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Antonin Scalia's Constitutional Textualism: The Problem of Justice to Posterity*

by Dr. Bruce E. Auerbach and Michelle Reinhart

Abstract: Antonin Scalia defends his textualist approach to interpreting the Constitution by asserting that the purpose of the Constitution is to restrict the range of options open to future generations by enshrining institutional arrangements and practices in constitutional mandates or prohibitions. For this purpose to be fulfilled, justices of the Supreme Court must read the language of the Constitution according to its original meaning. We argue there is little reason to believe that Scalia's understanding is correct. Neither the language of the Constitution nor the writings of Jefferson or Madison are consistent with Scalia's interpretation. More importantly, the goal Scalia posits, of seeking to restrict the range of options open to future generations, is intergenerationally unjust.

I. Introduction

United States Supreme Court Justice Antonin Scalia's approach to constitutional interpretation, which he calls "textualism", is as controversial as it is influential. On the one hand, its conservative supporters regard endorsement of textualism as a virtual requirement for confirmation to the federal bench. On the other hand, critics point out that Scalia's approach is entirely extra-constitutional,¹ and that historical meanings are sufficiently obscure and open to interpretation to allow Scalia to tailor textual interpretation to his policy preferences.²

Justice Scalia has defended his theory of constitutional interpretation against his critics vigorously in articles, speeches, and Supreme Court opinions. Scalia justifies his

"The very purpose Justice Scalia posits for the Constitution – to bind future generations to the institutions and limitations on the use of power the Framers thought appropriate – constitutes an injustice to future generations."

"textual originalism"³ by the assumption that the purpose of the Constitution is to restrict the range of options open to future generations by enshrining in constitutional

mandates or prohibitions the institutional arrangements and practices of the Framers' generation.⁴ For this purpose to be fulfilled, the justices of the Supreme Court must read the language of the Constitution according to its "original" meaning. In some situations, Scalia suggests, there will be disagreement as to the original meaning. In other situations

there will be disagreement as to how that original meaning applies to new and unforeseen phenomena. ... But the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution changes, that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable.⁵

The question we raise is whether Antonin Scalia's understanding of the purpose of the Constitution is correct, and if so, whether it would be legitimate. Applying concepts from the literature on intergenerational justice, we argue that the very purpose Justice Scalia posits for the Constitution – to bind future generations to the institutions and limitations on the use of power the Framers thought appropriate – constitutes an injustice to future generations. Moreover, neither the text of the Constitution nor the writings of the Framers support the understanding of the purpose that Justice Scalia ascribes to the Framers. The institutions and limitations on power they incorporated into the Constitution did not have the primary purpose of restricting future generations, but rather of restricting themselves. They understood, of course, that if the Constitution were successful and endured, future generations would inherit that document and the institutions it created. They fervently hoped that future generations would view their actions as wise and beneficial; but the Framers did not claim to act in the name of future generations, nor did they act with the

explicit purpose of binding future generations to the constitutional arrangements they created.

We argue that the absence of any language in the document itself indicating that the Constitution was ordained in the name of future generations, or any statements that it was established to bind future generations, weakens Antonin Scalia's claim that the Constitution must be interpreted

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according to the 'original' understanding of the text, when that understanding no longer makes sense to us. The Framers were not in a position to foresee the needs of future generations, nor the circumstances in which their descendants would live; nor could they have understood the values of their remote descendants, or their linguistic usages. Consequently, it would have been unjust of the Framers to have bound future generations to the constitutional arrangements they established, without providing the flexibility to reinterpret the Constitution in a manner that made sense to later generations.⁶ The amendment process alone is insufficient. The ability of future generations to reinterpret the Constitution for themselves is essential to the intergenerational legitimacy of the Constitution.

We argue that Antonin Scalia's view that the role of the judge is to reconstruct and impose the original meaning of the language of the Constitution, even in situations in which that meaning is *no longer accepted*, represents an intergenerationally unjust approach to constitutional interpretation. If the Framers did not in fact seek, and could not legitimately have sought, to bind future generations to their understanding of the Constitution, it is difficult to understand on what authority current members of the U.S.

Supreme Court would bind us to abandoned moral and linguistic understandings, such as the standards for “cruel and unusual” punishments or “due process of law” that prevailed in 1787.

