Aesthetics of the Cross: Competing Interpretations of the Ku Klux Klan Cross in *Capitol Square Review and Advisory Board v. Pinette*

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"[T]he facts count" in constitutional arguments and justification, even at the highest appellate levels . . . .

In *Capitol Square Review and Advisory Board v. Pinette*,[1] the United States Supreme Court considered whether a state agency's refusal to allow the Ku Klux Klan to exhibit a cross on a plaza surrounding the State Capitol in Columbus, Ohio, was justified by the Establishment Clause of the United States Constitution.[2] The Court decided that Establishment Clause doctrine did not justify this refusal, although the Justices offered different reasons for their votes and Justices Stevens and Ginsburg dissented.[3]

This essay contemplates a single aspect of *Pinette*: the conflicting statements of "the facts" in Justice Scalia's opinion of the Court and Justice Ginsburg's dissent. I want to explore the different meanings of these statements and different explanations or understandings lawyers may have of why the two Justices provide such contrasting interpretations. I also wish to evaluate these statements in terms of what they may tell us about the state of contemporary constitutional jurisprudence. In general, I shall argue that "the facts count" in constitutional arguments and justification, even at the highest appellate levels, and that Justice Ginsburg offers us a more persuasive and more insightful interpretation of "the facts" in *Pinette* than does Justice Scalia.

I.

In beginning his opinion, Justice Scalia states:

> Capitol Square is a 10-acre, state owned plaza surrounding the Statehouse in Columbus, Ohio. For over a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious. Ohio Admin. Code Ann. § 128-4-02(A)(1994) makes the square available "for use by the public . . . for free discussion of public questions, or for activities of a broad public purpose," and Ohio Rev. Code Ann § 105.41 (1994) gives the Capitol Square Review and Advisory Board responsibility for regulating public access. To use the square, a group must simply fill out an official application form and meet several criteria, which concern primarily safety, sanitation, and non-interference with other uses of the square, and which are neutral as to the speech content of the proposed event.
>
> It has been the Board's policy "to allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square." (citation omitted) Such diverse groups as homosexual rights organizations, the Ku Klux Klan and the United Way have held rallies.

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> The Board has also permitted a variety of unattended displays on Capitol Square: a State-sponsored lighted tree during the Christmas season, a privately-sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival. Although there was some dispute in this litigation regarding the frequency of unattended displays, the District Court found, with ample justification, that there was no policy against them.[4]

This statement, for me, suggests a Renaissance painting of a harvest scene or town square, say by a Breugel or Bosch, in which secular activities mix with the religious, with perhaps a church or other religious symbols constituting part of a discreet background within which peasants, peddlers, merchants, friars and others are hard at work, play, or relaxation.[5] More prosaically, does not Justice Scalia's statement, at least on first impression, appear to be relatively "objective," "comprehensive," and "detached" from the diverse intentions and behaviors on and about Capitol Square? He describes a spacious area, an extensive history of diverse uses, the legal authority and mandate for public access to Capitol Square (complete with formal citations), and even the mechanical, seemingly ministerial, nature of the application process which groups use to seek permission for their events and installations. In the second paragraph, Justice Scalia juxtaposes interesting examples of diverse groups which have used the square: "homosexual rights organizations, the Ku Klux Klan and the United Way," and the unattended displays of "a State-sponsored lighted tree during the Christmas season (why not say 'Christmas tree'?), a privately-sponsored menorah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an art festival."[6]

All in all, might not one say that Justice Scalia has provided a satisfying description of a "public forum" successfully at work? It is not surprising that his subsequent legal argument justifies the right of the Ku Klux Klan to exhibit its unattended cross on Capitol Square as a matter of free speech in a public forum.[7]

II.

