

LECTURE

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A Law Clerk's Reflections on Justice Scalia

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Abstract: *With the passing of Justice Antonin Scalia, America has lost not only a great jurist, but one of the great conservative leaders of our time alongside men like Ronald Reagan and Barry Goldwater. In his opinions, Justice Scalia articulated a philosophy grounded in separation of powers that made clear that, ultimately, the only views that matter in a democratic republic are the views that are enacted into the positive law through our republican form of government. He believed that legislation is almost always the art of the deal; therefore, the only thing that matters is the words that were enacted into law, because they capture that deal. We also have lost the single best and most articulate defender of traditional views, which today are under constant attack. This is where Justice Scalia's contributions and leadership were so critical and why he will be so sorely missed, for in defending his view of the Constitution, Justice Scalia defended our view of the world.*

It's a great honor to talk to you today about the legacy of my hero and my boss, the late Justice Antonin Scalia, who I had the deep privilege and honor to clerk for during the 1997 term. My remarks are going to be pretty simple. I'm going to tell a couple stories. I'm going to read some lengthy quotes from Justice Scalia's opinions because what better way to remember this man than through his own words? I'm going to provide some comments on why I think Justice Scalia made such a resounding impression on this country that went well beyond his legal principles and the jurisprudential principles for which he stood.

I think my favorite Justice Scalia story involves the law clerks' one-time attempt when I was clerking to try to improve upon one

KEY POINTS

- Antonin Scalia was not just a great jurist, but one of the great conservative leaders alongside Ronald Reagan and Barry Goldwater.
- He articulated a philosophy grounded in separation of powers that made clear that, ultimately, the only views that matter in a democratic republic are those that are enacted into the law.
- Because legislation is almost always the art of the deal, the only thing that matters is the words that are enacted into law, because they capture that deal.
- He believed in original understanding and textualism because they ensure that all law is enacted by the people through their elected representatives.
- In the Justice's view, only the words of the Constitution and statutory text mattered, because there is no single, overriding purpose for a statute, but there are often competing and inconsistent purposes for a statute.
- To say that one specific purpose overrides the others is to break that democratic view.

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of Justice Scalia's dissenting opinions. He had circulated to us a proposed dissent in one of his cases, and it was, as usual, a very fiery Scalia dissent with lots of great rhetoric. He gave it to the clerks to review, and he asked what we thought of it. We said, "Justice, this is a wonderful opinion. But, you know, Justices Kennedy and O'Connor have also dissented, and we think that if you tone it down a little, they'll probably join it."

He looked at us, and he said, "That's a good idea. Let me think about that."

He went back into his chambers, and he came out a couple of hours later and gave us the new draft, and much to our surprise, he'd in fact jacked up the rhetoric. So we reviewed it again and said, "Justice, I have to tell you, we love this opinion, but if you did tone it down a little bit, we really do think that Justices Kennedy and O'Connor would join."

He looked at us, and he looked down. He looked at the opinion. He looked up at us again and said, "Sometimes I just got to be me."

One of the great things about clerking for the Justice was the law clerk reunions, which the current law clerks organize. Each law clerk plays a different role in organizing it. One of them gives a toast to the Justice.

There's no better way to remember Antonin Scalia than through his words.

In my mind, the best role that a law clerk always served was reading from what we called "the book." "The book" was a bound volume of all of the Justice's opinions from the prior term, and one clerk was responsible for reading select passages from "the book" to the other clerks in order to make sure that all of us knew what the Justice had been up to over the last year. I'm going to give you a couple of samplings from what a reading from that book would sound like because there's no better way to remember this man than through his words. These are the words through which he will always be remembered.

Justice Scalia in His Own Words

My favorite Justice Scalia opinion was his dissent in *United States v. Virginia*—the Virginia Military Institute case where the Supreme Court held that single-sex education, a military academy run by the state of Virginia, was unconstitutional. Scalia was the lone dissenter in that case. In his defense, Justice Clarence Thomas was recused because I believe that his son or nephew attended VMI. This is what Justice Scalia wrote:

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 the 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.¹

Another one of my favorites is *Evans v. Romer* in which the Court struck down Colorado's law prohibiting special protections for homosexuals. There Justice Scalia, joined then by the Chief Justice William Rehnquist and Justice Thomas, again dissented and wrote as follows:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare...desire to harm" homosexuals but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws.²

1. *United States v. Virginia*, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting).

2. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (internal citation omitted).

