

BAR & BENCH

SALT LAKE COUNTY BAR ASSOCIATION

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SUMMER 2016



Past SLCBA Presidents (left to right): Bart Johnsen, Amy Sorenson, Honorable Laura Scott, Honorable Robert Shelby, Diana Hagen, David Reymann, Trina Higgins



SLCBA Board picture (left to right): Jonathan Pappasideris, Michael Langford, Kristen Olsen, Kate Conyers, Blakely Denny, Bart Johnsen, Honorable Michele Christiansen, Lauren Shurman, Trystan Smith, Aida Neimarlija, Clemens Landau, Jack Nelson

Not Pictured: Rita Cornish, Chris Hogle, Mark Kittrell, Kristine Larsen, Honorable Julie Lund, Jennifer Mastrorocco, Sam Meziani

SLCBA's Art and the Law Contest

Winners

By Blakely Denny

“We need rules to help us so everyone is treated fairly. Miranda shows people what to do if they are in trouble, so they have help and a fair chance.” – Conrad Reichert, Millcreek Elementary

SLCBA's Art and the Law Contest

Each year, in conjunction with the ABA's annual National Law Day, the Salt Lake County Bar Association sponsors the “Art and the Law” art contest for elementary, middle school, and junior high students in Salt Lake County. In the competition, students express their artistic visions about the National Law Day theme. Through the years, students have tackled interesting and often abstract themes, such as “The Rule of Law: Foundation for Communities of Opportunity and Equity” and “The Legacy of John Adams from Boston to Guantanamo.” For 2016, students artistically interpreted the theme of “Miranda: More than Words.” The theme celebrates the seminal case of *Miranda v. Arizona*, 384 U.S. 436 (1966), where the United States Supreme Court held that law enforcement officers must

advise suspects of their constitutional rights in order to use statements made during a custodial interrogation in a later criminal proceeding.

The Salt Lake County Bar Association hosts the annual art competition to give students an avenue to address legal topics and current events in a hands on and engaging way. In crafting their pieces for the theme of “Miranda: More than Words,” students considered the procedural protections afforded by the U.S. Constitution and the role of the courts in safeguarding such rights. Students submitted over 75 entries and Salt Lake County state court judges volunteered their time to judge the art. Judge Elizabeth Knight, Judge Kara Pettit, Judge Elizabeth Hruby-Mills, Judge Royal Hansen, Judge Su Chon, Judge Renee Jimenez, and Judge Julie Lund had the difficult job of selecting the winners, who received cash prizes for both themselves and their classrooms, and an invitation to the Law Day luncheon hosted by the Utah State Bar. The winning pieces are hanging in courtrooms across the county. Every year, the art becomes more inventive and thought-provoking. We can't wait to see next year's pieces.

Best in Show

Tauema Taofi – Eisenhower Middle School Grade School

Elementary School

1st – Conrad Reichert – Millcreek Elementary

2nd – Izzy Bown & Katie Kim – Rowland Hall

3rd – Aubrey Reichert – Millcreek Elementary

Middle School

1st – Enoch Vaenuku – Northwest Middle School

2nd – Lucy Johnson – S.L. Arts Academy

3rd – Sheila Hernandez – Northwest Middle School



Tauema Taofi



Conrad Reichert

Restaurant Review

Stanza Italian Bistro

By Michael Langford

As my wife and I drive around downtown Salt Lake City on yet another one of our recent 102° early summer evenings, we are debating on where we want to grab a bite to eat. We have our regulars: Mazza, Paris Bistro, but are feeling a bit adventurous on this hot summer evening.

As we drive down 300 S., Stanza Italian Bistro & Wine Bar catches our eye. We find parking directly out front and are immediately drawn to the newly renovated building that once was home to Faustina. As we walk to the front of the building, we are redirected to an entrance on the east side. We walk through the large patio, which boasts generous outdoor seating, and are surprised to see abundant parking behind the building. We enter the restaurant and find a friendly

hostess. She asks if we have reservations, we do not, but she is able to immediately seat us in booth overlooking the patio. As we sit our attention is immediately drawn upwards to the very high ceilings. I get the feeling that there was a complete re-design of the space. As the waiter, Nick, comes over to take our drink orders, I ask him to share information regarding the updated architecture. Nick informs us that the space was not completely remodeled, but one gets this sense due to an addition of a second story (which can be used for private events) in the south side of the restaurant and an increased ceiling height in the north side of the restaurant.