Now consider Justice Ginsburg's different perception:

> We confront here . . . a large Latin cross that stood alone and unattended in close proximity to Ohio's Statehouse. Near the stationary cross were the government's flags and the government's statutes. No human speaker was present to disassociate the religious symbol from the State. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio's government did not endorse the display's message.[8]

This statement, for me, recalls a Ciambue Madonna, an early Renaissance painting of bright color, stark emotion, limited, sparse context, and undeniable spiritual significance and power.[9] There is context in Justice Ginsburg's statement, but unlike Justice Scalia's context, Justice Ginsburg focuses on the precise nature of the cross (it is a "Latin cross," not a Greek or other kind of cross) and on salient relationships between the cross and its neighbors: the Statehouse, government flags, government statutes, and the absence of information about ownership of the cross or its relationship to government. In contrast to Justice Scalia's statement, one might be tempted, on first impression, to say that Justice Ginsburg's statement is more "subjective," "particularistic" rather than comprehensive, and "engaged" rather than detached, for she asks the observer to "confront" the situation of a particular cross in a particular space and her statement ignores the multiple historical uses of Capitol Square.

All in all, might not one say that Justice Ginsburg provides a satisfying description of a "government endorsement," in effect, of a particular cross installed within a particular public forum? It is not surprising then that her subsequent legal argument justifies exclusion of this unattended Ku Klux Klan cross from Capitol Square on the grounds of Establishment Clause doctrine.[10]

III.

What might explain these two very different statements or interpretations of "the facts" in *Pinette*? I shall canvass five possible explanations. These theories are not mutually exclusive of each other, but each yields a different perspective on the role of factual interpretations in constitutional jurisprudence. It may be important how we think about "the facts" in cases like *Pinette* as we ponder how to apply this case, make arguments in similar cases, or evaluate contemporary trends in constitutional law.

The most popular explanation of these divergent statements, I suspect, is one of "mere advocacy." That is, we assume that the different Justices have already decided to take different positions on the relevant rules of law to be applied to the case and then, like good advocates, they have "characterized" the facts about the cross and the square in ways which are intended to help persuade us about their different positions on the rules.[11]

If this were the case, if judges act as advocates in stating "the facts," we might note the several skillful rhetorical moves that Justices Scalia and Ginsburg employ in their statements. Justice Scalia's statement tends to minimize or trivialize any potential government-religious relationships or effects of the Ku Klux Klan cross by locating the cross in a relatively large area and in a relatively long historical time period of public square activities. His statement advances the apparent authority of state law for the activity, and he suggests relationships of equality between the

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challenged act and other diverse religious and political acts, ultimately suggesting (by a repeated reference) some kind of analogy between the Klan's cross and the relatively uncontroversial United Way! In contrast, Justice Ginsburg's statement emphasizes the potential government-religious effects by locating the cross in terms of its proximity to government structures and by providing a description of its particular religious quality, by focusing upon the immediate rather than distant context as it were. We might conclude that both Justices Scalia and Ginsburg *as advocates* are quite skillful rhetoricians, at least if we could agree that "mere advocacy" best explains their contrasting statements.

[O]ne possible explanation for the perceptual fault line between the Justices may be fundamentally different ways of thinking about moral/legal problems.

A second explanation might be that Justice Scalia's statement strives for "objectivity," "neutrality" or "impartiality" in describing the situation while Justice Ginsburg's statement reveals a more "subjective" or more "partisan" approach. The evidence to support this explanation would lie in Justice Scalia's attempt to describe many relationships between the cross and activities which occur on the square, and in Justice Ginsburg's focus on the immediate context of the cross's location. But this explanation seems wrong. Justice Scalia's statement is just as "subjective" as Justice Ginsburg's, and her statement is just as "objective" as Justice Scalia's. For example, Justice Scalia decided *against* describing the cross's proximate relationship to the government structures, and this was certainly a subjective decision or, in other words, the decision of a thinking subject. Conversely, Justice Ginsburg relies on "objective" facts just as much as Justice Scalia, for it is just as "objectively true" that the cross is a Latin cross, as it is that the cross was installed in a ten acre plaza. Justice Ginsburg relies on *different* objective facts, to be sure, but the facts she chooses are as objectively true as the facts Justice Scalia selects. Perhaps if there were some precise convention among judges about how "the facts" should be stated in appellate opinions we could call Justice Scalia's statement objective because it is consistent with the convention, and Justice Ginsburg's statement subjective because it is inconsistent. But where is there any evidence of such a convention among judges?