II. Antonin Scalia’s Approach to Constitutional Interpretation

Antonin Scalia advocates what he calls a “textualist” approach to the interpretation of the Constitution. Textualism consists of interpreting a statute or the Constitution according to “the original meaning of the text.”⁷ Scalia contrasts his commitment to interpreting a text based on the original meaning of the text’s language with both the search for the (original) intent of the authors of the text, and the view that a document ought to be interpreted according to its current or evolving meaning.

Antonin Scalia rejects the search for the original intent of the draftsmen of a law or the Constitution, and claims also to have long ceased using legislative history to discover the intent of the drafters in deciding cases.⁸ Scalia contends that textualism is very different from original intent. The doctrine of interpreting the Constitution according to the original intent of the Framers had been advanced by former Reagan Attorney General Edwin Meese and other political conservatives as a response to liberal judicial activism of the 1960s and 70s. Their approach had also been subjected to a number of devastating critiques. Among the problems critics point to is the difficulty of determining whose intent ought to be counted, those who wrote the Constitution or those who ratified the Constitution?⁹ Other critics point to the difficulty of determining what the ratifiers’ intent was when the text is not clear, and when there is only unreliable evidence, at best, of their thinking about a particular passage.¹⁰ Antonin Scalia rejects the search for original intent, in interpreting both the Constitution and legislation, but he retains Edwin Meese’s goal of making the Constitution a bulwark against an expanded understanding of individual rights.

For Scalia “the Great Divide with regard to constitutional interpretation is not that between the Framers’ intent and the objective meaning of the text, but rather between original meaning (whether derived from Framers’ intent or not) and *current* meaning.”¹¹ His strongest criticisms are reserved for those who espouse the view that the Constitution ought to be understood as a living document whose meaning changes over time. This view “... frustrates the whole

purpose of a written constitution.”¹² If laws were meant to change meaning and application over time, Scalia argues, it would make more sense for old restrictions to be lifted instead of new restrictions added, but just the opposite is the trend in modern constitutional law. “*Less* flexibility in government instead, not *more*... No, the reality of the matter is that, generally speaking, devotees of The Living Constitution do not seek to facilitate social change but to prevent it.”¹³ Nor is it necessarily the case that the Constitution “evolves” in the direction of greater individual rights. We value some rights, such as property rights and the right to bear arms, less than the Founders did.

But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgement of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions of rights*.¹⁴

Justice Scalia argues that the correct way to interpret the Constitution is textualism. This approach, he claims, removes subjectivity from the Court’s decisions.

In some sophisticated circles, [textualism] is considered simpleminded—“wooden,” “unimaginative,” “pedestrian.” It is none of that. To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.¹⁵

III. Constitutions and Intergenerational Justice

The decision of a generation to establish specific institutions and to place some question beyond the purview of the majority of its current citizens is an act of sovereignty and self-governance, insofar as those decisions affect themselves and their contemporaries, and if they have a meaningful say in adopting that instrument and if they consented to the terms of that

document.¹⁶ The situation is very different with respect to future generations. Future generations cannot be consulted about the terms of a constitution, nor can they give their consent to that document, except long after it was written and adopted. At that point consent to the Constitution is not free and voluntary, but constrained by the very existence of the Constitution and the institutions that rest upon it, and by the dangers posed by abandoning those institutions.

“Had the Framers claimed to have acted in the name of posterity, there would be grounds for holding that the Constitution is an intergenerational contract... the Framers made no such claim, and surely they would have seen such a claim as hubristic.”

Significantly, the Framers “ordained and established” the Constitution in the name of “We the People of the United States” and not in the name of themselves and their posterity. The Preamble does clearly express the hope that the Constitution will secure “the Blessings of Liberty to ourselves and our Posterity.” But a concern with securing the Blessings of Liberty to the present and future generations is very different from claiming the authority to establish the Constitution in the name of posterity. Had the Framers claimed to have acted in the name of posterity, there would be grounds for holding that the Constitution is an intergenerational contract, binding on later generations. But the Framers made no such claim, and surely they would have seen such a claim as hubristic and illegitimate.