The restaurant décor could best be described as modern with classic and industrial accents. It mirrors the menu, which is best described as modern take on Italian classics. Stanza also boasts an impressive drink menu, with wine selections ranging from sparkling to traditional Italian reds and cocktails. My libation of choice to begin the evening was the classic Negroni: one part gin, one part vermouth rosso and one part Campari, garnished with an orange peel. I was very impressed by this full-flavored yet refreshing cocktail and will add it to my short list of favorites.

To being our culinary adventure, we ordered the polenta, which was colorful, flavorful and plentiful.

The polenta was served in several square pieces, covered in fresh mushrooms and arugula and resting on a freshly prepared tomato sauce. Many times I've experience polenta being very dry, but that was not my experience with this small plate. It was very fresh and moist and could be substituted as a light meal on a hot summer night. For the main course, I couldn't resist the duck breast with grilled corn, ricotta ravioli and wine soaked blackberries. The presentation was delightful and the flavors paired perfectly with one another. The serving was adequate, and the duck was prepared perfectly, not undercooked and not overcooked, just right. I paired my main dish with a light red from the Langhe region in Italy as recommended by Nick.

In summary, our first experience at Stanza was notable, and one that will keep us coming back. This isn't surprising based on the management team behind this new Salt Lake City gem. They also own and operate Current Fish & Oyster, Under Current Bar, Café Niche, Kyoto, Oasis Café, and Café Trio Downtown and Cottonwood. We would recommend giving Stanza a try; Salt Lake



Stanza Italian Bistro & Wine Bar

has stepped up it's culinary game with this new addition!

Where • 454 E. 300 South, Salt Lake; 801-746-4441
 stanzaslc.com

Prices • Small plates and salads, \$6-\$15; pastas and entrees, \$17-\$38

Hours • Open at 11 - 4:30 p.m. for lunch Monday – Friday, after 5pm for dinner Monday- Saturday; reservations recommended

Details • Main Course Management also owns and operates Current Fish & Oyster, Under Current Bar, Café Niche, Kyoto, Oasis Café, and Café Trio Downtown and Cottonwood

By Kristen Olsen and Kate Conyers

What is the Commission?

The Utah State Bar Commission is like the board of directors for the Utah State Bar. Under the State's Constitution, the regulation of the practice of the law and lawyers is given to the Utah Supreme Court. The Court in turn has delegated responsibility for the administration of the practice of law and the regulation of lawyers to the Utah State Bar, which is a 501(c)(6) non-profit corporation. The Commission is the decision-making body of the Bar.

What does the Commission do and why does it matter?

The primary responsibility of the Commission is to carry out all of the responsibilities delegated to the Bar. Specifically, the Commission establishes policy and rules ranging from admissions of lawyers, administering the Bar Examination, writing the Bar Examination, and setting thresholds to the character and fitness committee process through the Court, among other things.

Some examples of things the Commission does include:

- Organizing CLEs, annual conventions (Spring, Summer, and Fall Forum), and other Bar events;
- Lobbying the Legislature when bills and issues affect the administration of justice and the regulation and management of the practice;
- Creating and implementing programs and services, such as the Pro Bono program, Modest Means program, and the Lawyer Referral Service Directory;
- Selecting members to be considered by the Governor for the Judicial Nominating Commission and other law related commissions;
- Providing services and benefits to its members like Beneplace Group Benefits ([here](#)), Blomquist Hale counseling services ([here](#)), and Casemaker online legal research ([here](#)); and
- Selecting individuals to receive recognition and awards.

During the past year, the Commission has been focused specifically on responding better to the needs of its membership. It has sought increased transparency and better communication in the things the Bar does and how they can be improved. This has resulted in a dozen individual changes in the Bar's Office of Professional Conduct, admissions department, and financial department. The Commission, at the direction of Past President Angelina Tsu, also created

monthly Bar Reviews, the Breakfast of Champions mentor award event, 50-year Pins, and the 85th Anniversary Gala.