He continued:

When the Court takes sides in the culture wars, it tends to be with the knights rather than with the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation’s law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he’s a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant’s homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: “assurance of the employer’s willingness” to hire homosexuals.³

The Justice concluded:

Today’s opinion has no foundation in American constitutional law and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.⁴

The last quote that I’m going to entertain you with is from his dissent in *Morrison v. Olson*, which

many people regard as the Justice’s greatest dissenting opinion. That’s a case where the Supreme Court upheld the independent counsel law, which vested in an independent prosecutor the authority to exercise the entire power of the executive branch when it came to carrying out a criminal prosecution independent of the President. There again, Justice Scalia was the lone dissenter in an eight-to-one opinion. He wrote:

It is the proud boast of our democracy that we have “a government of laws and not of men.” Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX of the Massachusetts Constitution of 1780, which reads in full as follows: “In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative or judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government.... Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon the mere words of ours.⁵

And he concluded: “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 Constitution sought to establish—so that a gradual concentration of the several powers in the same department can effectively be resisted.”⁶ Then the next two lines, I think, will go down as some of the greatest in the lexicon of jurisprudential history:

3. *Id.* at 652–53.

4. *Id.* at 653.

5. *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

6. *Id.* at 699 (internal citation omitted).

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.⁷

Defending Our View of the Law

The passages from these three opinions out of Justice Scalia's hundreds perfectly capture why his passing hit us so hard. They show two things that, combined, are why I believe that Justice Scalia will go down not just as a great jurist, but as one of the great conservative leaders of our time alongside men like Ronald Reagan and Barry Goldwater.

First, these passages powerfully articulate and defend a judicial philosophy that most of us would agree is the only legitimate one in a democratic republic. But at the end of the day, I don't think that is what explains Justice Scalia's greatness, because there are lots of jurists and philosophers who do that. Rather, the second—and in my view more important—point is that in these passages, Justice Scalia powerfully defended a view of the world that is increasingly under attack. Let me take each of these issues separately.

As to his judicial philosophy, Justice Scalia articulated a philosophy grounded in separation of powers that made clear that, ultimately, the only views that mattered in a democratic republic are the views that are enacted into the positive law through our republican form of government. Anything else lacked democratic legitimacy. I think that explains each of Justice Scalia's great legal contributions to jurisprudence.

Justice Scalia believed in original understanding and textualism not out of a defense of empty formalism. He believed in these principles because they're the only ones that ensure that all law is enacted by the people through their elected representatives. The Constitution was enacted by the people. The Declaration of Independence and the natural law principles that underlie it were not. That's why, in the Justice's view, only the words of the Constitution mattered.

The same is true for statutory text. Justice Scalia's rejection of legislative history and public policy reflected the reality that legislation is almost always the art of the deal. There is no single, overriding purpose to a statute, but there are often competing and inconsistent purposes to a statute. To say that one specific purpose overrides the others is to break that democratic view. That's why Justice Scalia believed the only thing that mattered were the words that got enacted, because those words are what capture the deal.

Justice Scalia believed in original understanding and textualism not out of a defense of empty formalism. He believed in these principles because they're the only ones that ensure that all law is enacted by the people through their elected representatives.

All of this explains why in cases like *Morrison v. Olson*, Justice Scalia sought so hard to rigorously enforce and defend the Constitution's structural protections. In the Justice's view, it was the constitutional structure that protected our liberty. Corruption of that structure was a corruption of the very republican form of government upon which everything else depended. As he said in *Morrison*, "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon the mere words of ours."⁸

So my first point: Justice Scalia's greatest jurisprudential contribution was, in my view, his commitment to constitutional structure as reflected in the principles of original understanding and textualism. But I don't think that is what makes Justice Scalia a hero to conservatives as opposed to simply a great jurist. Justice Scalia was not the first jurist devoted to constitutional structure, and I certainly hope that he won't be the last.

7. *Id.*

8. *Id.* at 697.

Defending Our View of the World

This is what leads to my second point. The reason we crumbled when Justice Scalia died was not simply because we lost a great jurist. It was because we lost the single best and most articulate defender of our view of the world that most of us in this room have known and may ever know. We live in an era where our views, traditional views, are under constant attack. Our adversaries have not even tried to beat us through the democratic processes, but instead go straight to the courts where they often win not by asserting that our views are legally wrong, but by asserting that they are so fundamentally illegitimate that the Constitution prohibits them. And they now have an increasingly compliant judiciary that agrees with their policy views and is unconstrained by legal principle. This is where Justice Scalia's contributions and leadership were so critical and why he will so dearly be missed, for in defending his view of the Constitution, Justice Scalia defended our view of the world.

In the Justice's view, it was the constitutional structure that protected our liberty. Corruption of that structure was a corruption of the very republican form of government upon which everything else depended.

