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INTRODUCTION

Justice Antonin Scalia and the Long Game

*William K. Kelley**

When President Reagan nominated D.C. Circuit Judge Antonin Scalia to the Supreme Court in 1986, commentators noted that his gregarious and charming personality was an important strength of the nomination, because the new Justice could be expected to charm his way to influence on the Court. The theory was that he would be able to persuade judges to his point of view by force of personality, much like the liberal lion Justice William Brennan had reportedly been able to do for a generation. One legal analyst predicted, “[Y]ou will not see him running off and writing separate opinions merely because he takes exception with small issues or details,” because “[h]e believes it is important to the country for the Court to get together and to speak with a single voice.”¹ The young and energetic judge dazzled people across the spectrum. Even the very liberal Senator Howard Metzenbaum, a Democrat from Ohio, was charmed, noting facetiously during

* Associate Professor, Notre Dame Law School. This Article is based on remarks delivered as part of *The George Washington Law Review's* Symposium Commemorating the 100th Anniversary of Farrand's *Records of the Federal Convention*, held on November 3–4, 2011. Thanks to *The George Washington Law Review* for hosting the Symposium, and to Professors John Manning and Brad Clark for comments on an earlier draft. Thanks also to Jim Kennedy, a student at Notre Dame Law School, and to Patti Ogden, Research Librarian at Notre Dame Law School, for research assistance.

¹ E.R. Shipp, *Scalia's Midwest Colleagues Cite His Love of Debate, Poker and Piano*, N.Y. TIMES, July 26, 1986, at A7 (internal quotation marks omitted).

his confirmation hearings that Judge Scalia had shown bad judgment in “whipping” him on the tennis court.² Judge Scalia immediately interjected, “It was a case of my integrity overcoming my judgment, Senator.”³ To which Senator Metzenbaum responded, “Touché.”⁴ During the summer of 1986, the commentators expected that his keen intellect combined with his personal charm would make him a force to be reckoned with on the Court.

Upon taking his seat, Justice Scalia shook up the Court. His vivid prose, particularly in separate opinions,⁵ and his refusal to join opinions containing analysis he found disagreeable⁶ created something of a culture shock.⁷ It is fair to say, moreover, that Justice Scalia’s judicial style and sometimes caustic pen alienated some of his colleagues, particularly Justice Sandra Day O’Connor. An early example was a sharp dissent filed by Justice Scalia during his second Term, in a case involving the constitutionality of executing a defendant who was fifteen years old when he committed his offense.⁸ Justice O’Connor provided the fifth vote to reject the death penalty in that case on the ground that the State had not specifically included fifteen-year-olds as within the coverage of its capital punishment regime.⁹ Justice Scalia’s dissent characterized her position in that case as a “Solomonic” compromise which “hoist[ed] on to the deck of [the Court’s] Eighth Amendment

² *Hearings on the Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 13 (1986).

³ *Id.*

⁴ *Id.*

⁵ *See, e.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616, 657–58 (1987) (Scalia, J., dissenting); *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting).

⁶ *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87, 97–99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

⁷ *See, e.g.*, Ethan Bronner, *Combative Justice Scalia Moves into Ascendancy*, *BOS. GLOBE*, Apr. 29, 1990, at 1. It is difficult, of course, to assess a particular Justice’s effect on the Court’s work. *E.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 *HARV. L. REV.* 802 (1982) (analyzing the multitude of factors contributing to opinions issued by the Court beyond the individual Justices involved). The public record of votes in cases and the views expressed in separate opinions provide the only information about where a Justice falls within the Court’s lineups in particular cases absent insider information. *See generally*, EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979) (providing examples of the kind of insider information that may bear on the Court’s lineups in particular cases). Of course, insider accounts themselves might be unreliable chronicles of what actually happened within the Court.

⁸ *See Thompson v. Oklahoma*, 487 U.S. 815, 818–19 (1988).

⁹ *Id.* at 848–50 (O’Connor, J., concurring in the judgment).

jurisprudence the loose cannon of a brand new principle.”¹⁰ The next year, Justice Scalia famously characterized Justice O’Connor’s separate opinion in *Webster v. Reproductive Health Services*¹¹ as “irrational”¹² and not to be taken “seriously”¹³—and in the process was said to have fairly seriously alienated Justice O’Connor.¹⁴ Other Justices were also put off by Justice Scalia’s style.¹⁵

Fairly quickly after his appointment, then, the narrative about Justice Scalia changed. It turned out that he was not the charmer who would lead the Court through force of personality, but was instead the intemperate provocateur whose rhetorical excesses had “cost him the votes of more moderate conservative justices.”¹⁶ After his first decade of service, Court watchers were increasingly deeming his tenure to be a disappointment, if not a failure. Justice Scalia’s performance, according to one commentator, had “put an end” to conservatives’ hopes “that he would do for [them] on the Court what Justice Brennan had done so brilliantly for the liberals—build majorities for his firm ideological positions.”¹⁷