Doing these things takes a lot of time. The Commission meets nine to ten times a year and each meeting lasts up to four hours. Individual Commissioners also spend around eight to ten hours between each Commission meeting on other responsibilities, such as sitting on subcommittees, liaising to other Bar groups like Sections and Divisions of the Bar, and attending Bar conventions, events, and socials. The Commission also delegates many of its responsibilities to the Bar's Executive Director, John Baldwin, who manages a staff of thirty-eight individuals to assist in these tasks.

How does the Commission operate?

Some things can be handled by the Commission during one commission meeting, and others things—such as implementing long-term projects—can take years. Take the New Lawyer Mentoring Program as an example. The Mentoring Program came to the attention of the Commission after the Utah Supreme Court approached it with a report written by local lawyers and judges. The Court asked the Commission to determine whether it was something that could be implemented in Utah. The Commission in turn set up a committee to research whether the program would be valuable, necessary, important, achievable, and whether it would be a good thing for the lawyers of Utah and for the new lawyers. The committee met and researched these issues over the course of a year, regularly reporting to the Commission about its progress and requesting feedback. Once the committee determined that the Mentoring Program would be a good fit for the Bar, it sought approval through the Commission.

Once a program is ready to be approved by the Commission, it determines how the program is to be funded, whether to charge for CLEs, how to encourage mentors or members to join, and other specifics. Once the details of the program are figured out, the Commission petitions the Court to approve the program. The Court has ultimate authority over the Commission and it must approve any program that is not self-sustaining and needs money to be implemented. The Executive Committee of the Commission—the President, President Elect, and 1-3 other members selected by the President and approved by the Commission—meets with Court representatives on a quarterly basis to update the Court about its activities.

How can I access the Commission to affect change?

Attorneys are encouraged to raise concerns and express ideas to the Commission in an effort to resolve issues, improve the practice of law, and better the administration of justice in Utah. While there is no formal process for submitting ideas and concerns to the Commission at large, “your best bet,” Baldwin explained, “is to approach a commissioner” and ask them to bring your concerns and ideas to the attention of the Commission. Baldwin said one of the greatest things about the way the Commission is structured is that attorneys need only to pick up the phone or send an email to a Commissioner in order to be heard and to contribute to improving the Bar.

The ideas, suggestions, and concerns attorneys express to the individual Commissioners are generally brought to the entire Commission at the monthly meetings or shared with Baldwin, the Bar President, individual Commissioners, the Executive Committee of the Commission, and/or the Utah Supreme Court. For example, Baldwin explained, he often gets calls from Commissioners explaining that an attorney has expressed frustration about a certain issue of which the Commission, as a whole, was unaware. Such issues, according to Baldwin, are often easily resolved or investigated once the Commission is put on notice that such a problem exists. “Sometimes it affects great change, sometimes it doesn’t,” Baldwin said, but either way, “it’s a great populist notion.”

Who is on the Commission?

The Utah Bar Commission is generally composed of the following voting members: the current President, the President-Elect (who may or may not be a standing Commissioner), and thirteen Commissioners, eleven of which represent the five geographic divisions of the Bar, and two of which are non-attorney appointed “public members.” Angelina Tsu of Salt Lake City has just completed her year as President, and Robert Rice of Salt Lake City was sworn in this month as the new bar president at the Summer Bar Convention in San Diego. John R. Lund is the president-elect. Herm Olsen of Logan represents the First Division; John W. Bradley of Ogden represents the Second Division; S. Grace Acosta, H. Dickson Burton, Kate Conyers, Heather Farnsworth, Michelle Mumford, Cara Tangaro, and Heather Thuet, all attorneys practicing in Salt Lake City, represent the Third Division; Liisa Hancock of Provo represents the Fourth Division; and Katie Woods of St. George represents the Fifth Division. The two non-attorney

voting members are Mary Kay Griffin, a Certified Public Accountant, and Steven R. Burt, an architect. As non-attorneys, Griffin and Burt add a “public perspective that we as lawyers don’t always see because we think and act and look and talk and bill . . . like lawyers,” said Baldwin.