To be sure, the Constitution does not dictate our political and philosophical viewpoint, and Justice Scalia would have been the first one to tell us that, but neither does the Constitution require adherence to 21st century moral values any more than it requires Mr. Herbert Spencer's social statistics, and for good reason. As Justice Scalia said over and over again, there are reasons why traditional principles have survived for centuries. It wasn't just dumb luck or a cross-generational multi-cultural conspiracy of white men. At the very least, Justice Scalia reminded us, the Constitution did not prohibit those time-tested principles. In short, just as there might be good reasons to change, there were also good reasons not to change, and the Constitution respected those reasons too.

Justice Scalia, therefore, defended our right to defend tradition, the values upon which this nation was built. Justice Scalia explained this well in *Evans v. Romer*, where he said, "Amendment 2 is designed to prevent piecemeal deterioration of the sexual majority favored by the majority of Coloradans."⁹ He continued that this was "an appropriate means to a legitimate end." He defended our right to defend tradition. I think he captured this best with his defense of traditional values in his closing lines of *United States v. Virginia*, the VMI case, where he wrote the following:

In an odd sort of way, it is precisely VMI's attachment to such old-fashioned concepts as manly "honor" that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. The record contains a booklet that all first-year VMI students (the so-called "rats") were required to keep in their possession at all times. Near the end there appears the following period piece entitled "The Code of a Gentleman."¹⁰

Then he quotes extensively from the code of the gentleman:

Without a strict observance of the fundamental Code of Honor, no man, no matter how "polished," can be considered a gentleman. The honor of a gentleman demands the inviolability of his word and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice...or he is not a Gentleman.

A Gentleman...

Does not discuss his family affairs in public or with acquaintances.

Does not speak more than casually about his girl friend.

Does not go to a lady's house if he is affected by alcohol. He is temperate in the use of alcohol.

9. *Romer*, 517 U.S. at 653.

10. *Virginia*, 518 U.S. at 601-02.

Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.

Does not hail a lady from a club window.

A gentleman never discusses the merits or demerits of a lady.

Does not mention names exactly as he avoids the mention of what things cost.

Does not borrow money from a friend, except in dire need. Money borrowed is a debt of honor, and must be repaid as promptly as possible. Debts incurred by a deceased parent, brother, sister or grown child, are assumed by honorable men as a debt of honor.

Does not display his wealth, money or possessions.

Does not put his manners on and off, whether in the club or ballroom. He treats people with courtesy, no matter what their social position may be.

Does not slap strangers on the back nor so much as lay a finger on a lady.

Does not “lick the boots of those above” nor “kick the face of those below him on the social ladder.”

Does not take advantage of another’s helplessness or ignorance and assumes that no gentleman will take advantage of him.

A Gentleman respects the reserves of others, but demands that others respect those which are his.

A Gentleman can become what he wills to be.¹¹

The Justice closed: “I do not know whether the men of VMI live by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.”¹²

Powerful words. Justice Scalia did not just defend our view of the law, though he did that superbly. He defended our view of the world, and he did it better than anyone else. And that, I believe, is why we were broken to the core when we heard the terrible news on that cold February day.

As Justice Scalia said, there are reasons why traditional principles have survived for centuries. Just as there might be good reasons to change, there were also good reasons not to change, and the Constitution respected those reasons too.

Conclusion

It was my greatest honor to serve this man, so let me close with a short story on how I will always remember him. One of the great things that Justice Scalia always did with his law clerks before he actually cast a vote in a case is, he would bring the law clerks into chambers, and we would have a pretty open debate on how the Justice ought to vote. He at least created the illusion that he took into account what we thought before he cast that vote.

This one particular case involved the statute that was 18 U.S.C. § 922, which prohibits felons from possessing firearms. It was not a particularly important case, but the issue turned on whether this particular felon had violated this statute by being in possession of a firearm. The clerks were debating pretty vigorously back and forth.

As we went on and on, the Justice swiveled around in his chair with his back to us. At one point, one of the clerks that thought the felon hadn’t violated the statute invoked the Second Amendment, in response to which another one of the more liberal clerks declared, “Well, surely, you don’t think the Second Amendment protects felons.” In response to which, the first clerk declared, “When the revolution comes, we’re going to need the felons, too.”

11. *Id.* at 602–03.

12. *Id.*

At that point, I looked up at Justice Scalia, and I saw the back of his head, and he was just bouncing up and down, laughing. Justice Scalia had a wonderful face and an expressive face, but when I remember Justice Scalia, I will always remember the back of his head bouncing up and down in laughter.

Thank you for inviting me to participate in this celebration of one of our greatest conservative and American leaders.

—*Noel J. Francisco is a partner at Jones Day in Washington, D.C., and served as a law clerk for Justice Antonin Scalia during the 1997 term.*