Three other explanations are closer to the mark, in my view, because each of these can be related to the distinctive role that is played by judges who strive conscientiously and impartially to decide difficult or harder cases. Let us assume that Justices Scalia and Ginsburg are such judges and let us consider these explanations in somewhat logical order.

Perhaps we should think of *Pinette* as a decision in "equity" rather than "law" or, in other words, a case that involves a fact-driven decision based on "the equities of the facts" rather than "legal rules." For Aristotle "equity" meant a good justification for ignoring legal rules when the rules point toward unjust results,[12] and there is a long Anglo-American tradition of establishing equity courts to supplant courts of law for just these kinds of cases.[13] To be sure, we tend to think of "equity" as involving some sort of general agreement among the judges about "the just result" that is impeded by legal rules. But when the appropriate legal rule is unclear or contested, as in *Pinette*, there would seem to be at least a tacit appeal for judges to search "the equities of the facts" as a means of deciding the case. If this is so, then Justice Scalia's and Justice Ginsburg's statements of the facts in *Pinette* appear in new and interesting light. We can take Justice Scalia's statement to represent his (and others) sincere perception of the facts and competing values at stake, a perception in which the Klan's cross in this particular context cannot have much impact upon anyone and is unlikely to convey constitutionally worrisome religious messages to observers. Similarly, we can take Justice Ginsburg's statement to represent her (equally) sincere perception of the facts and competing values at stake, a perception in which the Klan's cross in this particular context may have a large impact upon observers and may convey a message of religious endorsement by government that is constitutionally worrisome. Of course, we would like some explanation of how each of these perceptions can be a "sincere perception," and the equity explanation itself doesn't provide this. But the next two explanations may.

Consider the possibility that much appellate decision-making, including *Pinette*, is governed neither by legal rules alone nor by equity but rather by a "mutual construction of facts and rules." This is Kim Scheppele's theory of legal interpretation, in which the interpretation of facts is influenced by the interpretation of rules and, conversely, one's interpretation of rules is influenced by one's interpretation of facts.[14] In this theory, with its roots in Aristotelian practical reasoning and John Dewey's pragmatism, the "mere advocacy" explanation of Justices Scalia's and Ginsburg's statements is *partially right*, but the advocacy explanation is also *inverted* to suggest that the Justices' sincere perceptions of the facts may in part determine their interpretations of the rules!

Typically, we may think of this mutual construction process as limited to trial work, decisions by juries, and issues of "mixed

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law and fact." But our traditions that appellate judges should pay careful attention to "the facts" and that "equity" should supplant "the law" in certain cases[15] suggest that some kind of interpretive reciprocity between facts and rules may be operative throughout our appellate law, no matter how messy this may make our understandings and our criticisms of appellate law. Let us then examine Justice Scalia's and Justice Ginsburg's statements in this light.

Might not Justice Scalia's perception of the activities in Capitol Square, including installation of an unattended Ku Klux Klan cross, have driven him and the three Justices who joined his full opinion to "interpret" the rule of the public forum cases as precluding any examination of possible government endorsement of private speech? In other words, Justice Scalia's perception that this instance of private religious speech is likely to have minimum impact upon observers in the context of many mixed uses of Capitol Square, including other forms of private religious speech, may have persuaded him that the *general consequences* of an absolute rule for public forum speech would be to promote private religious speech activities while imposing but negligible burdens at best upon Establishment Clause values. If this perception of the facts and consequences were persuasive to someone, would not that person be likely to "see" an absolute rule for public forum speech in the authoritative precedents and other legal materials?

Similarly, might not Justice Ginsburg's perception of the installation of the Ku Klux Klan's "Latin cross" in near proximity to government symbols have driven her to "interpret" the public forum free speech rule as a more limited one that still requires asking whether government endorsement of private religious speech has occurred? In other words, Justice Ginsburg's perception that this particular installation of a religious symbol is likely to convey a strong message of government endorsement of the Christian religion may have persuaded her that the *general consequences* of an expanded public forum free speech rule would be dangerous to the protection of Establishment Clause values.