In addition to the voting members of the commission listed above, there are non-voting members who attend the Commission meetings and serve the Bar in various capacities, including the immediate Past President of the Bar, Angelina Tsu, the Deans from the University of Utah and Brigham Young University law schools, a Utah Supreme Court liaison, and representatives from the Young Lawyers Division, the Utah Minority Bar Association, Women Lawyers of Utah, Paralegal Division, and American Bar Associate delegates. The Utah Bar recently announced that a representative from the LGBT & Allied Lawyers of Utah will be added to the non-voting members of the Commission this year.

The voting Commissioners hail from diverse professional and political backgrounds. Some work for large firms while others are solo practitioners. At least two work in government service and one works as in-house counsel. With regards to politics, Baldwin said that generally, he does not know the Commissioners’ political affiliations, but he believes, based on the issues on which the Commission focuses, that more members are likely socially liberal than conservative. He believes the Commission as a whole, however, is fiscally conservative with its allocated budget because each voting member is a fiduciary over the Bar’s finances.

In addition to the various professional and political backgrounds of the Commissioners, Baldwin said, the Commission is diverse in other ways. For example, it is currently made up of nine voting female members and only six voting male members, which is not representative of the overall Utah Bar membership consisting of approximately 80% male attorneys and only 20% female attorneys. Last year marked the first female majority, according to Baldwin, who said that the number of female Commissioners has significantly grown over the past three years. The racial diversity of the Commission, according to Baldwin, is likely more representative of the overall Utah Bar membership, but it is difficult to determine.

Baldwin noted that there is more diversity on the Commission with regards to LGBT representation than he has noticed in the past, and he has observed an influx of

young attorneys serving on the Commission. “So often the younger lawyers are more enthusiastic and have more ideas,” Baldwin explained. He believes the diverse characteristics and demographics of the Commissioners adds a diversity of voice within the Commission as each member brings something different to the table.

How do I run for Commission?

Utah Bar elections are held each April. According to the Utah Bar website, before an attorney can apply to run, “[a]pplicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held.” If you are interested in running for a commissioner position next year, you must submit a

Utah State Bar Nominating Petition by February 1, 2017, available here. For more information about the elections and about the services offered by the Bar to assist in your campaign, visit <http://www.utahbar.org/bar-operations/run-for-commission/>.

If you are interested in volunteering in a different capacity, you are invited to volunteer for a committee position by completing an online form, available [here](#). All other inquiries may be directed to your respective commissioners (contact information is available [here](#)).



President Robert Rice: I ran for the Bar Commission in 2011 because I like lawyers and the practice of law and wanted to take the time to be of service to both. I was raised by one lawyer (my Father was a judge for 35 years) and a terrific mother who had a deep respect for lawyers. I’ve enjoyed immensely my practice and my colleagues at Ray Quinney and Nebeker. I thought the least I could do is become involved in our Bar Commission and do my part to be of service to our profession. My priorities at the Bar, especially as I prepare for my year as President, include promoting access to justice, improving membership services, making meaningful changes to increase diversity and awareness of diversity in our Bar and ensuring full implementation of recommendations made by the Futures Commission. Each of these initiatives play an important role in continuing the growth of an already-strong Utah State Bar. On

the lighter side, it’s worth noting that my first job was digging ditches. Yes, digging ditches. I worked on a very large cranberry marsh as a teenager in Wisconsin, where cranberry marshes are ubiquitous. I dug ditches by hand around the perimeter of football-field-sized cranberry marshes, finishing one and moving onto another, until I had dug miles of ditches by summer’s end. There’s a metaphor in there somewhere about the practice of law, I’m sure.



President Elect John R. Lund: I view serving on the Commission as a way to be an advocate for lawyers and for the legal profession. And we need some advocacy! People want to write us off as an antiquated and unhelpful. Nothing could be further from the truth. My overall goal in Bar service is to help both lawyers and the public see the real value in what lawyers do. For health, I cycle, run and do Yoga with Adrienne. For fun, I travel, dine, fish and dream of being the next American Idol.



