearly. He was a publicly observant Catholic too, besides having nine children, at least one of whom was a priest, and so on. It was kind of surprising to people that he had come down on this direction, and in fact, Congress responded to that decision by adopting the Religious Freedom Restoration Act, which was a kind of obviously faulty attempt to correct the Supreme Court's opinion in that case, so that had bipartisan support. So in other words, there were a lot of critics of Skalia's performance in Smith.

Perhaps the thing for which he's best remembered or going to be best remembered is the cogency and the disdainful mocking tone of several of his dissenting opinions —

WOODS: that's actually my favorite aspect of Skalia right there.

GUTZMAN: Right, well there's a really good book published by one of your and my former publishers, Regnery, called *Skalia Dissents*, which is just a collection of his most notable dissents. And you know, what he tended to do in these dissents was to mock the Supreme Court's invention of new rights. So you could tell he was angry, but he also was just very funny, and besides that, though, he was the leader of the court's consistent four-vote minority that objected to the invention of rights involving sex, so for example, the abortion right, the sodomy right, the homosexual marriage right. He insisted these were all completely inconsistent with a federal model of government and that they had nothing to do with any powers that the Constitution intended to

grant to Congress or with any rights that you could tease out of any provision of the Constitution through any reasonable reading.

And of course actually in some of those cases, Justice Kennedy had avoided any actual legal argument. So for example, in the recent Obergefell decision involving assertion by the court — the bare majority of the court — that there was a right to homosexual marriage, Kennedy didn't even really make a legal argument. He just talked about recent philosophical developments and kind of gave you a 1960s hippie version of the meaning of life and so on. And Skalia had really no time for this kind of assertion. He would often come back to the argument that, well, if we're going to have this kind of government, we have to concede that this isn't really a republic — or he used the word "democracy," but he meant a republic — and really what we have here is rule by nine lawyers. There's nothing more to it than that. There's really no legitimacy underlying these decisions. And he would get very angry too.

In fact, in the 1992 Casey decision, in which, to the surprise of many, the court with three recent Republican appointees all appointed by presidents who had sworn that Roe v. Wade was abominable and they should like to see it eliminated, three of these Republican appointees joined in the majority opinion, and actually, they wrote a plurality, the three of them together. And what they said was, well, it wasn't that they defended Roe v. Wade, but it was that if, after having established this precedent in 1973, the court in 1992 undid it simply on the basis that there had been political expression against it, then the court would undercut its own role in American government and American life. And of course what this was was just a pretty naked and philosophically really pretty lame assertion that the court ought to have a kind of imperial role in American government. So Skalia, again, was very angry with this. He thought it was entirely contrary to any reasonable philosophy of republican society and certainly contrary to the assertion by American revolutionaries and by the Constitution itself, that the Constitution was based on the consent of the governed.

So I think these are likely the most important of the opinions of the decisions, the trains of thought that Skalia laid down in his opinions, but there are just a wealth of funny things and interesting arguments and novel mock coinages and so on sprinkled through his writing. It's the rare body of judicial writing that's actually fun to read.

WOODS: How would you compare him and his work to the work of Clarence Thomas?

GUTZMAN: Well, Thomas is West Coast Straussian, and I think that Skalia was *sui generis* (laughing). So Thomas often makes assertions about the United States being founded on equality and is prone to mentioning Abraham Lincoln and sounds like a Jaffa follower. And on the other hand, Skalia elaborated an idea of, as Meese put it, again, of constitutionalism, a "jurisprudence of original intent." Yet, his idea of a jurisprudence of original intent is — although I like that formula and I agreed with basically every word of Meese's speech elaborating this idea in, what, 1985 or '86, I don't agree with all the particulars of the way that Skalia elaborated on that idea, because he — well, for example, when it comes to judicial review, Skalia famously said — in a CSPAN address, he famously said, you know, we judges made that up. That

is, he said judicial review isn't actually in the Constitution. You can read the Constitution and it's not there, so really this is something that the judges made up.