The mutual construction thesis still leaves an incomplete explanation of how different Justices can arrive sincerely at such different mutual constructions of facts and law. In a second article, Kim Scheppele has usefully supplemented her theory of mutual construction with a discussion of the role that different experiences and perspectives of individuals can play in generating radically different interpretations of facts and rules.[16] Scheppele argues that, in general, the background experiences, perspectives, and values of legal decisionmakers have enough in common to support agreement on many interpretive issues. At times, however, "perceptual fault lines" arise between different kinds of observers; this phenomenon will be particularly acute during times of "social earthquakes" or radically changing social mores.

What experiences and perspectives might divide Justice Scalia and Justice Ginsburg in ways that generate the apparent "perceptual fault lines" in their interpretations of the Ku Klux Klan cross on Capitol Square? We know that Justice Scalia is a male, a Roman Catholic, and prior to his judicial career an academician particularly interested in government deregulation.[17] We know that Justice Ginsburg is a female, a Jew, and prior to her judicial career an academic and litigator particularly committed to advancing women's constitutional rights.[18] These differences — of gender, religion, and professional experience — may help us understand why the Justices' perceptions of "the facts" in *Pinette* diverge so dramatically and yet why both statements are entirely sincere and committed to "the best interpretation" of the facts.

Feminist scholars have argued recently that male thought tends to strive for "detachment" and "objectivity" and, in legal arenas, that it also tends to be "acontextual" and "rule-oriented." In contrast, female thought or "feminist legal method" tends to be pragmatic, contextual, and more attentive to relationships or interdependencies between different persons.[19] Certainly the opinions of Justices Scalia and Ginsburg appear to represent this division in thinking about difficult moral/legal issues. On the one hand, as we have seen, Justice Scalia's statement of the facts appears on first impression to be objective and relatively detached from the events on Capitol Square, and he ultimately argues for a "bright line" rule of absolute protection for private religious speech within public forums. On the other hand, as we have seen, Justice Ginsburg's statement of the facts appears sensitive to the immediate context and direct effective relationships between the Ku Klux Klan cross, its neighboring government symbols, and observers, and her opinion signals pragmatism by its willingness to entertain fact-specific, sometimes costly inquiries into the possible effects of government endorsement of private religious speech in certain public forums. Thus, one possible explanation for the perceptual fault line between the Justices may be fundamentally different ways of thinking about moral/legal problems. This division of thinking is by no means a division between all males and all females, but it is a division in thinking that has only been made apparent to us by the "social earthquake" of the modern womens' rights movement and feminist legal scholarship that is part of this movement.

Secondly, we may also imagine different religious experiences of the Justices playing a part in their equally sincere perceptions or interpretations of facts and law. For many Christians, I would imagine that symbols of the cross are generally perceived as a kind of everyday event, important to some of us but certainly nothing to worry about. It's just a normal part of our background experience. At least Justice Scalia's statement of the facts in *Pinette* fits very closely to this notion of the background experiences and perspectives of Christians. For non-Christians in American society, however, I would imagine that symbols of the cross are relatively infrequent

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and often experienced as special events, sometimes threatening but typically a sign of difference between the American Christian majority and those who are different from this majority in important ways. At least Justice Ginsburg's statement of the facts in *Pinette* fits closely with this notion of the background experiences and perspectives of non-Christians.

Finally, of course, Justice Scalia's detachment, his focus on the larger context of Capitol Square activities over time, and his choice of an absolute rule for private religious speech in public forums, all seem consistent with his pre-judicial professional experience as an academic interested in government deregulation. Similarly, Justice Ginsburg's sensitivity to the relationships on Capitol Square, to context and pragmatism, and to observers who experience difference from those with power in American society are all quite consistent with her former professional experience as a litigator seeking to advance women's constitutional rights.

I thus conclude that "political factors" of gender, religion and professional experience may indeed, somewhat paradoxically, help us understand why Justice Scalia's statement of facts and Justice Ginsburg's quite different statement of facts in *Pinette* should be understood as equally sincere perceptions rather than "mere advocacy" by judges who have, for other reasons, adopted different positions on the legal rules relevant to the case. In other words, these factors support the idea that "the facts count" in *Pinette*, either because this decision should be understood as a tacit decision "in equity" rather than "in law" or because the decision constitutes a good example of Kim Scheppele's theory of the mutual construction of facts and rules.

IV.