Past President Angelina Tsu: I ran for a seat on the Bar Commission because there were some issues that were really rough for me during my term as YLD president. When I expressed my frustration about it to one of the Bar Commissioners, I was told, “If you are not a part of the solution, you are part of the problem.” I decided that problem was that younger lawyers, women lawyers and lawyers of color were underrepresented on the Commission and decided to become part of the solution. When I ran for Bar Commission, only two of the voting members were women and there were zero lawyers under the age of forty. Currently, women hold seven of the thirteen voting seats on the Commission and there are five lawyers under the age of forty. I think you can see the difference in the decisions that come out of this Commission. I am really looking forward to the addition of Heather Thuet, Grace Acosta and Cara

Tangaro. They are incredible people and great leaders. Interesting facts about me: I am the only person I know who has accidentally visited Panama City. The plane that I was in had to make an emergency landing there. It was a little scary, but it helped to reach my goal of visiting forty countries before turning forty—so I am not complaining.



S. Grace Acosta: I believe that it is important that many points of view be considered when making decisions that affect a large group of people. I would work hard to be the voice of those “not at the table” whenever possible. I am an animal lover and have 3 dogs 3 cats in addition to 2 kids. I also love camping and hiking.



H. Dickson Burton: For me, joining the Commission is a great way to give back to the profession that has been so very good to me. Also, after spending much of my time with patent attorneys, serving on the Commission is a great opportunity to escape and interact with normal people. :-). In my spare time I love to travel, near and far, with my wife and family.



Kate Conyers: I joined the Bar Commission because it is important to me to be a voice for public defenders, criminal defense lawyers, young lawyers and women lawyers. I also believed and still believe that I can make a positive difference on the Commission for all Bar members. I’m an avid Ute fan. I also love spending time with my 20+ nieces and nephews, traveling, and meeting new people while networking at legal events.



Heather Farnsworth: I wanted to be on the Bar Commission to be a voice for women and for small firms, because at that time women (with the ability to vote) were under-represented as were small firms. This has since changed and we now have a very diverse commission which I think is fantastic. For something fun-- I tend to own odd/unusual pets: I currently have a toothless chihuahua, a neurotic basset hound (he requires sedation during thunderstorms), and two sphynx (hairless) cats. I’ve had rats, toads, etc. in the past.



Michelle Mumford: I joined the Commission because I saw a demographic that was missing that I thought needed representation and thought I could add value to the Bar through time and service while learning from seasoned attorneys and great mentors. I hope to increase the Bar's focus on innovative and quality practice while continuing to reach out to underserved attorneys and client populations. I enjoy food and travel. When I went to Paris I brought a dozen chocolate croissants home. They didn't make it off the plane



Cara Tangaro: I joined the Commission to be a voice for solo practitioners and criminal practitioners. For example, I would love to see the Bar Conventions contain more talks/speakers for criminal practitioners. A couple fun facts about me: I had three children in two years (oops); I rowed in college (crew); I lived in Florence, Italy for a year; and I went to the Barcelona Olympics with the Dream Team (nanny for John Stockton)



Heather Thuet: I have enjoyed being Chair of the Litigation Section but the section has term limits! So, I joined the Commission. Ok, all kidding aside, I embrace the opportunity to serve the entire Bar as a Commissioner and look forward to making positive changes. In my spare time, I am out adventuring with my daughter. She reminds me how to perceive the world with through the eyes of child and embrace new challenges. This winter we learned to ski (or more aptly, she waited while I tried to learn to ski) and this summer we're trying bikes. I also own a boutique real estate brokerage and enjoy helping my clients buy and sell real estate. I am an avid Pilates enthusiast and teach Pilates too.

Practitioner Profile

Y L D P r e s i d e n t
J a e l y n n J e n k i n s

By Rita Cornish

In her four short years of practice, Jaelynn Jenkins has gained a depth and breadth of experiences and a focus to be envied by attorneys practicing more than twice as long. Jenkins currently practices at the small but distinguished firm of Fetzer Simonsen Booth Jenkins, where she has found a niche in estate planning and business law. Although her legal work is top notch, Jenkins true talent and skills lay in business development, networking, and finding time for service to the community and the profession.

Although her dad was a lawyer, Jenkins came to the practice of law through a round-about process. Coming out of high school, Jenkins pursued a Bachelor's degree in family and human development at Brigham Young University with a view toward becoming a therapist. Sometime into that program, however, she was discouraged by the thought that most therapists embrace a solitary career by hanging out their own shingle and running all aspects of their business. Jenkins realized she wanted more structure and camaraderie in her professional life. After some introspection, she identified research and writing the most favored aspects of her studies and redirected her efforts toward a career in the law.

