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Antonin Scalia Law School
George Mason University
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EMPLOYMENT

George Mason University Antonin Scalia Law School

Distinguished University Professor, 2017-present
Executive Director, Liberty & Law Center, 2017-present
George Mason University Foundation Professor, August 2010—2017
Professor, August 2002-August 2010
Associate Professor, September 1998-August 2002
Assistant Professor, August 1995-August 1998

Hebrew University, Faculty of Law

Visiting Professor, December 2022; Associate Fellow, Aug. 2024-present

University of Turin

Visiting Professor, Summer 2021

William and Mary Law School

Visiting Professor, Spring 2014

Brooklyn Law School

Visiting Professor, Fall 2006

University of Michigan Law School

Visiting Professor, Fall 2005-Spring 2006

Georgetown University Law Center

Visiting Professor, Spring 2003

John M. Olin Foundation

Junior Faculty Fellow, 1997-98 (paid research leave awarded to five humanities scholars nationwide)

Columbia Law School

Mellon Foundation Fellow, Julius Silver Program in Law, Science, and Technology, 1994-95

Crowell & Moring

Associate, 1992-94

Honorable David A. Nelson
Sixth Circuit U.S. Court of Appeals
Law Clerk, 1991-92

SELECTED PUBLICATIONS

Books

Classified: The Untold Story of Racial Classification in America (Post Hill Press 2022)

Rehabilitating Lochner: Defending Individual Rights against Progressive Reform (University of Chicago Press 2011; paperback 2012)

The New Wigmore: Expert Evidence (Aspen Law and Business 2004 and annual supplements; 3d edition 2020) (with Kaye and other coauthors)

Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law (Encounter 2015)

A Conspiracy against Obamacare: The Volokh Conspiracy and the Health Care Case (Palgrave MacMillan 2013) (with Adler, Barnett, Kerr, Kopel, and Somin)

You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute 2003; paperback 2004)

Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (Duke University Press 2001)

Phantom Risk: Scientific Inference and the Law (MIT Press 1993) (coauthor of several chapters and coeditor)

Articles and Book Chapters

"Law and Political Economy": A Solution in Search of a Problem, *J. Law, Econ. & Pol'y* (forthcoming)

Racial Box-Checking and the Administrative State, 22 *G'town J. L. & Pub. Pol'y* ____ (2024)

The Supreme Court's Mysterious 1920s Due Process Education Trilogy, *J. Contemp. Leg. Issues* (forthcoming 2024)

Three Bad Ideas about Race in America, *American Journal of Law & Equality* (forthcoming 2024)

Racial Classification in Higher Education Admissions Before and after *SFFA*, 77 *SMU L. Rev.* 273 (forthcoming 2024)

Students for Fair Admissions and the End of Racial Classification as We Know it, 2022-23 *Cato Sup. Ct. Rev.* 73

Revisiting Justice George Sutherland, the Nineteenth Amendment and Equal Rights for Women, 20 *Geo. J. L. & Pub. Pol'y* 140 (2022)

The Modern American Law of Race, 94 *S. Cal. L. Rev.* 171 (2021)

“Administrative Constitutionalism:” Considering the Role of Agency Decisionmaking in American Constitutional Development, 38 *Social Phil. & Pol'y* 109 (2021)

The Perils of Administrative Constitutionalism: An American Perspective, 2 *J. Commonwealth L.* 138 (2021)

The Right to Armed Self-Defense in the Light of Law Enforcement Abdication, 19 *Geo. J. L. & Pub. Pol'y* 177 (2021)

Class Legislation, Fundamental Rights, and the Origins of *Lochner* and Liberty of Contract, 26 *George Mason L. Rev.* 1023 (2020)

Antidiscrimination Laws and the Administrative State: A Skeptic’s Look at Administrative Constitutionalism, 94 *Notre Dame L. Rev.* 1381 (2019)

Constitutional Hardball Yes, Asymmetric Not So Much, 118 *Colum. L. Rev. Online* 207 (2018)

Reflections on the 100th Anniversary of *Buchanan v. Warley*: Recent Revisionist History and Unanswered Questions, 48 *Cumberland L. Rev.* 101 (2018)

The Boundaries of Anti-Discrimination Law, in Todd Henderson, ed., *The Future of Classical Liberalism* (Cambridge U. Press 2018)

Prevailing Wage Legislation and the Continuing Significance of Race, 44 *Notre Dame J. Leg.* 158 (2018)