If the facts count in *Pinette*, we are left with a problem of evaluation. Which basic approach to "the facts" of cases like *Pinette* should we prefer, Justice Scalia's or Justice Ginsburg's? Each reader, of course, will make his or her own decision. Before I conclude, though, I shall not go quietly but draw a few connections between the two approaches and some philosophical considerations about the nature of our constitutional jurisprudence.

First of all, I hope that we shall not decide on one approach *because of* our gender, our religion or our professional experience. We should strive, I suggest, for a constitutional law that involves deliberations and changes of views across our concrete differences rather than one that simply argues for rights from interests.[20] Secondly, I would suggest that the traditions of our constitutional jurisprudence of rights support judicial sensitivity to immediate contexts, to relationships between persons who differ from each other in significant respects, and to the views of outsiders whose interests and perspectives differ from those of the majority.[21] For me, as a male, Protestant, and lawyer with no professional experience deregulating government or advocating women's rights, these traditions of constitutional jurisprudence support Justice Ginsburg's approach to "the facts" of cases like *Pinette*. If the facts count in constitutional decision making, we should prefer Justices who engage with these facts, their immediate contexts, and the social relationships revealed within them. Justice Ginsburg's statement in *Pinette* does this; Justice Scalia's does not.

Notes

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1. Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995).
2. The First Amendment of the U.S. Constitution provides in part that "Congress shall make no law respecting an establishment of religion,"and this prohibition was incorporated into the Fourteenth Amendment's due process clause and applied to state government actions in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).
3. Four Justices would have held that the cross was to be displayed in a "public forum" and thus could not be excluded as a matter of free speech law. *See Pinette*, 115 S. Ct. at 2447-50. Three Justices would have held that government "endorsement" of religious symbols, even in public forums, violates the Establishment Clause, although these Justices did not perceive endorsement in this case. *See id.* at 2451 (O'Connor, J. concurring in the judgment).
4. *Id.* at 2444-45.
5. *See, e.g.*, Pieter Breugel the Elder, *Harvesters, in* HUGH HONOUR & JOHN FLEMING, THE VISUAL ARTS: A HISTORY 380-81 (1982); Hieronymous Bosch, *The Garden of Earthly Delights, in id.* at 351-53.
6. *Pinette*, 115 S. Ct. at 2447-49.
7. *Id.*
8. *Id.* at 2474 (Ginsburg, J., dissenting).
9. *See, e.g.*, Ciambue, *Madonna Enthroned with Angels and Prophets, in* HUGH HONOUR & JOHN FLEMING, THE VISUAL ARTS: A HISTORY, *supra* note 5, at 303.
10. *Pinette*, 115 S. Ct. at 2475 (Ginsburg, J., dissenting).
11. For a description of how good advocates characterize facts in this way, see STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 144-49 (1985).
12. *See* Aristotle, *The Ethics of Aristotle, in* THE NICHOMACHEAN ETHICS 1137b9-1137b24 (J.A.K. Thomson, trans., Hugh Tredennick rev. 1976); Lawrence Solum, *Equity and the Rule of Law, in* NOMOS XXXVI: THE RULE OF LAW 120 (1993).
13. *See* JOHN NORTON POMEROY, A TREATISE ON EQUITY

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JURISPRUDENCE §§ 16-23 (5th ed., Spencer W. Symons ed. 1941).

14. *See* Kim Lane Scheppele, *The Mutual Construction of Facts and Rules, in* LEGAL SECRETS 86 (1988).

15. For example, in granting injunctive relief, See generally OWEN FISS & DOUG RENDLEMAN, INJUNCTIONS (2d ed. 1984).

16. *See* Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1112-1113 (1987).

17. *See, e.g.,* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993, at 511-15 (Clare Cushman ed. 1993).

18. *See, e.g.,* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 189-92 (Melvin I. Urofsky ed. 1994).

19. *See, e.g.,* Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

20. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

21. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (declaring segregated public schools unconstitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (protecting a Jehovah Witness's right not to work on her Sabbath); Wisconsin v. Yoder, 406 U.S. 205 (1972) (protecting the right of Amish to withdraw their children from public schools); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release-time programs that permitted private religious instruction of public school students during public school hours).

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