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IN MEMORIAM:
JUSTICE ANTONIN SCALIA (1936–2016)

Some Reflections on Justice Scalia

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I knew Justice Scalia for many years and considered him a generous friend. We were both great supporters of the Federalist Society and met frequently at Society events, but our longest and most interesting conversations usually happened when I called him to recommend students for clerkships, which I did quite often. Still, I confess that it was not until last fall that I sat down to a methodical reading of his work and tried to develop a systematic understanding of his judicial philosophy. I did this in preparation for a January seminar that I taught with Judge Amul Thapar;[1] the seminar focused explicitly and exclusively on Justice Scalia's work, on his theories of textualism and originalism, and on his efforts to defend and implement them.[2] Of course, even a very intensive week was

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1 Judge Thapar was a district judge at the time, but he was nominated by President Donald Trump to the Sixth Circuit in March and confirmed on May 26, 2017.

2 Judge Thapar and I have taught a seminar each January for the last several years. We called it "Judicial Philosophy in Theory and Practice," and assigned cases and readings in pragmatism, living constitutionalism, originalism, and textualism, as well as the antitheory that Judge J. Harvie Wilkinson III advocates. See J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to*

hardly long enough to take the Justice's full measure, but we immersed ourselves in his work long and deeply enough to reinforce our long-held respect and admiration for him and his work. More specifically, in preparing for and teaching the course, I personally came to appreciate three significant aspects of Justice Scalia's career that, while not directly related to the substance of his ideas, help to explain his influence and to understand why it will endure.

The first was simply the vigor and intensity of his intellectual engagement with the law. This became increasingly evident as we began selecting readings to assign. Justice Scalia wrote well and at length, and it was difficult to select those readings that were most penetrating or relevant to the issues we wanted our students to think about. I wished they could read everything; that *I* could read everything! It was, I think, not only because his ideas had merit that he was able to change the terms of the debate about constitutional and statutory interpretation. It was also because he wrote so prolifically and clearly and spoke so frankly about them. His views may have remained incomprehensible to many, but his passionate advocacy, his willingness to engage his critics, and his mighty efforts to explain and justify his convictions made his ideas impossible to ignore.

A second aspect of Justice Scalia's work that I came to appreciate was the depth and seriousness of his commitments to originalism and textualism. I had long known and sympathized with the substance of those commitments, but had not fully grasped quite how fundamental they were to the way he conceived of his obligations as a justice. I knew that some people doubted whether he actually meant what he said about originalism or practiced what he preached about the tethers that bound him to the Constitution's original public meaning or to the text of statutes. For example, my former law school colleague, dean and good friend, John Jeffries, once wrote an elegant tribute to the Justice.[3] Jeffries conceded that for Justice Scalia, "the words used, in their plain meaning, [served] as authority and as external constraint,"[4] and he acknowledged

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Self-Governance 107–19 (Oxford 2012). On account of Justice Scalia's untimely death, we decided to focus exclusively on his judicial philosophy in 2017.

[3] See generally John C. Jeffries Jr, *Tribute to Justice Antonin Scalia*, 62 NYU Ann Survey Am L 11 (2006).

[4] Id at 12.

that the Justice was guided by genuine respect for American tradition.[5] But Jeffries seems clearly to have concluded that the "animating vision behind Scalia's jurisprudence"[6] was neither originalism nor textualism. Rather it was "an awareness of the fragility of human achievement, [ ] a sharp distrust of easy promises about a better world, [ ] a keen appreciation of what we have to lose."[7] According to Jeffries, Scalia was "deeply skeptical about the capacity of judges to work improvements in the world—skeptical *not merely* about the legitimacy of judicial efforts to shape the future, but *more fundamentally* about their ability to get it right."[8] Further, "[i]t is *not merely* that [Scalia] doubts the *authority* of judges to make bets on the future; he doubts their *capacity* to do so with anything like consistent success."[9]