The Abuse of Executive Power: Getting Beyond the Streetlight Effect, 11 *Fla. Int’l L. Rev.* 289 (2016) (based on keynote symposium address)

The Due Process Right to Earn a Living: A Brighter Future Ahead?, 126 *Yale L.J. F.* 287 (2016)

“Substantive” Due Process: It’s Complicated, 95 *Tex. L. Rev. See Also* 1 (2016)

Defending Daubert: It’s Time to Amend Federal Rule of Evidence 702, 57 *Wm. & Mary L. Rev.* 1 (2015)

What to do about Federal Agency Science: Some Doubts about Regulatory *Daubert*, 22 *George Mason L. Rev.* 549 (2015)

The Misbegotten Judicial Resistance to the *Daubert* Revolution, 89 *Notre Dame L. Rev.* 27 (2014)

The Mainstreaming of Libertarian Constitutional Thought, 76 *L. & Contemp. Probs.* 43 (2014)

(with Ilya Somin)

“Reverse *Carolene Products*,” the End of the Second Reconstruction, and other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*, 2014 *Cato Sup. Ct. Rev.* 261

From Progressivism to Modern Liberalism in Constitutional Law: Louis D. Brandeis as a Transitional Figure, 89 *Notre Dame L. Rev.* 2029 (2014)

Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle, 89 *NYU J. Law & Liberty* 210 (2013)

The Progressive Origins of Conservative Hostility to *Lochner v. New York*, in Jonathan O’Neill & Joseph Postell, eds., *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era* (Palgrave MacMillan 2013)

The Conservative Origins of Strict Scrutiny, 19 *Geo. Mason L. Rev.* 861 (2012)

Lochner and Constitutional Continuity, 36 *J. Sup. Ct. Hist.* 116 (2011)

Excluding Unfit workers: Social Control Versus Social Justice in the Age of Economic Reform, 72 *L. & Contemp. Probs.* 177 (2009) (with Thomas C. Leonard)

Revisiting *Yick Wo v. Hopkins*, 2008 *Ill. L. Rev.* 1393

Getting to Causation in Toxic Tort Cases, 74 *Brooklyn L. Rev.* 51 (2008)

Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution, 93 *Iowa L. Rev.* 451 (2008)

Learning the Wrong Lessons from “An American Tragedy,” 104 *Mich. L. Rev.* 1961 (2006)

The Red Menace Revisited, 100 *Nw. U. L. Rev.* 1295 (2006) (review essay of Martin Redish, *The Logic of Persecution: Free Expression and The McCarthy Era*)

Lochner v. New York: A Centennial Retrospective, 83 *Wash. U.L.Q.* 1469 (2005)

Bolling, Equal Protection, Due Process, and *Lochner*phobia, 83 *Geo. L.J.* 1253 (2005)

Judicial Power and Civil Rights Reconsidered, 114 *Yale L.J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (with Ilya Somin)

Lochner v. New York: Barrier to the Growth of the Regulatory State, in Michael Dorf, ed., *Constitutional Law Stories* (Foundation Press 2004)

Expressive Association after *Dale*, 21 *Social Phil. & Pol’y* 195 (2004), also published in Ellen Frankel Paul, ed., *Freedom of Speech* (Cambridge Univ. Press 2004)

The *Daubert* Trilogy in the States, 44 *Jurimetrics J.* 351 (Spring 2004) (with Jeffrey Jackson)

Keeping Junk Science Out of the Asbestos Litigation, 31 *Pepp. L. Rev.* 11 (2003)

Lochner's Feminist Legacy, 101 *Mich. L. Rev.* 2176 (2003) (review essay of Julie Novkov, *Constituting Workers, Protecting Women*)

Lochner's Legacy's Legacy, 82 *Tex. L. Rev.* 1 (2003)

Lochner Era Revisionism, Revised: *Lochner* and the Rise of Fundamental Rights Constitutionalism, 92 *Geo. L.J.* 1 (2003)

Improving the Qualifications of Experts in Medical Malpractice Cases, 1 *Law, Probability & Risk* (2002)

Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test, 41 *Jurimetrics J.* 385 (2001)

Antidiscrimination Laws and the First Amendment, 66 *Mo. L. Rev.* 83 (2001)

The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 *Wm. & Mary Bill Rts. L.J.* 619 (2001)

