

## Justice Scalia: Constitutional Conservative

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When former President Ronald Reagan died in 2004, an outpouring of praise followed from across the political spectrum. As a conservative, it was striking to hear people who had spent their careers opposing President Reagan's policies speak so fondly about him. The virtue they identified most often was his speaking skill; Reagan, after all, was known as the "Great Communicator." But their focus on rhetoric missed a deeper point. As President Reagan himself recognized, "I never thought it was my style or the words I used that made a difference: it was the content. I wasn't a great communicator, but I communicated great things."<sup>1</sup>

Justice Antonin Scalia's death in 2016 came more suddenly than President Reagan's. But it sparked a similar response. Justice Scalia was widely hailed as a great writer, praise as sincerely delivered as it was deeply deserved. But as with President Reagan, appreciation for Justice Scalia's style should not obscure the content he communicated. Put simply, Justice Scalia's opinions were persuasive because his ideas were persuasive. And those ideas, like President Reagan's, were fundamentally conservative. They were rooted in the history and tradition of the American people—specifically, the Framers of the Constitution, who structured a democratic republic that protects individual liberty by separating and limiting governmental power. By defining and defending a judicial philosophy grounded in the constitution's text, structure, and history, Justice Scalia was not just the modern era's most influential Justice, he was its most influential conservative after the president who appointed him to the bench.

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<sup>1</sup> Ronald Reagan, *Farewell Address to the Nation* (American Presidency Project, Jan 11, 1989), archived at <http://perma.cc/ZE75-8CT7>.

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As Chief Justice Roberts recently observed, when President Reagan appointed Antonin Scalia to the Supreme Court in 1986, many people did not know how to pronounce the Justice's first or last name.<sup>2</sup> That obscurity did not last long. By the time I arrived as a law clerk in 1997, Justice Scalia was a hero to a generation of law students. I did not necessarily agree with every one of his decisions; I doubt anyone would. But clerking for him was (and remains) the highlight of my legal career.

It was also a lot of fun. Early in the Term, the Justice took his four law clerks to lunch at A.V. Ristorante, his beloved pizzeria on Capitol Hill. He ordered four large pizzas for the five of us. After some hearty eating, we had finished off three of the four pies and were stuffed. But Justice Scalia made it clear that he did not expect his new hires to leave anything on the table. So, like a scene out of *Cool Hand Luke*, we slowly finished off the last pizza (anchovies and all). Nothing in Justice Scalia's chambers was done halfway.

That included, of course, the law. Justice Scalia began every case from first principles. And the very first principle was the separation of powers embodied in the structural provisions of the Constitution—what he called “real constitutional law.”<sup>3</sup> By expressly enumerating and limiting the powers of each branch of the federal government, the structural separation-of-powers provisions prevent government overreach and protect individual liberty—the fundamental tenets of constitutional conservatism. As the Justice often explained, the Framers “viewed the principle of separation of powers as the absolutely central guarantee of a just Government.”<sup>4</sup> Indeed, the Framers did not even include a Bill of Rights in the original Constitution. And as Justice Scalia and President Reagan both observed, “our Bill of Rights would be worthless” without “a secure structure of separated powers”—the fate of “the bills of rights of many nations of the world,” including the Soviet Union.<sup>5</sup>

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<sup>2</sup> *Associate Justice Antonin Scalia Memorial: Special Session of the Supreme Court* 15 (Nov 3, 2016), archived at <http://perma.cc/7VEN-6TUR>.

<sup>3</sup> Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 *Notre Dame L Rev* 1417, 1417 (2008).

<sup>4</sup> *Morrison v Olson*, 487 US 654, 697 (1988) (Scalia dissenting).

<sup>5</sup> *Id.* (Scalia dissenting). See also Ronald Reagan, *Address before a Joint Session of Congress on the State of the Union* (American Presidency Project, Jan 27, 1987), archived at <http://perma.cc/9425-HCY9>.