When a people adopt a constitution, and specifically when they choose to protect certain rights and privileges in that constitution, they place those matters beyond the purview of the ordinary legislative process and the power of the majority to alter them through the ordinary democratic process. If a constitution is to be seen as legitimate, the decision as to which rights to protect and which rights to leave to the democratic process should reflect accurately the fundamental values of the founding generation. As generations pass, however, the assumption of congruence between the values and the circumstances of the founders and those of their descendants becomes increasingly problematic. The further removed a generation, the greater the likelihood that there will be significant differences between the moral

concepts and values of the two generations.¹⁷ For this reason, justice to future generations generally requires that the present generation *not* seek to limit the choices and options of their descendants whenever possible. Justice to future generations certainly requires that the present generation not seek to enforce its preferences on future generations, assuming that were possible. Although we should not be indifferent to the types of choices future generations may face, we have an obligation to respect the autonomy of future persons, and not to seek to limit their choices unnecessarily, nor to make choices for them that they are capable of making for themselves.

Antonin Scalia's argument that "the whole purpose [of a constitution] is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away"¹⁸ ought to give one pause. On the one hand, it is quite clearly legitimate, even desirable, to establish institutions that are just and to leave them as a heritage for future generations. To the extent future generations find valuable and good the institutions they have inherited or established, a strong case can be made that they have an obligation to preserve those institutions both for their own benefit and for

"In order for a constitution to be intergenerationally just, the authority of future generations to reinterpret the document based on their understandings and values must be acknowledged and preserved."

the benefit of future generations. On the other hand, people who establish or preserve institutions as a heritage for future generations must also recognize that future generations may not share their judgment of the worth of those institutions.

The dilemma of constitutionalism is that the mechanisms that protect the rights of contemporaries against legislative majorities who want to take these rights away also make it difficult for future generations to adapt the Constitution to their potentially very different circumstances. As we argue later in this article, in order for a constitution to be intergenerationally just, the authority of future generations to reinterpret the document based on their understandings and values must be acknowledged and preserved.

For this reason, to establish institutions and procedures *for the purpose* of limiting the

choices of future generations is, in and of itself, an act of injustice to future generations, unless there are extraordinary reasons for doing so. Future generations have the right to decide for themselves which institutions are worthy of preservation, and which should be changed or even abolished. This right is not absolute; future generations are obligated to consider the consequences of abandoning established traditions and institutions, especially the consequences for their posterity of abandoning the institutions they have inherited. But the right of future generations to their own judgment of the worth of the institutions they inherited, and their right to act on that judgment, are inalienable. The commitments and actions of past generations cannot take away this right, and every generation has the corresponding obligation to respect and preserve these rights by not seeking to bind posterity to their ancestors' conception of the good. Each generation is thus at liberty to alter or even abandon the commitments of its ancestors, subject to the obligation to consider the consequences of those actions.¹⁹

Thomas Jefferson and James Madison both express very much this view in correspondence they exchanged in 1789 and 1790.²⁰ In a letter dated September 6, 1789, Jefferson poses the question whether a generation has the right to bind a later generation. Jefferson answers that no such authority can exist. He considers it self-evident "*that the earth belongs in usufruct to the living;*" that the dead have neither powers nor rights over it.²¹ Jefferson goes on to argue that "no society can make a perpetual constitution, or even a perpetual law. The earth always belongs to the living generation. They may manage it ... and what proceeds from it, as they please, during their usufruct.... The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being."²²

No clearer repudiation of Scalia's claim that the purpose of the Constitution is to bind future generations to the judgments of the past could be asked for. Of course, Jefferson was not at the Constitutional Convention in Philadelphia, and for this reason is not considered to be one of the Framers of the Constitution. But Madison was at the Convention and is generally considered to be the principal architect of the Constitution. While Madison espouses a more flexible position in his response to Jefferson, he largely accepts the validity of Jefferson's

argument. He raises a number of practical objections, including that periodic revisions of the Constitution would render government "too mutable to retain those prejudices in its favor which antiquity inspires."²³ Madison also argues that debts incurred to make improvements in the natural state that benefit future generations are valid obligations of future generations, and ought to be paid by them.²⁴

Nonetheless, Madison agrees with Jefferson's assertion that the validity of national acts generally should be limited to the life of the generation that enacted them. And Madison states that keeping this principle in view in the proceedings of government would serve "as a salutary curb on the living generation from imposing unjust or unnecessary burdens on their successors."²⁵ Clearly, both Jefferson and Madison would reject Antonin Scalia's claim that the "whole purpose [of the Constitution] is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."²⁶