Both the initial predictions—that Justice Scalia would influence the Court’s outcomes through the force of charming personality—and the midterm assessments—that Justice Scalia’s personality had counterproductively moved the Court against his preferred outcomes—fundamentally misunderstood both the internal operations of the Court and, much more significantly, Justice Scalia as a Justice. One cannot doubt that Justice Scalia’s sometimes sharp pen might occasionally put off some of his colleagues, just as their opinions might occasionally do the same to him. The business of the Court, however, is not normally done according to personal relationships. Each Justice decides on his or her votes based on the merits, and there is no room for deal making or vote trading. Of course, this is no insight, but

¹⁰ *Id.* at 877–78 (Scalia, J., dissenting).

¹¹ *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

¹² *Id.* at 536 n.* (Scalia, J., concurring in part and concurring in the judgment).

¹³ *Id.* at 532.

¹⁴ See JOAN BISKUPIC, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 277–96 (2005).

¹⁵ See JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 534–35 (1994); see also Aaron Epstein, *The Interpreter and the Establishment Clause*, in A YEAR IN THE LIFE OF THE SUPREME COURT 126, 136 (Rodney A. Smolla ed., 1995) (noting Justice Anthony Kennedy’s distaste for Justice Scalia’s rhetoric).

¹⁶ David M. O’Brien, *This Time, It’s Personal: Justice Scalia’s Increasing Incivility*, L.A. TIMES, July 14, 1996, at M2; see also JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 141 (1995).

¹⁷ SIMON, *supra* note 16, at 138.

merely a description of how the Court operates.¹⁸ One would think that all of the Justices would be offended by the suggestion that their votes turn on the state of their personal relationships with others.

As for the misunderstanding of Justice Scalia as a Justice, the witty line he delivered to Senator Metzenbaum was perhaps more revealing than people understood at the time.¹⁹ What he has cared about all along was more than just getting votes, though he surely doesn't object to that. More important than that, however, is his drive to get things right—to pursue, with intellectual integrity, a consistent jurisprudence. From the beginning of his time on the Court, Justice Scalia has been playing the long game. Slowly but surely, he has fundamentally transformed the terms of legal debate in this country—in the courts, in the academy, and in the political process. Of course, he has not done this alone. He has been the most important voice, though, by virtue of his position on the Court and—yes—the force of his personality. Not his charm, but the intellect he has brought to his jurisprudence and the remarkably effective prose he has produced in service to that jurisprudence.

His jurisprudential views have transformed the Court in two primary fields: in his insistence that textualism is the only legitimate method of statutory interpretation and in his reliance on originalism in interpreting the Constitution.²⁰ First, the world of statutory interpretation today is utterly different from what it was a generation ago.²¹ From the beginning of his tenure, Justice Scalia insisted that a strong version of textualism was the only legitimate methodology for statutory interpretation, and rejected as illegitimate reliance on most forms of legislative history as guides to statutory meaning. He did this in case after case, often concurring alone to note his objection to mere citations of committee reports in Court opinions.²² For Justice Scalia, the language voted on by both Houses, and signed into law by the

¹⁸ William J. Brennan, Jr., *State Court Decisions and the Supreme Court*, 31 PA. B. ASS'N Q. 393, 406 (1960) (“Each Justice studies each case in sufficient detail to resolve the question for himself.”).

¹⁹ See *supra* note 3 and accompanying text.

²⁰ Justice Scalia has propounded his positions in case after case, for two and a half decades. See *infra* note 22.

²¹ See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 242–45 (1992) (explaining views of statutory interpretation as they have evolved since Justice Scalia joined the Court).

²² For early examples, see *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 616–17 (1991) (Scalia, J., concurring); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 529–30 (1989) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 97–99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

President, is all that is law. Reliance on committee reports and the like as guides to statutory meaning, he insisted, was contrary to basic norms of democratic legitimacy, and worked a transfer of power both to individual legislators and their staffs and also, not coincidentally, to the judiciary.²³ Justice Scalia did not, of course, make this textualist move alone. He built on his own work as a judge on the D.C. Circuit, and on earlier scholarly work by, among others, academics-turned-judges Richard Posner and Frank Easterbrook.²⁴ Justice Scalia's textualism was a frontal challenge to the prevailing norms of the time, which had adopted a strong purposivism based upon faithful agency norms that gave priority to what Congress would have wanted, even at the expense of disregarding the text of the law in question. When Justice Scalia became a judge in 1982, the Court's decision in *United Steelworkers of America v. Weber*²⁵—which held that the spirit of Title VII overcame its concededly clear text in a way that permitted some voluntary affirmative action by private employers—was but three years old.²⁶ And it had been scarcely a decade since the Court casually said in *Citizens to Preserve Overton Park v. Volpe*,²⁷ “Because of . . . ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.”²⁸

Coincidental with Justice Scalia's embarking upon a consistent course of insisting on textualism in every case, the academic field of statutory interpretation exploded.²⁹ Numerous scholars produced reams of work challenging Justice Scalia's methodology.³⁰ Others took textualism and defended and refined it.³¹ Although the Court

²³ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–37 (1997); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–18 (discussing the role of textualism in judicial review of agency action).