The separation of powers, moreover, was not, in his view, an amorphous concept amenable to judicial balancing; the Constitution itself struck the balance. Thus, when the Court upheld a federal statute creating an independent counsel operating largely outside presidential control, Justice Scalia vigorously dissented. The Court's approval of the "mini-Executive that is the independent counsel," he explained, was the result of an "ad hoc approach to constitutional adjudication" irreconcilable with the judgment of the Framers that "[t]he executive Power shall be vested in a President of the United States."<sup>6</sup> And the stakes for the separation of powers were high. As Justice Scalia explained in two of the most memorable lines ever written in a judicial opinion: "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."<sup>7</sup>

Justice Scalia's dissent in *Morrison v Olson*<sup>8</sup> is regarded by many as his masterpiece. But it was really just his warm-up act. The very next term, he wrote another lone dissent in *Mistretta v United States*,<sup>9</sup> which upheld the authority of the US Sentencing Commission to issue binding sentencing guidelines.<sup>10</sup> Justice Scalia explained that a criminal defendant could not be deprived of liberty based on binding guidelines issued by the unelected, unrepresentative Commission—"a sort of junior-varsity Congress" outside the three constitutional branches of government.<sup>11</sup> The Constitution, Justice Scalia wrote, was not "a generalized prescription that the functions of the Branches should not be commingled too much."<sup>12</sup> Rather, the "Framers themselves considered how much commingling was . . . acceptable, and set forth their conclusions in the document."<sup>13</sup>

A quarter-century later, Justice Scalia again adhered to the Framers' conclusions "set forth . . . in the document" in

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<sup>6</sup> *Morrison*, 487 US at 734 (Scalia dissenting).

<sup>7</sup> *Id* at 699 (Scalia dissenting).

<sup>8</sup> 487 US 654 (1988).

<sup>9</sup> 488 US 361 (1989).

<sup>10</sup> *Id* at 412.

<sup>11</sup> *Id* at 427 (Scalia dissenting).

<sup>12</sup> *Id* at 426 (Scalia dissenting).

<sup>13</sup> *Mistretta*, 488 US at 426 (Scalia dissenting).

interpreting the president's recess appointment power.<sup>14</sup> In *National Labor Relations Board v Noel Canning*<sup>15</sup>—my only opportunity to argue before my former boss—Justice Scalia repeatedly asked whether a purported historical practice of making recess appointments when the Senate was not in recess could be constitutional if it “flatly contradicts a clear text of the Constitution.”<sup>16</sup> The government said yes, but Justice Scalia said no. The majority's “adverse-possession theory of executive power,” he warned, “will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”<sup>17</sup>

Justice Scalia's devotion to the structural separation of powers did not only inform his constitutional decisions; it also drove his statutory interpretation. He argued relentlessly that the only legitimate basis for interpreting a statute is the statutory text because that is all the people's elected representatives agreed to. Permitting courts to rely on extratextual sources, such as legislative history or generic invocations of congressional intent, is to disregard the procedure of bicameralism and presentment expressly specified in the Constitution.<sup>18</sup> Thus, every statutory interpretation case is in some sense a separation-of-powers case, with nothing less than the people's right to govern themselves at stake.<sup>19</sup>

Justice Scalia's straightforward belief that federal statutes mean what they say was sometimes derided as simplistic. But as President Reagan understood, “there's a difference between being simplistic and being simple.”<sup>20</sup> Far from being simplistic, Justice Scalia's textualism revolutionized the law. In the 1970s and 1980s, Supreme Court opinions routinely explained that resort to “the statutes themselves” was appropriate only if the legislative history was “ambiguous.”<sup>21</sup> That upside-down approach ended when Justice Scalia joined the Court. As one of

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<sup>14</sup> US Const Art II, § 2, cl 3.

<sup>15</sup> 134 S Ct 2550 (2014).

<sup>16</sup> Transcript of Oral Argument, *National Labor Relations Board v Noel Canning*, Docket No 12-1281, \*6–8 (US filed Jan 13, 2014) (available on Westlaw at 2014 WL 111105).

<sup>17</sup> *Noel Canning*, 134 S Ct at 2594 (Scalia concurring in the judgment).

<sup>18</sup> See US Const Art I, § 7.

<sup>19</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 9–13 (Princeton 1997) (Amy Gutmann, ed).

<sup>20</sup> Peter Robinson, *Morning Again in America*, Wall St J A20 (June 7, 2004).