At first, Jenkins focused on obtaining her paralegal certificate from Utah Valley University. At the time the job market for paralegals was tough and she believed obtaining an associate's degree and paralegal certificate would give her an advantage in the market. Jenkins was an excellent student, enough so that one of her instructors—an attorney—intervened and counselled her that she had all the skills necessary to make a great attorney and that she would never be happy if she didn't go on and finish a law degree. Jenkins took the advice to heart and enrolled at the Gonzaga University School of Law, from where she graduated in 2012.

Upon graduating, Jenkins began to look for work in Utah. Time and again, however, she was told by local firms that they were looking for attorneys with local ties and that they were skeptical of her commitment to this market because she had gone to law school in Washington.

Jenkins was not deterred.

Jenkins took a position as a judicial law clerk and bailiff with Judge Davis, on the Fourth Judicial District Court. The experience gave her first-hand experience, not only with the procedural technicalities of being a bailiff, but also with what worked and didn't to persuade a judge and jury. Jenkins was fascinated by the breadth of issues handled in our state courts. "One minute you are dealing with the legal standards for Terry stops and searches, the next you are working on murder cases with national coverage, and there is also exposure to business disputes. And, you get to see a lot of trials that way." The variety was, simply put, interesting, and she got to see "the best of the best, and examples of what not to do" when it came to persuasiveness.



J a e l y n n
J e n k i n s

In 2014, Jenkins took a position as an associate with a small local firm. There she practiced in a wide variety of substantive areas on both the transactional and litigation sides including family law, adoption, personnel injury, workers compensation claims, and bankruptcy. It was there that she got her first taste of estate planning and business law, which resonated with her. Jenkins truly enjoys getting to know her clients, their families, their business goals, and their long term plans, which makes estate planning and business law a particularly good fit. She moved to her current firm about six months later, where she could focus on building a practice in those areas.

Jenkins career path has led her to realize the value and importance of networking, especially in a small market like Salt Lake City. Early on in her job search and even after she was employed, Jenkins teamed up with a colleague and initiated networking lunches with other attorneys and individuals in the community. She is quick to point out the advantage of including a buddy in networking situations: "You just have more courage." Wise beyond her years, Jenkins shares this advice on networking: "One of the mistakes people make in networking is waiting until they need something. I view networking as being involved in the community. Others see you coming around, they know you are here to stay, and that opens a place where we can be friends or acquaintances, without the burden of needing something right away."

Practitioner Profile

Y L D P r e s i d e n t
J a e l y n n J e n k i n s

Jenkins is also dedicated to giving back to the community and profession. Jenkins currently serves on the board of the Repertory Dance Theatre, where she lends her expertise as a trusts and estates attorney. Jenkins also commits time to bar service. She previously served as the Publicity Chair of the Young Lawyers Division of the Utah State Bar and currently serves as the President of that organization. In that role, she is passionate about launching Fit2PracticeUtah: A Health and Wellness Initiative. [See Jaelynn R. Jenkins, *Fit2PracticeUtah: A Health and Wellness Initiative*, Utah Bar Journal, July-Aug. 2016, at 60.] Jenkins notes that, “although it can be rewarding, lawyering is a high stress profession and we can all use some help balancing it out.” The initiative focuses on exploring and educating members of the Bar in four primary areas: sleep, nutrition, fitness, and mental health—four areas often neglected by our profession.

“Although it can be rewarding, lawyering is a high stress profession and we can all use some help balancing it out.”

Dear Justice Tongue:

Justice Antonin Scalia has, since his passing, been both lauded or derided as the most brilliant, charismatic, flamboyant, conservative, and/or inconsistent Jurist in our Supreme Court's history. How does your Honor see the late Justice in the annals of SCOTUS? Also, what do you make of the empty seat?

Respectfully,

Orr Reginal

Dear Mr. R.

Responding to your letter risks breaching two fundamental canons: namely: 1) talking ill of the dead, and 2) answering vague and hopelessly compound questions.

So, naturally, I'm game.