²⁴ See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). I hasten to note that Judge Posner is not himself a textualist, while Judge Easterbrook decidedly is.

²⁵ *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

²⁶ *Id.* at 193.

²⁷ *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971).

²⁸ *Id.* at 412 n.29.

²⁹ See generally Frickey, *supra* note 21 (describing the growth of statutory interpretation theory in the last third of the twentieth century); see also JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 1–204 (2010).

³⁰ See LISA SCHULTZ BRESSMANN ET AL., *THE REGULATORY STATE* 345–63 (2010) (citing and discussing examples).

³¹ See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68–70 (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8–9 (2001); John F. Manning, *Textualism as a Nondelegation*

has continued to rely on legislative history, the dominant interpretive norm on the Court—even among those Justices, like Justice Breyer, who defend the use of legislative history where they deem it appropriate³²—has come to focus keenly on the text of the statutes at issue. A recent prominent example of this phenomenon is the Court’s decision in *Zuni Public School District No. 89 v. Department of Education*,³³ which required the Court to interpret a complex statute governing the determination whether states had equalized school expenditures throughout the districts in the state, permitting them to use federal grant funds for education in a different way.³⁴ In calculating whether a state had equalized expenditures, the statute instructed the Secretary of Education to “disregard” school districts “with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State.”³⁵ Justice Breyer’s opinion for the Court concluded that the Secretary could permissibly determine the relevant percentiles by reference to the total number of students in the relevant school districts, rather than by the number of school districts involved.³⁶ The State had challenged this practice, relying on what the Court termed the “literal language of the statute.”³⁷

The Court agreed that its precedents require clear and unambiguous language to be given effect, regardless of any legislative history pointing the other way.³⁸ But then it concluded, first, that the language of the statute actually *supported* the Secretary’s actions;³⁹ and then second, the Court exhaustively demonstrated why the Secretary’s actions better effectuated Congress’s purposes in enacting the pro-

Doctrine, 97 COLUM. L. REV. 673, 674–75 (1997); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 347–51 (2005).

³² See Stephen Breyer, The 1991 Justice Lester W. Roth Lecture, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992).

³³ *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81 (2007).

³⁴ See *id.* at 84. The statute at issue in this case was designed to account for the impact of a federal presence on local school districts by generally prohibiting a state from reducing funding to those districts receiving federal aid. It exempts, however, those states where the expenditure-per-pupil for the highest-per-pupil district does not exceed the lowest-per-pupil district by more than twenty-five percent, and states that the Secretary of Education should not consider the top five percent nor the bottom five percent of school districts by expenditures when making this calculation. The Secretary of Education’s regulation promulgating this exception changed this provision to percentile of school districts by students. 20 U.S.C. § 7709(b)(2) (2006).

³⁵ 20 U.S.C. § 7709(b)(2)(B)(i).

³⁶ *Zuni*, 550 U.S. at 90–91.

³⁷ *Id.* at 89.

³⁸ *Id.* at 93.

³⁹ *Id.* at 91.

gram at issue.⁴⁰ In his dissent, Justice Scalia insisted that the statute's language simply did not make sense under the Court's interpretation, and that the Secretary's method of measuring the relevant percentiles could not stand.⁴¹ For present purposes, the importance of *Zuni* lies not in its particular outcome, but in the terms of the debate on the Court. Even the majority felt obliged to demonstrate that its interpretation—which it would be generous to term a strained reading of the text—depended for its legitimacy on its consistency with the text enacted by Congress.⁴² The Supreme Court, twenty-five years into the tenure of Justice Scalia, does not any longer invoke the spirits of statutes to overcome their texts.⁴³ It was not politic, and it was not charming, for Justice Scalia to complain every time his colleagues misstepped in statutory cases, particularly when everyone otherwise agreed on the result. But he took the long view that interpretive methodology matters, and the terms of statutory debate among the Justices have accordingly been transformed.

Second, in constitutional law, Justice Scalia has also taken the long view. Early in his tenure, he delivered a lecture announcing his adoption of originalism as a constitutional interpretive philosophy.⁴⁴ He later expanded his account of originalism in a book,⁴⁵ and has espoused the merits of that interpretive methodology consistently ever since. He has also, of course, put originalism to work in his opinions on the Court.⁴⁶ It is worth noting, as an aside, that he has tempered his adherence to originalism by recognizing that he operates within a system of *stare decisis*, so that he is largely willing to apply non-originalist precedents that do not otherwise demand overruling.⁴⁷

As with his textualism, Justice Scalia's consistent insistence on originalism has also contributed to an intense academic revival.⁴⁸

⁴⁰ *Id.* at 92–93.

