

Coots, Loons, and Civility

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Justice Scalia visited the Law School in February 2012. He taught my constitutional law class—by “taught,” he said a few words about the Seventeenth Amendment and then fielded questions lobbed from the class about anything but the Seventeenth Amendment. I asked him one. Little did I know, this would be the first of many exchanges with the Justice.

Four years later, I found myself alone in his chambers on President’s Day morning. Dumbfounded. When my co-clerks and I received the news that our Boss had died, our first reaction was disbelief. We had spent the last seven months writing opinions, dissenting from others’ opinions, deliberating, debating. The Justice had spent part of his last weekend in Washington gleefully working through a stack of drafts that had piled up while he was away. Sometime later that week, as we were working on a draft together, he stopped midsentence: “Misled,” he said (intentionally mispronouncing it “my-sled”), and lamented the difficulty of the English language. And the day before he died, the Justice called me from Texas to tell me that I had done the unthinkable. I had used “reference” as a verb in a draft. “You are a *Scalia* clerk,” he jokingly admonished. (I learned a hard lesson that day: Scalia clerks “refer to.” They do not “reference.”) His death came as a cold, ham-handed thud of an end to all of that.

What I couldn’t know then was that Justice Scalia, in both life and death, would teach me and many at 1 First Street something about civility and our third branch of government.

Mere hours after Justice Scalia passed away, public attention shifted toward filling the vacancy on the Court. Battle lines were drawn in tweets and public addresses. In the Republican presidential primary debate held that evening,

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moderator John Dickerson's first question was how and when the Justice should be replaced.¹

There was none of that at the Court. Justice Scalia's death was unprecedented in its recent history. The last sitting associate justice to pass away was Justice Robert Jackson in 1954, for whom, I might add, Justice Scalia had a great affinity. Even so, the Court responded how it often does, or aspires to do: measured and thoughtful, and with little appetite for the politicking across the street.

Not a word was spoken to us law clerks about the vacancy. Very little was said about the pending cases, save for the sentiment that it was too bad his circulating opinions would not be published. The usual routine of those at the Court stopped altogether to mourn the "paler place" it had become.² There were what some might call small gestures—a justice would wander into chambers to see how we were faring. A librarian dropped off a coffee cake. Gatherings with our fellow law clerks were frequent and spontaneous—anything we needed, they provided. And there were the traditions—his chair was draped in black, as were the courtroom doors. His law clerks lined the front steps as the Supreme Court honor guard carried his flag-draped casket toward the Great Hall. For the next twenty-four hours, those same clerks and officers stood with the casket as thousands of mourners streamed in to say goodbye to our modern-day Great Dissenter. This was no ordinary moment for the Court.

Alexander Hamilton wrote that the "permanency" of a judgeship—meaning life tenure—is "an indispensable ingredient in [the judiciary's] constitution, and, in a great measure, as the citadel of the public justice and the public security."³ That permanency of the office safeguards our liberty. But it also safeguards civility inside the Court.

The justices come to work each day to grapple with the likes of the Employee Retirement Income Security Act or Alaskan water rights with their eight colleagues and a handful of staff. By the end of most terms, they have decided about 40 percent of the

¹ *Transcript of the Republican Presidential Debate* (NY Times, Feb 14, 2016), online at <http://www.nytimes.com/2016/02/14/us/politics/transcript-of-the-republican-presidential-debate.html?mcubz=0> (visited Oct 16, 2017) (Perma archive unavailable).

² Ruth Bader Ginsburg, *In Memoriam: Justice Antonin Scalia*, 130 Harv L Rev 1, 5 (2016).

³ Federalist 78 (Hamilton), in *The Federalist* 521, 523–24 (Wesleyan 1961) (Jacob E. Cooke, ed).

granted cases unanimously.⁴ Are there also divisive cases? Always. Would a few beleaguer my old Boss? Of course, for the Court, like the rest of “government by men and women is, of necessity, an imperfect enterprise.”⁵ But soon enough the Court would return to the usual, introspective business *du jour*.

So to those inside the building, there was nothing surprising about the way the Court collectively mourned Justice Scalia. Those weeks and months merely reaffirmed that our third branch of government is unlike the others. It cannot be shoehorned into today’s “us versus them,” “right versus left,” “Republican versus Democrat” narrative, try as commentators might.⁶ It makes for a snappy headline, but not an accurate one.

In the nearly two years since Justice Scalia passed away, I reflect often about what he taught me about civility and the business of the Court. Some will misremember him as a bully. But Justice Scalia’s oft-quoted remark—“I attack ideas. I don’t attack people. And some very good people have some very bad ideas.”⁷—better describes his approach to the Court and public life. For Justice Scalia, civility was not at odds with free-thinking. Assumptions could be challenged, conclusions doubted, skepticism championed, without coming to blows.