I will get to Justice Scalia in due time, but not before I digress. It is important that I set a contrast.

The legislature is, and has for some time been, completely dysfunctional. It has declared war with itself and the polarizing expressions of power have rendered it at once dangerous and incompetent in the pursuit of our nation's needs. The vehicle is fear and the payload is money, which are the two most powerful and corroding sources of power.

In contrast to posturing politicians, Judges, for the most part, understand their role to be very different. The Judiciary is the one branch of government in which reasoned and civil discussion can and does occur. As one of my brilliant clerks once said, "In courtrooms around this nation, as in few other places on the face of the Earth, the great and the humble, the rich and unwashed, not only may speak truth to power without fear of reprisal, but must do so." Judges must therefore both be and appear objective, thoughtful and reasoned. Justice Scalia by dint of his character (and perhaps touches of narcissism) did not always seek to do so. Justice Scalia was one of the more outspoken justices in the history of the Supreme Court, and had no reservation in airing his political opinions in or out of the court. He sought notoriety and celebrity, advocated for conservative political and social doctrines and routinely engaged in bombast which not only departed from judicial decorum but did not typify the normal characteristics of a thoughtful jurist, though he was, at times, certainly that.

While his aggressive engagement of counsel from the bench was appropriate, his expressed disdain for the reasoned opinions of his fellow justices was regrettable. His use of language was often mocking, disrespectful and, incidentally, lacking in either the creativity or joyfulness of Dr. Seuss. Referring to Justice Kennedy's first sentence in the majority opinion legalizing gay marriage, Scalia stated that he would rather hide his head in a bag than agree. Justice Kennedy's words that drew such mockery were: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."

To the same effect, Scalia referred to the majority opinion in *Obergefell v. Hodges*, with terms like "silly" "absurd" "egotistical" and a "judicial putsch" (a secretly plotted and sudden executed attempt to overthrow a government). He also derided majority opinions with phrases such as "quite absurd," "pure applesauce" and "jigger-pokery." Such manner of language from a sitting Supreme Court justice tends to bring the Court and its vital function into popular disrepute and encourages citizens to look upon it with disdain. It also energizes the specter of entrenched polarization within the Court. It is not surprising that politicians added his dismissive language to their polarizing and non-illuminating disrespect for the Court. (They needed little encouragement to do so.)

It is true, of course, that both the Right and Left are guilty of attempts to appoint and promote judges whom they believe will heel to their political biases. However, judges should not seek to curry the approbation of either pole. In my view, Justice Scalia did so, and attempted to hide his political bias through inconsistently applied notions of "originalist" constitution interpretation.

Which brings me to the other reason I have always had pause about Justice Scalia. In "Reading the Law the Interpretation of

Legal Text,” (2012) he advocated “textual originalism,” arguing that judges must “...look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences.” Justice Scalia therefore purported to dismiss any reference to “legislative history” in order to discern the framers’ meaning. The legislature was to him a “hydra-headed body” whose members do not share a common view. (Clearly he was, at times, insightful). That said, Scalia was less than a faithful or even-handed historian. His selective historicity and “57 principles” used to assist in ascertaining “textual meaning” at enactment, left room for considerable mischief.

For example, in *District of Columbia v. Heller*, in which Scalia wrote the majority opinion striking down an ordinance forbidding ownership of handguns, he not only engaged in forbidden “legislative” history respecting the Second Amendment, but did so selectively. Justice Scalia, with his fascination for the supposed original meaning of the text of the document, stated he put substantial weight in what it said and meant at the time of adoption. However, in *Heller* he seems to have paid very little real attention to the Preamble to the Second Amendment, which was a very important part of the “text.” That Preamble, of course, reads: “A well regulated Militia being necessary to the security of a free state....” Objective reading would find the “text” of the Preamble to expressly and primarily concern the Second Amendment with “a well regulated Militia” and “security of a free state.”