A generation ought to preserve those inherited institutions it finds to be beneficial and worthy of passing on to posterity. They may even choose to perpetuate the institutions they have inherited out of familiarity and habit. But future generations should see themselves as having greater leeway than their ancestors to change and adapt institutions they have inherited to their needs. The lack of contractual obligation is only part of the reason for this greater leeway. Future generations are also in a better position to judge how constitutional arrangements have worked over time and how they continue to work. As Plato argued long ago, the user of an instrument will speak of its merits and defects with knowledge that the instrument maker does not possess.²⁷

The most important reason future generations may choose to alter inherited institutions is that these institutions have ceased to be useful in addressing the needs of a changing society. It is impossible for even the wisest founders to foresee the nature and direction of change in society. For that reason alone, institutions and practices must be able to be adapted to the inevitable changes in conditions and values. The greatest flexibility to adapt to change is found in the power to legislate in broad areas for the public welfare. On the other hand, the power of Congress to legislate is limited in a number of ways, including by prohibitions in the Constitution and the Bill of Rights,

by the general requirement that the power to legislate be fairly traceable to a grant of power to Congress by the Constitution, and by interpretations of the Supreme Court.

The constitutional amendment process has been used for great matters and sometimes for small ones. The post-Civil War amendments (XIII, XIV and XV) laid the groundwork for greater equality and civil rights in the United States. But the Amendment process has also been used four times to tweak the way the United States selects its presidents (XII, XX, VVII, XXV). Although constitutional amendments rest on a more solid foundation than laws or constitutional interpretations by the Supreme Court, the amendment process is notoriously cumbersome. More than eleven thousand proposals to amend the United States Constitution have been introduced in its history, but only twenty-seven amendments were adopted.²⁸

The power to adapt the Constitution by reinterpretation has proved to be as important as the amendment process in preserving the United States' political system. The power of the federal government to levy taxes on income was expanded by constitutional amendment, but the equally critical power to regulate the economy came about by way of reinterpretation of the commerce clause by the Supreme Court in 1937. The application of the Bill of Rights to the states is rooted in the 14th Amendment, but it is rooted just as much in the judicially created doctrine of the selective incorporation of the fundamental provisions of the Bill of Rights. The United States Constitution has survived more than two centuries both because it has been amended and because the Supreme Court has reinterpreted key clauses of that document in ways that facilitate adaptation to changed values and circumstances.

It is precisely this ability to reinterpret the Constitution in light of experience that Justice Scalia would deny. By limiting the meaning of the Constitution's language to its meaning at the time it was adopted, Scalia decouples the meaning of the language in the Constitution from changes in meaning in daily use. At the same time Scalia would deny justices the ability to reinterpret the provisions of the Constitution in light of experience.

IV. Scalia's Textualism and Intergenerational Justice – Conclusion

Antonin Scalia's argument that it would have been legitimate for the Framers of the

Constitution to seek to bind the hands of their descendants for their own good, and that the Framers actually sought to do so, turns the Constitution into an intergenerational contract or covenant whose purpose is to bind all generations of Americans to terms set down by the Framers, subject to change only by constitutional amendment. This understanding of the nature of the Constitution underlies Scalia's textual originalism. It requires justices to view their role as one of reconstructing the original meaning of the Constitution and applying that understanding to the constitutional review of current laws and policies.

“One can accept that the Constitution of the United States is an intergenerational compact, without accepting the radical view of that compact espoused by Scalia.”

One can accept that the Constitution of the United States is an intergenerational compact, without accepting the radical view of that compact espoused by Scalia. A far more moderate position is that by establishing a constitution that limits the powers of government, the Framers inevitably restricted the choices of future generations. This position is consistent with the understanding of Edmund Burke that the (British) Constitution is an intergenerational covenant embodying the accumulated wisdom of a people.²⁹ Burke's position is also consistent with a more humble approach to constitutional interpretation that requires judges to weigh the effects of past interpretations of the Constitution on society, and to modify those interpretations that have proven harmful. This view of the role of the Supreme Court has attracted the support of both liberal justices and traditionally conservative justices such as John Marshall Harlan (the younger). In *Gideon v. Wainwright* (372 U.S. 335 (1963)), for example, Justice Harlan was willing to abandon the rule the Court had handed down twenty-one years earlier in *Betts v. Brady* (316 U.S. 445 (1942)), largely because he was convinced that rule had proven unworkable.