<sup>21</sup> *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 412 n 29 (1971).

his law clerks later described, “[i]t was as if, in the middle of a tedious play, a cast member suddenly dropped his mask and exposed the entire performance as a sham.”<sup>22</sup> By the time he left the Court, his basic principles of textualism were accepted by justices left, right, and center. As Justice Elena Kagan memorably acknowledged in delivering the Scalia Lecture at Harvard Law School, “we’re all textualists now.”<sup>23</sup>

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The same constitutional principles of democratic self-government that animated Justice Scalia’s approach to the structural separation of powers also guided his jurisprudence on individual rights. When the People expressly protected an individual right by enumerating it in the Constitution, Justice Scalia enforced that protection vigorously. His most influential majority opinion came in *District of Columbia v Heller*,<sup>24</sup> in which he held that the original public meaning of the Second Amendment “right of the people to keep and bear Arms” protected an individual, not just a collective, right.<sup>25</sup> He wrote the definitive opinion on the Sixth Amendment’s Confrontation Clause, overruling an interpretation based on purpose and replacing it with one based on text. “Dispensing with confrontation because testimony is obviously reliable,” he summarized, “is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>26</sup> He similarly defended textually enumerated protections in the First and Fourth Amendments, even when the results did not match his personal preferences, as in his votes to strike down statutes that banned burning the American flag.<sup>27</sup>

When Justice Scalia believed the text of the Constitution did not protect an asserted right, however, his approach was

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<sup>22</sup> *Antonin Scalia—a Justice in Full* (National Review, Feb 29, 2016), archived at <http://perma.cc/KMY9-AFAP> (attributing the quote to Christopher Landau).

<sup>23</sup> *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* 8:09 (Harvard Law School, Nov 18, 2015), online at <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> (visited Nov 16, 2017) (Perma archive unavailable).

<sup>24</sup> 554 US 570 (2008).

<sup>25</sup> *Id.* at 636.

<sup>26</sup> *Crawford v Washington*, 541 US 36, 62 (2004).

<sup>27</sup> See generally *United States v Eichman*, 496 US 310 (1990); *Texas v Johnson*, 491 US 397 (1989). See also generally *United States v Jones*, 566 US 400 (2012) (Fourth Amendment).

different. In those cases, he argued, the Constitution left the people free to govern themselves according to their own values, at least absent strong evidence that history and tradition supported the existence of an implicit constitutional right.<sup>28</sup> By the same token, “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic,” he argued, courts “have no proper basis for striking it down.”<sup>29</sup>

With his focus on history and tradition, Justice Scalia steadfastly resisted the temptation to use the judicial role to impose any particular value system on society—even when modern conventional wisdom pointed strongly in one direction. In the landmark case requiring the Virginia Military Institute to admit female students, for example, Justice Scalia issued a lone dissent that the majority opinion author, Justice Ginsburg, would later describe as both a “zinger” filled with “searing criticism” and inspiration for a “more persuasive” majority opinion.<sup>30</sup> In a passage that captured the essence of his jurisprudence, Justice Scalia explained:

Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court.<sup>31</sup>

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<sup>28</sup> See *Cruzan v Missouri Department of Health*, 497 US 261, 294 (1990) (Scalia concurring).

<sup>29</sup> *Rutan v Republican Party of Illinois*, 497 US 62, 95 (1990) (Scalia dissenting).

<sup>30</sup> Ruth Bader Ginsburg, *In Memoriam: Justice Antonin Scalia*, 130 Harv L Rev 1, 3–4 (2016).

<sup>31</sup> *United States v Virginia*, 518 US 515, 566–67 (1996) (Scalia dissenting).

By defending the right of the people to hold beliefs that have increasingly come under attack, Justice Scalia emerged as one of the foremost defenders of traditional values not only in the judiciary, but in society as a whole. He often emphasized that his purpose was not to take any position on the underlying policy question, but only to defend the right of the people to resolve that question through the democratic process; to ensure “all participants, even the losers, the satisfaction of a fair hearing and an honest fight.”<sup>32</sup> In rejecting an asserted constitutional right to refuse life-saving medical procedures, for example, he argued that “federal courts have no business in this field.”<sup>33</sup> The answers to many of life’s difficult moral questions, Justice Scalia believed, are “neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known” to the citizenry at large.<sup>34</sup> His argument, therefore, did not rest on his belief that the people of Missouri had reached the “right” answer to this enduring and difficult moral question. Instead, it rested on his belief that the Constitution left it to the people of Missouri to decide that question for themselves.