⁴¹ *Id.* at 111–12 (Scalia, J., dissenting).

⁴² *See id.* at 93–94 (majority opinion).

⁴³ *See id.*

⁴⁴ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁴⁵ SCALIA, *supra* note .

⁴⁶ Examples abound, but for a particularly prominent (and controversial) example, see *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴⁷ *See, e.g., McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring); *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring).

⁴⁸ Justice Scalia's work has been the subject of many books, and many more law review articles—a recent search turned up some four hundred law review articles referring to Justice Scalia in the title. A sample of such work includes JOYCE A. BAUGH, *JUSTICE ANTONIN SCALIA AND THE FRESHMAN EFFECT* (1989); JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009); RICHARD A. BRISBIN JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* (1997); JOSEPH L. GERKIN, *WHAT*

Originalism as a judicial philosophy has been refined by scholars across the political spectrum, and has been the subject of scores of articles and books, some defending and others attacking it as a methodology.⁴⁹ Whatever one thinks about the merits of these disputes, it is fair to say that constitutional law, both in the academy and in the courts, is done differently today than it was a generation ago. The influence of originalism on the Supreme Court is more sporadic, particularly as the Court operates within doctrinal fields already saturated by precedent, but it is worth noting that virtually all the Justices apply originalist methodologies when they believe that the materials provide an answer.⁵⁰

The long game that Justice Scalia has played is one of consistent and insistent devotion to interpretive methodologies that are applied prior to the outcome in any particular case. He has been outspoken, both in opinions and extrajudicially, about his methodologies and why he believes they are the only legitimate way for judges to discharge their offices consistently with their place in the constitutional structure. More than any other contemporary Justice—indeed, perhaps any Justice in history—Justice Scalia has sought to marry his jurisprudence explicitly to the judicial role, and to do so prior to the merits of any particular case before the Court.⁵¹

GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS (2007); KENNETH W. MILLER & DAVID NIVEN, DEATH JUSTICE: REHNQUIST, SCALIA, THOMAS, AND THE CONTRADICTIONS OF THE DEATH PENALTY (2009); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006); DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA (1996); CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT (1993); JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT (2006); PAUL I. WEIZER, THE OPINIONS OF JUSTICE ANTONIN SCALIA: THE CAUSTIC CONSERVATIVE (2004); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Bradford R. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS U. L.J. 753 (2003); Frank B. Cross, *Determinants of Citations to Supreme Court Opinions (and the Remarkable Influence of Justice Scalia)*, 18 SUP. CT. ECON. REV. 177 (2010); Nadine Strossen, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 1 (2006).

⁴⁹ For examples, see sources cited *supra* note 48.

⁵⁰ See, e.g., *Heller*, 554 U.S. at 576–600; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

⁵¹ Of course, many Justices have made important and distinguished contributions as scholars. Obvious examples include BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Little, Brown & Co. 1923); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (Ronald D. Rotunda & John E. Nowak eds., 1987). My modest claim is not that Justice Scalia's scholarly contributions necessarily match theirs, but that his theoretical account for how Justices should go

By contrast, consider how common it is for judges to discharge their offices without explicit methodological commitments. Is it more legitimate to decide cases on an ad hoc basis, independent of any methodological commitments, so that the outcome in each case is one that the Justice finds congenial? Justice Breyer has taken on the challenge and sought to ground his judicial performance in a theory external to any particular case.⁵² Justice David Souter provided his own account in a notable commencement address, but only after his retirement from active service.⁵³ Of course, Justices routinely address the implications for our democratic institutions of their decisions, but they rarely seek systematically to describe and defend a consistent interpretive methodology that is attentive to the Court's role: to say what the law is in the course of deciding contested cases, but to do so in a manner that is respectful of and consistent with the Constitution's fundamental commitment to republican self government. Throughout our history, though, few if any Justices have sought to legitimate their own place in the constitutional system in the way that Justice Scalia has sought to—now for two and a half decades. I submit that his long game is working, and that history will record his tenure as one of enormous impact. Contrary to early and midterm reports, his personality—which has at different times been termed gregarious, and then snarky—will not be the key to his legacy. Instead, his place in history will be marked by the force of his ideas and his consistent and elegant expression of them.

about their jobs is explicitly about the role of the Supreme Court in the American constitutional system.

⁵² See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

⁵³ See Justice David H. Souter, *Text of Justice David Souter's Speech: Harvard Commencement Remarks (as delivered)*, HARVARD GAZETTE, May 27, 2010, available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech>.