Antonin Scalia rejects an evolutionary and pragmatic approach to constitutional interpretation, in part because the U.S. Constitution, unlike the British Constitution, is a written document. But he also rejects an evolutionary view because he understands the Constitution to have been established for the purpose of binding the

actions for future generations of Americans. For Scalia, the terms of this compact can be applied correctly only by reconstructing the meaning of its language as it was understood at the time it was written.

We have argued that Antonin Scalia's approach to constitutional interpretation places an undue and illegitimate burden on the present generation. As a practical matter, exclusive reliance on the Amendment process has proved unworkable. The U.S. Constitution has changed as much by judicial interpretation as by amendment. But Scalia's theory of constitutional interpretation is not merely impractical. It also rests on an intergenerationally unjust model of constitution making. It would not have been legitimate for the Framers of the Constitution to have attempted to impose their values on future generations, by deliberately restricting the choices of their descendants, as Scalia argues they did.

None of this undermines the validity of intergenerational compacts such as constitutions, or other policies likely to affect persons well into the future. Constitutions are important – even essential – devices for shaping political institutions and preserving fundamental values. Moreover, we agree with Madison that constitutions are by their nature inherently intergenerational. If they are successful, they will endure and shape politics into the future, while at the same time restricting the range of available choices open to our descendants. On the other

“There is no reason to think that either we, or the Framers of the Constitution, were endowed with the superhuman wisdom required to justify interpreting the Constitution as a covenant... whose terms are fixed by their meaning at the time it was adopted.”

hand, when we adopt policies that affect future generations, the uncertainty we have respecting the effects of our actions and their impact on future persons requires that we avoid substituting our judgment for theirs whenever possible, and that we err on the side of increasing, rather than decreasing, the range of choices open to future generations.

The question is not whether the present generation may adopt policies that incidentally restrict the choices of future generations by adopting institutions and practices they see as beneficial to themselves. Rather the

question is whether the present generation may deliberately seek to restrict the choices of its descendants, a purpose Antonin Scalia espouses and attributes to the Framers of the United States Constitution. There is no reason to think that either we, or the Framers of the Constitution, were endowed with the superhuman wisdom required to justify interpreting the Constitution as a covenant, binding on future generations, whose terms are fixed by their meaning at the time it was adopted. This certainly was not the understanding of the Constitution reflected in the writings of Jefferson and Madison, and it is not an approach that can withstand analysis as an application of the principles of intergenerational justice. There is good reason to conclude that Antonin Scalia's position is wrong both historically and ethically, and should be rejected.

Notes

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1 Breyer, B 2005: 117.

2 Tribe, L 1997: 68-71. Tribe questions whether one could actually discover a better or more correct understanding of the Constitution by simply meditating on it. He does not believe one can determine the level of abstraction or the "empirical facts about what a finite set of actors at particular moments in our past meant to be saying" (68) even with the use of complicated tools such as biography and psychology. Nor does he believe that all constitutional clauses may be neatly defined as either specific or abstract and that whether a clause is seen as specific or abstract may change over time. The thrust of Tribe's critique of Scalia is that with so much wiggle room for interpretation in discovering the meaning and mode of the law, it is difficult say whether Scalia is espousing law or his own judicial aspirations disguised in fanciful explanations of history.

3 Scalia, A 2003. In a speech delivered in Washington, D.C. on October 18, 1996 at The Catholic University of America, Antonin Scalia describes himself as belonging to a small but hardy school, called "textualists" or "originalists." We have taken the liberty of combining the two terms in describing Scalia's approach to interpreting the Constitution.

4 Scalia, A 1997: 23.

5 Scalia, A 1997: 45-46.

6 If the Framers did not, and could not legitimately, have bound future generations to their understanding of the Constitution, then it is even more difficult to justify the efforts of some current members of the Court to use interpretations of the Constitution to bind us to abandoned moral and linguistic understandings.

7 Scalia, A 1997: 38.

8 Scalia, A 1997: 36.

9 Logfren, C. A 1990: 117-150.

10 Hutton, J 1999: 151-178.

11 Scalia, A 1997: 38.

12 Scalia, A 1997: 12.

13 Scalia, A 1997: 42.

14 Scalia, A 1997: 43.

15 Scalia, A 1997: 23.

16 Different normative considerations would apply to a decision supported by even a large majority to repress a discrete and insular minority.

17 This position is argued first by Martin Golding 1980: 69 in his influential essay, "Obligations to Future Generations." Terence Ball 1988: 150 makes a similar argument in his *Transforming Political Discourse*. See also Bruce E. Auerbach 1994.