Justice Scalia’s creative use of “originalism” was in full career when he and his co-author expressed the opinion that the seminal decision of *Brown v. Board of Education* could be reconciled with the doctrine of “textual originalism.” Justice Scalia stated that what constitutes a denial of equal protection must be answered “...on the basis of the ‘time-dated’ meaning of equal protection in 1868.” In that regard, he had earlier stated in his article, “Originalism: The Lesser Evil” that the doctrine required “immersing one’s self in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”

However, in that exercise, he seems to have overlooked the fact that at the time the 14th Amendment was ratified, African-Americans were universally excluded from, or strictly segregated in public schools. As Ronald Turner noted in his law review article (62 *UCLA L. Rev. Disc.* 170), Democrats had argued, at the time of enactment, that the Civil Rights Act or the 14th Amendment would produce horrible consequences, such as compulsory school integration. Republicans had responded however, with denials of such a possibility. It is supreme irony, therefore, that Justice Scalia found the *Brown v. Board* to be an exercise of “originalism” when it more closely represented an application of underlying fundamental constitutional principles understood in modern times and in a way different than the meaning of the 14th Amendment was understood at adoption. Assessed apart from original meaning and with new awareness that “separate but equal” is in principle inherently “unequal,” the Supreme Court reversed *Plessy v. Ferguson*.

What I find most amusing, ironic, and at the same time dispiriting is the fact that in almost all of Justice Scalia’s decisions, under the banner of “originalist” interpretation, he seemed to have navigated his way to the position favored by the Right. In my observation, it was largely justified with selective historicity and in many instances blatant violations of his own prescriptions for adherence to the “originalist” doctrine. Accordingly, although the Constitution does not mention corporations, he had no trouble joining the majority in *Citizens United*, and according corporations status as “persons” and deserving constitutional protection under the 14th Amendment. (That presumably put corporations ahead of women in his mind, as he found it “questionable” whether the Constitution prohibited discrimination against women, who were not mentioned in that text.)

He complained that “a system of government that makes People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.” Nevertheless, in *Bush v. Gore*, it didn’t stop him from voting with the plurality to stop efforts to ascertain the result of the vote (think “democracy”) in Florida, in 2000.

The “originalist” doctrine rings hollow when applying constitutional provisions to circumstances not faced or even considered by the framers of the Constitution. And by the way, the very power exercised by the justices of the Supreme Court, including Justice Scalia, to overrule or confirm the constitutionality of legislative enactments is not expressed in the

Justice Tongue

A Time With Greater Promise

Constitution, but was developed through reasoned judicial interpretation of constitutional provisions and discernment of necessary core constitutional principles.

In the last analysis, this nation must seek men and women for the Court who are above ideology, who understand their apolitical role. But, that just seems to be beyond the reach of politicians, and we have an empty seat on the Supreme Court, long after prior and better functioning legislative branches would have given their advice and consent. To his credit, the president has made a principled choice for the empty seat. The Right, spoiled by the likes of Justice Scalia, won't have any of it.

With his nomination of Judge Merrick Garland, a non-ideological centrist, the president has simply "called out" the legislature. Senator Orrin Hatch had earlier referred to Judge Garland as follows, "Merrick B. Garland is highly qualified to sit on the D.C. Circuit. His intelligence and his scholarship cannot be questioned...his legal experience is equally impressive...accordingly, I believe Mr. Garland is a fine nominee. I know him personally, I know of his integrity, I know of his legal ability, I know of his honesty, I know of his acumen, and he belongs on the Court. I believe he is not only a fine nominee, but is as good as Republicans can expect from this administration. In fact, I would place him at the top of the list." During his own nomination confirmation hearings, Chief Justice John G. Roberts, nominated by George W. Bush, praised Garland's judgment. As the Republican Governor of Oklahoma stated: "Merrick distinguished himself in a situation [prosecution of the Oklahoma bombing] where he had to lead a highly complicated investigation to make quick decisions during critical times. Merrick Garland is an intelligent, experienced and even-handed individual."

There are more examples that make it clear Merrick Garland is an appropriate non-partisan choice. Sadly the legislative branch, dysfunctional, inept and controlled by a fractured Right, neglects its duties so as to prevent the Supreme Court from properly performing its duties. Such is my take on the very empty seat.

A last word on Justice Scalia. He was, without question, brilliant and certainly cared deeply for this country and its Constitution. And, if he made his fellow justices better by engaging them in intellectual combat, then he performed a valuable service. So, God bless and God rest.

Fondly,

Justice J. Learned Tongue

**Over
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