Railroad Unions, Racism, and Labor Regulations, 5 *Independent Rev.* 237 (2000)

Lochner vs. *Plessy*: The *Berea College* Case, 25 *J. Sup. Ct. Hist.* 93 (2000)

Assessing the Social and Legal Consequences of Scientific Ambiguity, in *Cutting Green Tape: Tort Law, Bureaucracy and the Environment* (Meiners & Stroup eds., Independent Institute 2000) (with Foster and Huber)

Two Asian Laundry Cases, 23 *J. Sup. Ct. Hist.* 95 (1999)

Sex Discrimination Laws Versus Civil Liberties, 1999 *U. Chi. Leg. Forum* 133 (1999)

The Breast Implant Fiasco, 87 *Cal. L. Rev.* 457 (1999)

Lochner, Parity, and the Chinese Laundry Cases, 41 *Wm. & Mary L. Rev.* 211 (1999)

Philip Sober Restraining Philip Drunk: *Buchanan v. Warley* in Historical Perspective, 51 *Vand. L. Rev.* 799 (1998)

The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African Americans, 74 *Tex. L. Rev.* 781 (1998)

Lessons from the American Experience, in *Law and Markets* (Robson & Lippert eds. 1997)

The Shameful, Wasteful History of New York's Prevailing Wage Law, 7 *George Mason Civ. Rts. L.J.* 1 (1997)

Loser-Pays: Where Next? 55 *Md. L. Rev.* 1161 (1996) (with Walter Olson)

Junk Science in the United States and the Commonwealth, 21 *Yale J. Int'l L.* 123 (1996)

Leading Expert Evidence: A U.S. Perspective, 3 *James Cook U. L. Rev.* 170 (1996)

The Science of Forensic Psychiatry and Psychology, 2 *Psychology, Psychiatry & L.* 75 (1995)

The Davis-Bacon Act: Vestige of Jim Crow, 13 *Nat'l Black L.J.* 276 (1994)

Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African Americans, 30 *San Diego L. Rev.* 89 (1994)

The Admissibility of Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, 15 *Cardozo L. Rev.* 2139 (1994)

From Pesthouses to AIDS Clinics: Neighbors' Irrational Fears of Treatment Centers for Contagious Diseases, 23 *Colum. Hum. Rts. L. Rev.* 1 (1990)

Out of the *Fryeing* Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation, 10 *Rev. Litig.* 117 (1990)

ADDITIONAL PUBLICATIONS

Social and Economic Legislation during the Taft Court, review of Robert Post, *The Taft Court: Making Law for a Divided Nation, 1921–1930* (2024), <https://balkin.blogspot.com/2024/02/social-and-economic-legislation-during.html>

Unchecking the Box, *Brandeis Magazine*, Winter 2023

Diversity by Diktat: An Obscure 1977 OMB Memo Forms the Basis for Today's Affirmative-Action Programs, SCOTUSblog, Oct. 6, 2022

Two Decades Ago, The FDA and NIH Mandated the Use of Race to Categorize Subjects and Report Results in Medical and Scientific Research They Oversee. It was a Huge Mistake, *Yale Journal on Regulation: Notice and Comment* (July 2020), <https://tinyurl.com/4a5vjvub>

Review of Adam Winkler, *We the Corporations*, *Claremont Review*, Feb. 2019

How Anti-Discrimination Became a Religion, and what it Means for Judaism, *Mosaic*, Aug. 8, 2016, <http://mosaicmagazine.com/response/2016/08/how-anti-discrimination-became-a-religion-and-what-it-means-for-judaism>

The Courts and Tradition: A Begrudging Respect, *Liberty Law Forum*, Aug. 8, 2016, <http://www.libertylawsite.org/liberty-forum/the-courts-and-tradition-a-begrudging-respect>

Review of Sophia Lee, *The Workplace Constitution: From the New Deal to the New Right, Reason*, Feb. 2016, at 55

The Racism behind Prevailing Wage, *N.Y. Daily News*, Jan. 25, 2016 (op-ed)

Attacks on Religious Freedom: Coming Soon to a Church Near You, *Daily Signal*, Nov. 24, 2015 (op-ed)

Review of Phillip Hamburger, *Is Administrative Law Unlawful?*, 33 *Law & History. Rev.* 759 (2015)

Restoring Freedom of Contract between Doctor and Patient in Medicare Part B, Mercatus Center, Sept. 2015

Reassessing *Lochner v. New York*, in Paul J. Larkin, ed., *Economic Liberty and the Constitution: An Introduction*, Heritage Foundation Special Report No. 157, Oct. 1, 2014.