Well, how did he arrive at that conclusion? He called himself a textualist originalist, so he would start with the text, and then he would say that the text is to be understood as a reasonable person would have understood it at the time. I think this is an alternative to my own personal brand of originalism, which is the one that Thomas Jefferson described by saying that the Constitution is to be understood in the sense in which it was advocated by its friends when it was depending before the people.

So from that point of view, since in multiple states leading Federalists said that if this Constitution were ratified there'd be judicial review and then the argument was basically whether that would be — in Virginia the argument was whether that would be true. Anti-Federalist leader Patrick Henry said, well, that would be great, but I don't believe it'll happen. Then on the other hand, in New York the chief anti-Federalist, the governor, George Clinton, decried this idea because he said it would be putting the judges above the legislature, and that was not a republican idea. So in other words, there was a consensus that this was the way the Constitution would work, and I don't know of any evidence to the contrary from the ratification debates.

So again, I think Skalia's "textualism" is an alternative to the way that people thought the Constitution would work when they were ratifying it, that they thought that their understanding in the ratification conventions would be binding on people. And Madison said that too. So this is one place in which I disagree with him, but in general I think whatever the particulars of his specific brand of originalism, the idea that originalism was the only path to legitimacy of government really has come to be pervasive. And again, if you're an opponent of this idea you have to answer it. And it's a majority opinion among Republican politicians.

My own experience with talking to various groups and individuals about my books on this subject, or your and my book and my book on this subject, is that I think activist, non-politician, conservatives are even more devoted to it than the verbiage that comes out of the politicians would lead us to believe they would be. And that ultimately is chiefly Skalia's doing. Although, again, it was Reagan's and Meese's program, he was the one who was most responsible for instantiating this into Americans thinking about these things.

WOODS: Well, Kevin, before I let you go, would you mind sharing just a brief thought about what's likely to happen next?

GUTZMAN: Well, Obama will nominate someone, I have no doubt. And if McConnell is to be believed, there will not be a vote on that person's nomination. I should think that they wouldn't have hearings, you know? And there's been a lot of false commentary on McConnell's position. People have said, well, there's a constitutional duty for the Senate to hold hearings and there's a constitutional duty for them to have a vote and so on. There weren't ever hearings on any judicial nomination until the 1930s, so somehow if this was incumbent upon the Senate under the Constitution, for

nearly the first century and a half of the Constitution people didn't know that — though this is just a specious assertion. And besides that, there of course have come to be widely known statements by prominent Democratic senators within the last decade that when the shoe was on the foot they would forego considering nomination of any Republican candidate to the Supreme Court. So I think, again, that Obama surely will nominate someone.

The question is what kind of person he'll nominate. Will he nominate a moderately liberal person, hoping maybe that some of the Republican senators will decide to go along with the Democrats and insist that there will be a vote? Or alternatively, will he nominate somebody like the other two people he chose, who obviously were both chosen on the ground of their "race/class/gender" backgrounds. He could choose somebody like that and hang them out there and have Hillary Clinton run in the fall campaign on the basis of if you elect me then I will ensure that this fabulous affirmative action candidate for the Supreme Court is put on the Supreme Court. After all, this will be a great way to cement President Obama's fabulous legacy. That seems to be likely actually, don't you think?

WOODS: I'm afraid so, and I was — I don't know why I was looking to Kevin Gutzman for some cheery other alternative scenario that might occur (laughing).

GUTZMAN: You should know better than that by now.

WOODS: Exactly. I don't know what I was thinking.

GUTZMAN: (laughing)

WOODS: Well, listen, I'm really glad that we had a chance to talk about this, and I just want to say you are a tremendous asset to us at LibertyClassroom.com. I consider it a point of boasting that we have you as a faculty member of there, so I hope people who have not checked that out will now feel like they have yet another reason to check out LibertyClassroom.com. Best of luck with all your projects. I want to catch up with you soon about how your stuff is going. I don't want to ask you know, because I really need to let you go and get to sleep, but thanks again. We'll talk to you again soon.

GUTZMAN: You're welcome.