I think Jeffries misconceived Justice Scalia's animating vision. Neither Scalia's skepticism about the legitimacy of judicial efforts to shape the future nor his doubts about judicial authority to do so were "mere" considerations, just makeweights in service of an overarching distrust of judicially decreed constitutional innovation. Rather, Justice Scalia was an originalist *in principle*. He doubted the authority of judges to make bets on the future *in principle*. He acted from the conviction that it was the fundamental and singularly important judicial duty to preserve the constitutional structure that the Founders created and to perform only those governing tasks that the Constitution assigns to judges. Indeed, there was nothing *more fundamental* to him than this conception of the source and accordingly of the scope and limit of the judicial power. For me, the single best way to understand Justice Scalia is to recognize that he truly regarded himself as tethered—tethered by the Constitution to its original public meaning and to the text of the statutes he was called on to interpret. Along the way, of course, he ended up tethering himself to his philosophy on account of his many extrajudicial efforts to explain, justify, and commit to it in no uncertain terms. Also along the way, by announcing the objective criteria to which he

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5 Id.

6 Id.

7 Jeffries, 62 NYU Ann Survey Am L at 12 (cited in note 3).

8 Id (emphasis added).

9 Id at 12–13 (first emphasis added).

bound himself, he provided his critics with all the ammunition they might need.[10]

Importantly, however, within the boundaries of the tethers that bound him, he seemed to harbor few doubts about the ability of judges—at least in their capacity as *lawyers*—to "get it right." Indeed, though he never claimed that judging was easy or simple, his opinions reflect considerable confidence in his legal analysis, in the correctness of the conclusions to which it led him, and ultimately in the capacity of his judicial philosophy to dictate right outcomes. And when he disagreed with his colleagues' "judicial efforts to shape the future," it was not the accuracy of their predictions of likely consequences that he most vigorously disputed. Rather, it was the incompleteness of their predictions, their egregious failure to account for the untoward consequences of the structural distortions that their decisions entailed.[11] And, "of overwhelming importance,"[12] he lamented the illegitimacy of their constitutional innovations, because he regarded such decisions as "naked judicial claim[s] to legislative—indeed, *super*-legislative power; . . . claim[s] fundamentally at odds with our system of government."[13]

Lastly, while he is perhaps most well known for his vivid prose, Justice Scalia was above all a first-rate lawyer and an exceedingly conscientious judge. Reading many of his opinions at once impressed me anew with how quickly he got to the essence of a case,[14] how scrupulously he addressed and answered

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[10] It was of utmost importance to Justice Scalia that judges have "an objective basis for judging." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 28 (Thompson/West 2012). For example, in answer to Judge Wilkinson's attempt to "escape from theorizing," Wilkinson, *Cosmic Constitutional Theory* at 115 (cited

in note 2), he worried about whether Wilkinson's

> injunctions "be modest" and "be restrained" mean always deferring to the wishes of the legislature? And if not always, then how are the appropriate occasions to be identified? . . . Judges' repudiation of what [Judge Wilkinson] calls a theory and what [Scalia and Garner] would call principled interpretation creates an aristocratic regime in which wise, modest judges (trust them) allow or forbid whatever they like or dislike.

Scalia and Garner, *Reading Law* at 28 (cited in note 10).

[11] See, for example, *Morrison v Olson*, 487 US 654, 697 (1988) (Scalia dissenting).

[12] *Obergefell v Hodges*, 135 S Ct 2584, 2627 (2015) (Scalia dissenting).

[13] Id at 2629 (Scalia dissenting).

[14] My favorite example of this is on the third page of his dissent in *Morrison*:

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the

each opposing argument—especially when he was in dissent, which was often—and how forcefully he argued the positive side of his own position. The combination of his witty, direct, and colorful prose, the precision of his analysis, and the judicial craftsmanship he displayed made his opinions not only fun to read. They were also either wonderfully convincing or deeply challenging, depending on your point of view. Because my point of view often coincided with his, I often found them wonderfully convincing, but I must acknowledge that his critics did not find them so.

Justice Scalia enriched my life in more ways than I can count. His contributions to the law are and will continue to be profound. They changed the terms of debate. It is quite impossible for me to find words that would celebrate his contribution as it deserves to be celebrated. I am, simply, grateful to have known him, to have learned from him, and to have counted him as a friend. I only wish he'd had more time among us.

> Constitution sought to establish . . . . Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Morrison, 487 US at 699 (Scalia dissenting).