Justice Scalia had no time for the “yes man.” Disagreement energized my contrarian Boss.⁸ When I interviewed for the job, he implored me to name his worst opinion. He listened intently (surely, he could have made my arguments better than me) and then reveled in the opportunity to tell me why I was wrong. And one need read only a handful of his dissents to see that those were more enjoyable projects—bemoaning the “freedom-destroying cocktail” in *Navarette v California*⁹ or “doubt[ing] that the proud men who wrote the charter of our liberties would

⁴ *SCOTUSblog Stat Pack, October Term 2015—Unanimity* (SCOTUSblog, June 29, 2015), archived at <http://perma.cc/J5VW-JUAU>.

⁵ Antonin Scalia, *Teaching about the Law*, 8 *Christian Legal Society Q* 6, 8 (Fall 1987), quoted in Adam J. White, *Antonin Scalia, Legal Educator* (National Affairs, Fall 2017), archived at <http://perma.cc/28L2-JMQ6>.

⁶ See, for example, Garrett Epps, *America’s Red and Blue Judges* (The Atlantic, Sept 25, 2017), archived at <http://perma.cc/X8RC-F9VG>.

⁷ Interview of Antonin Scalia by Lesley Stahl (60 Minutes, Apr 24, 2008), online at <http://www.cbsnews.com/news/justice-scalia-on-the-record> (visited Oct 16, 2017) (Perma archive unavailable).

⁸ See Jennifer Senior, *In Conversation: Antonin Scalia* (NY Mag, Oct 6, 2013), archived at <http://perma.cc/T662-SAKS> (“I feel less comfortable when everybody agrees with me. I say, ‘I better reexamine my position!’”).

⁹ 134 S Ct 1683, 1697 (2014) (Scalia dissenting).

have been so eager to open their mouths for royal inspection” in *Maryland v King*¹⁰—than his majority opinions.

There is an important lesson in this. Civil disagreement was possible with Justice Scalia because his manner of disagreeing was always based on facts and evidence, logic and reason, precedent and text. (Heaven help the law clerk who went to the Justice with little more than an instinct.) The Justice’s method of constitutional interpretation, originalism, embodies this. Sure, the Justice often acknowledged that he might *like* a case to come out a particular way. But that was not the task at hand. For him, dictionaries or historical evidence relevant to the original understanding of constitutional or statutory provisions were the means of answering the question presented; there was no working backward from what he thought the answer *should* be.

Day-to-day debates with the Justice were no different. By the end of our discussions of the week’s cases, a pile of *US Reports* or volumes of the US Code might overwhelm his desk. He wanted to see for himself before deciding. Likewise, no opinion circulated until Justice Scalia “booked” it for accuracy. “Booking” entailed a law clerk’s bringing him a library cart full of every opinion, statute, or article cited in the draft for the Justice to read. Marking up the draft with a red pencil, the Justice would cross-examine the law clerk about whether a “see” signal was fair for a particular citation or whether there might be a better authority for a point made, for however long it took.

Nor was his way of disagreeing limited to the cases, or even legal debates. We were booking an opinion not long before he passed away, and he remarked something along the lines of, “We’ve been sitting here all this time, and you haven’t complimented my bird!” On a recent hunting trip, his former law clerk and friend had gifted him a wood-carved, black-and-white decoy. He had it proudly displayed on his coffee table. I responded, “It’s a loon, right?” To which the Justice responded, “No, it’s a coot.” I pushed back, like any good Scalia clerk, “I’m pretty sure that’s a loon.” And with that, Justice Scalia announced that we would resolve our disagreement with his dictionary, Webster’s Second. First, we looked up “coot.” (He was delighted to find that a secondary meaning of “coot” was a foolish old man.) Then we looked up “loon.” Only after examining those definitions was he content to say that he was

¹⁰ 133 S Ct 1958, 1989 (2013) (Scalia dissenting).

right, and I was wrong. The decoy was a coot, and a coot is no loon.

Finally, Justice Scalia also taught me that disagreements are best had face to face. (It takes no genius to conclude that civility languishes on Internet comment threads.) Look no further than Justice Scalia's approach to oral argument. An advocate would stand but ten or so feet from the Justice as he peppered her with questions much like a professor would a law student. He taught me that some disagreements take time. I once stood at his desk for an unending three minutes while he pondered, in silence, whether to write something separately explaining his views of a case. And, most importantly, he taught me that not all disagreements need be so serious. On the bench and off, our Boss was often the funniest man in the room.

There was a portrait of the Court's eighth chief justice, Melville Fuller, in Justice Scalia's chambers. It was Chief Justice Fuller's idea, so goes the story, that the Justices shake hands with one another before argument—a sign that “harmony of aims if not views is the Court's guiding principle.”¹¹ That custom continues today. I never asked our Boss why he liked that portrait of Chief Justice Fuller. But it now seems a fitting choice. For him, civility was not about excluding certain ideas from public discourse or retreating to our respective echo chambers. To exercise civility was to embrace the sort of disagreement that ends with a handshake—harmony of aims, though not views.

¹¹ *How the Court Works—Oral Argument* (Supreme Court Historical Society), archived at <http://perma.cc/E2ZP-CQHZ>.