Oyez, Oyez, Oyez! Curious Cases at the Supreme Court, *Phi Kappa Phi Forum*, Fall 2013, at 18

Review of Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Times*, *Reason.com*, May 21, 2013

Online *Fisher* symposium: Affirmative Action after *Fisher* – Back to the Future?, SCOTUSblog Sept. 6, 2012.

Is this 1936?, *Scotusblog*, June 29, 2012, <http://www.scotusblog.com/2012/06/is-this-1936/>
The Role of *Lochner* in the Health Care Litigation, *Jurist*, March 2012, (op-ed)

Lochner v. New York, the Judiciary, and Legitimate Constitutionalism, *Claremont Review of Books* (Dec. 2011)

Response to George W. Liebmann, 21 *L. & Pol. Book Rev.* 441 (2011)

Brandeis Brief Myths, 15 *Green Bag* 2d 9 (2011)

Oliver Wendell Breyer, *Newark Star-Ledger*, July 12, 2011 (with Josh Blackman) (op-ed)

Context Matters: A Better Libertarian Approach to Antidiscrimination Laws, *Cato Unbound*, June 16, 2010

The Neglected Case of *Buchanan v. Warley*, *Scotusblog*, Feb. 10, 2010

Rufus Peckham, in *The Yale Biographical Dictionary of American Law* (Roger K. Newman ed. 2009)

The Unfinished *Daubert* Revolution, *Engage: Journal of the Federalist Society Practice Groups*, Feb. 2009, at 35

Roberts v. Jaycees, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008) Right to Petition, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Liberty of Contract, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Munn v. Illinois, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Allgeyer v. Louisiana, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Buchanan v. Warley, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Emigrant Agent Laws, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Review of Paul Moreno, *Blacks and Organized Labor: A New History*, *Independent Review* (Dec. 2006)

Liberty of Contract, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

The Right to Petition, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

Quackspertise, *Wall Street J.*, Sept. 30, 2006 (op-ed)

Affirmative Blackmail, *Wall St. J.*, Feb. 11, 2006 (op-ed)

Review of Ken Kersch, *Constructing Civil Liberties*, *American Historical Rev.*, Oct. 2005

Thoughts on *Hodges v. United States*: Comment on Karlan, 82 *B.U. L. Rev.* 811 (2005)

The Right to Petition, in *The Heritage Guide to the Constitution* (David Forte, ed. 2004 and 2d ed. 2012)

Peg-Leg Williams, in *One Hundred Americans Making Constitutional History* (Melvin Urofsky, ed. 2004)

Review of Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, *American J. Legal History* (2003)

Review of Michael J. Phillips, *The Lochner Court Myth and Reality: Substantive Due Process*

from the 1890s to the 1930s, *Law & History Rev.* (Winter 2003)

Let Private Colleges Practice Affirmative Action, *Cato Daily J.* (and syndicated newspapers), June 23, 2003 (op-ed)

Free Speech? Not on Campus, *Orange County Register*, Oct. 21, 2003 (op-ed)

Solomon Amendment Fight, *Harv. Law Rec.*, Nov. 20, 2003 (op-ed)

Review of Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*, *Ideas on Liberty*, Nov. 2002, at 58

Junk Science in the Asbestos Litigation, *Mealey's Asbestos Reporter* (Aug. 2002)

Junk Expert Testimony: The Battle Rages On, *Engage: The Journal of the Federalist Society's Practice Groups*, 2002, at 112

Tort Reform Lessons, *Aetna 2001 Annual Report* (2002)

Disinterested in *Daubert*: State Courts Lag Behind in Opposing "Junk" Science, Washington Legal Foundation, Legal Opinion Letter (June 21, 2002)

Casey Martin Ruling is Par for the Course, *Wall St. J.*, May 30, 2001 (op-ed)

The ACLU Has Lost its Way, *Cincinnati Enquirer*, May 16, 2000, at 8 (also published in other newspapers) (op-ed)

Anti-Bias Laws vs. Civil Liberties, *Wash. Times*, Aug. 15, 1999 (op-ed)

Review of Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Eh.net—economic historians' listserv)