18 Scalia, A 1997: 40.

19 Locke, J 1980: 62, who influenced the thinking of the Framers makes very much this point in his *Second Treatise of Civil Government*: "...[W]hatever engagements or promises any one made for himself, he is under the obligation of them, but cannot by any compact whatsoever bind his children or posterity. For his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son than it can of anybody else."

20 The authors would like to thank Prof. Beau Breslin of Skidmore College for suggesting the importance of the correspondence between Jefferson and Madison in comments on a draft of this paper presented at the Northeast Political Science Association (U.S.) annual meeting in November of 2010.

21 Jefferson, T 1989: 960.

22 Jefferson, T 1989: 964.

23 Madison, J 1790.

24 Madison, J 1790.

25 Madison, J 1790.

26 Scalia, A 1997: 40.

27 Republic of Plato (Book X, section 601). It is noteworthy that the Philadelphia Convention was called for the purpose of proposing amendments to the Articles of Confederation. Such amendments would

have required unanimous ratification by all thirteen states. When the Convention had finished its work, not only did they propose adopting a completely new Constitution, they also proposed a ratification process that abandoned the requirement of unanimity.

28 United States Senate Web Page: http://www.senate.gov/pagelayout/reference/three_column_table/measure_proposed_to_amend_constitution.htm. Viewed February 2012.

29 Burke, E 1955: 110.

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Short-sightedness in Youth Welfare Provision: the Case of RSA in France

by *Juliana Bidadanure*

Abstract: *This paper¹ reconstitutes and addresses critically the deontological and consequentialist arguments given by the French government to justify the denial of the national guaranteed minimum income support (RSA) to young people under 25 years old. The deontological arguments express a concern for distributive justice and suggest that young people do not deserve income support. The consequentialist arguments, on the other hand, emphasise social efficiency: they draw on the alleged negative outcomes that the extension of income support to young people would bring about. After analysing each argument, this paper concludes that the denial of RSA to young people is an illegitimate discrimination. It then proposes that we understand our duties towards young people through an account of prudence that reconciles both (1) concerns of distributive justice with concerns for social efficiency and (2) concerns for inter- and intragenerational justices.*

Introduction

In June 2009, the Sarkozy government reformed the “Revenu Minimum d’insertion” (RMI), which was the French guaranteed minimum income support (effective since 1988), and implemented a new scheme

called RSA “Revenu de solidarité active”. Just like the former RMI, this new plan included a monthly allowance (of about €460) for those without any source of income. However, as opposed to the former RMI, it also made provisions for a second allowance to top up the income of the low-paid. As a result, the government claimed that it would incentivise work rather than inactivity.²

In the initial proposal, young adults between 18 and 25 years old were ineligible for RSA,³ just as they were excluded from the former RMI. According to the *Haute Autorité de Lutte contre les Discriminations et pour l’Égalité* – the French Equal Opportunities and Anti-Discrimination Commission – such differential treatment was discriminatory. The inequality of treatment was based on age – a criterion prohibited by the law – and it deprived young people of an important social right.⁴

As a response, President Nicolas Sarkozy introduced a new scheme in September 2009 entitled “RSA-jeunes” (RSA-youth) aimed at young people between 18 and 25 years old. However, as its name suggests, RSA-jeunes is different from the original RSA. It requires a past contribution: young people are only entitled to income support if

they have worked full-time for two years in the past three. Initially, 160,000 young people⁵ were supposed to receive this new allocation, which represented only 2% of young people, while approximately 20% of them lived under the poverty line, and while more than 23% of active young people were unemployed.⁶ Today, over a year after its official launch, the situation is even worse: only about 10,000 young people receive RSA-jeunes, while over one million people aged between 18 and 25 live under the poverty line.⁷ French youth unemployment is, on average, more than twice as high as the national (9.3%) and the OECD (8.5%)⁸ unemployment rate.

In this paper, I aim at presenting the justifications that were given for the denial of the original RSA to young people and for the implementation of the very restrictive RSA-jeunes instead. There was a critical lack of governmental publications justifying the practice,^{9,10} which is unacceptable given what is at stake. Drawing mainly on the introductory speech for RSA-jeunes by President Sarkozy and from scholars who questioned age requirements for minimum income, I have tried to reconstitute a taxonomy of the underpinning premises