Justice Scalia’s approach was rooted not only in the history of the country, but also the history of the Court. As he explained, the Court was “covered with dishonor and deprived of legitimacy”<sup>35</sup> when it created unwritten property rights in cases like *Dred Scott v Sandford*<sup>36</sup> and the line of cases, including *Lochner v New York*,<sup>37</sup> resisting the New Deal. Just as Justice Holmes explained in the early twentieth century that the Constitution “does not enact Mr. Herbert Spencer’s Social Statics” or any other “particular economic theory,”<sup>38</sup> Justice Scalia reiterated for a new generation that the Constitution is “made for people of fundamentally differing views.”<sup>39</sup>

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<sup>32</sup> *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 1002 (1992) (Scalia dissenting).

<sup>33</sup> *Cruzan*, 497 US at 293 (Scalia concurring).

<sup>34</sup> *Id* (Scalia concurring).

<sup>35</sup> *Casey*, 505 US at 998 (Scalia dissenting).

<sup>36</sup> 60 US 393 (1857).

<sup>37</sup> 198 US 45 (1905).

<sup>38</sup> *Lochner*, 198 US at 75 (Holmes dissenting).

<sup>39</sup> *Id* at 76 (Holmes dissenting).

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Like the loss of President Reagan, the loss of Justice Scalia deprives the country of an irreplaceable defender of constitutional conservative principles. Like President Reagan, however, Justice Scalia's influence will continue. As a young law clerk, I sometimes wondered why Justice Scalia did not do more to get other Justices to join his opinions. I remember one case in which my fellow clerks and I told the Justice that Justices Kennedy and O'Connor might join his opinion if he removed a few fiery lines. The Justice took our comment under advisement and returned a few hours later with a revised draft. To our surprise, it was even more forceful than the previous version. We reminded him that some revisions might persuade his colleagues to join. He looked at us, then down at his draft opinion, and up again, and said, "Sometimes I've just got to be me."

And so it was. "Let Scalia be Scalia" was a hard rule to resist. On reflection, though, I think there was more to his approach. Justice Scalia's dissents, so often written in defense of democratic principles, were themselves exercises in democracy—appeals to the People (particularly future lawyers) to correct the Court's errors. And on that mission, Justice Scalia may have his greatest influence. An entire generation of law students has grown up reading Scalia opinions and absorbing his ideas—a phenomenon captured succinctly by my fellow Scalia clerk and predecessor Solicitor General Paul Clement in his article "Why We Read the Scalia Opinion First."<sup>40</sup> And it is not only lawyers who have been reading. Judge Joan Larsen of the Sixth Circuit—another former Scalia clerk, who recently served on the Michigan Supreme Court—recounted that uttering Justice Scalia's name at a meeting of ordinary citizens in Michigan provoked a spontaneous round of applause.<sup>41</sup> And when Justice Scalia's casket sat in the Supreme Court's Great Hall for public viewing, thousands of Americans waited in line to pay their respects, some for more than three hours.<sup>42</sup> Outside the building,

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<sup>40</sup> See generally Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 *Judicature* 52 (2017).

<sup>41</sup> *Justice Scalia Memorial Service* 1:00:57–1:02:48 (C-SPAN, Mar 1, 2016), online at <http://www.c-span.org/video/?405460-1/memorial-service-supreme-court-justice-antonin-scalia&start=3159> (visited Oct 28, 2017) (Perma archive unavailable).

<sup>42</sup> See *Mourners Pay Respects to Late Justice Scalia* (Chi Trib, Feb 19, 2016), archived at <http://perma.cc/8QYZ-9DAA>.

mourners created a makeshift memorial. They left not only flowers, but a head of broccoli, a jar of applesauce, and a bag of fortune cookies—images invoked by Justice Scalia that captured the attention of lawyers and the devotion of the people alike.<sup>43</sup>

President John Adams said his “proudest act” was his “gift of John Marshall to the people of the United States.”<sup>44</sup> Ronald Reagan gave the American people a gift in Justice Antonin Scalia. And that gift will continue to give for generations to come. At least to this former law clerk, it makes his passing slightly more bearable.

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<sup>43</sup> *Id.* See also Transcript of Oral Argument, *National Federation of Independent Businesses v Sebelius*, Docket Nos 11-393, 11-400, \*13 (US filed Mar 28, 2012) (available on Westlaw at 2012 WL 1031484); *King v Burwell*, 135 S Ct 2480, 2501 (2015) (Scalia dissenting); *Obergefell v Hodges*, 135 S Ct 2584, 2630 (2015) (Scalia dissenting).

<sup>44</sup> *The Marshall Court, 1801–1835* (Supreme Court Historical Society), archived at <http://perma.cc/L996-YCQ2>.