Comment on *Kumho Tire*, *AALS Section on Evidence Newsletter*, Spring 1999, at 3

Letter to the Editor, Judge was Correct to Exclude Testimony, *Legal Times*, April 12, 1999, at 23
Comment on Gary Edmond and David Mercer, The Politics of Jury Competence, in *Technology and Public Participation* (Xlibris 1999)

The Abuse of Opening Statements and Closing Arguments in Civil Litigation, *Court Rev.: Journal of the American Judges' Association*, Fall/Winter 1997, at 16; revised version published as Manhattan Institute Civil Justice Memo No. 38 (Aug. 1999)

'Non-Scientific' Expert Witnesses: What Degree of Judicial Scrutiny Should They Face?, Washington Legal Foundation, Oct. 1998

A Breast Bone of Contention, *Los Angeles Daily J.*, Aug. 26, 1998, also published in *Litigation News*, Winter 1998, at 7 (op-ed)

Review of *Science on Trial*, *Litigation News*, Spring 1997, at 4

Good Science Wins a Victory in the Courtroom, *Charlotte Observer*, Jan. 24, 1997, at 13A (also published in several other newspapers) (op-ed)

Procedural Tort Reform: Lessons from Other Nations, *Regulation*, No. 1, 1996, at 67

Legal Reform: Learning from the Commonwealth, *Manhattan Institute Civil Justice Memo* No. 25 (May 1996)

Breast Implants: A Study in Phantom Risks, *Manhattan Institute Research Memorandum* No. 5 (April 1995)

Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, *Health & Environment Digest*, April 1994, at 3

Science and the Toxic Tort: New Guidelines for the Admissibility of Scientific Evidence, 261 *Science* 1509 (1993) (with Foster and Huber)

It's Time to Reform New York's Prevailing Wage Law, Empire Foundation for Public Policy Research (September 1993) (think tank study)

Scientific Evidence in the Courtroom: Admissibility and Statistical Significance after *Daubert*, Washington Legal Foundation (1993) (with Robert Charrow)

Daubert Plaintiffs Won Battle, Lost War, *Product Safety and Liability Rep.* (BNA) *Special Report: Daubert: What Next?*, Summer/Fall 1993, at 16 (co-author with Peter Huber) (article also appeared in *Shepard's Scientific and Expert Evidence Quarterly*)

Roots of the 'Underclass': The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 *Am. U. L. Rev.* 85 (1993)

The Davis Bacon-Act: Let's Put an End to Jim Crow, Cato Institute (Jan.1993)

Equal Protection for Economic Liberty: Is the Court Ready?, Cato Institute (October 1992)

Note, The Supreme Court and 'Civil Rights,' 1886-1908, 100 *Yale L.J.* 725 (1990)

Note, A Contractual Solution to the Contraceptive Crisis, 8 *Yale L. & Pol'y Rev.* 146 (1989)

Hauling Junk Science Out of the Courtroom, *Wall St. J.*, July 14, 1993, at A16 (op-ed)

Junk Science in the Courtroom, *Wall St. J.*, March 24, 1993, at A15 (op-ed)

Why Johnny Can't Pray, *Reason*, Feb. 1992, at 56

Exclusionary Rule: Something's Not Kosher About Davis-Bacon, *Reason*, Aug./Sept. 1991, at 32

Blocking the Lights, *Reason*, Nov. 1990, at 40

Regulating What Children Watch, *Liberty*, Jan. 1990, at 63

PROFESSIONAL SERVICE

Academic Referee: *American Journal of Legal History*, Cambridge University Press, *Columbia Law Review*, *Harvard Law Review*, *Independent Review*, *Journal of American History*, *Jurimetrics*, *Law and History Review*, *Law and Social Inquiry*, *Law and Society Review*, Oxford University Press, *Supreme Court Economic Review*, *Yale Law Journal*, Yale University Press, among others.

AALS Section on Evidence

Chair, 2005; Chair-elect, 2004; Secretary 2003

Cato Supreme Court Review

Board of Editors, 2003-present

George Mason University Antonin Scalia Law School

Annual committee service, including seven-time chair of the appointments committee

EDUCATION

Yale Law School

J.D. 1991

Senior Editor, *Yale Law Journal*

John M. Olin Fellow in Law, Economics, and Public Policy

Lambe Fellow, Institute for Humane Studies

Brandeis University

B.A. *Summa cum laude* (History) 1988

Phi Beta Kappa