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2016

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Alan B. Morrison

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### Recommended Citation

Morrison, Alan B., "Remembering Justice Antonin Scalia" (2016). *Minnesota Law Review: Headnotes*. 44.  
<https://scholarship.law.umn.edu/headnotes/44>

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## Remembering Justice Antonin Scalia

Alan B. Morrison<sup>†</sup>

There is so much to say about Justice Antonin Scalia. He has already been the subject of a full biography by Joan Biskupic (*American Original*<sup>1</sup>) and a two-person play (*The Originalist*<sup>2</sup>), both of which captured the essence of what made him such a polarizing Justice. Others in this symposium will write about his contributions to various substantive areas of the law and to constitutional interpretation generally. I have chosen to write about some very important parts of his nearly thirty years on the Supreme Court bench that might not catch the attention of others.

### I. PREDICTIONS ARE HARD TO MAKE

Most Americans, indeed most lawyers, are very surprised to learn that Justice Scalia was unanimously confirmed 98-0 by the Senate in 1986. Part of the explanation for the vote was that there had been a major battle over the elevation of William Rehnquist from Associate Justice to Chief Justice, and the opposition had largely run out of gas when it came time to consider the Scalia nomination. But the main reason for the lack of opposition was that then-Circuit Judge Scalia had no record that would suggest how he would vote in controversial cases before the Supreme Court.

What is significant about that fact is that the reason he had no such record will apply to future nominees whose main record is how they decided cases that came before them. Lower court judges, even those sitting on circuit courts of appeals, are bound to follow Supreme Court precedent, whether they agree or not. But once on the High Court, that legal impediment is

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<sup>†</sup> Lerner Family Associate Dean, George Washington University Law School. Copyright © 2016 by Alan B. Morrison.

1. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009).

2. JOHN STRAND, *THE ORIGINALIST* (2015).

gone, and a Justice is free to decide a case the way he or she thinks is correct. That does not mean that precedents are thrown out the window, but they are less important and can be more easily distinguished, if not overruled, when sitting on the Supreme Court than in a lower court. In addition, Justices change their views once on the High Court, even if they are in their mid-50s when appointed. Justices Harry Blackmun and John Paul Stevens are two examples of Justices whose views “evolved” over their tenures to become more skeptical of government. And Chief Justice Rehnquist evolved in a different way when he became Chief: as an Associate Justice he frequently concurred and dissented, but he did that much less often after he was elevated to Chief Justice.

There is another reason why Judge Scalia’s record was a poor indicator of what his Supreme Court record would be: the very different mix of cases in the two fora, especially because he sat on the D.C. Circuit. There are a number of respects in which the case mix in the D.C. Circuit differs from that of other federal circuits. First, a very high percentage of cases are either direct appeals from administrative agencies or come from judgments involving those agencies that originate in the District Court for the District of Columbia. Other appeals courts have some (and in the case of immigration cases, many more) of those kinds of cases, but most of the most significant of these cases come to the D.C. Circuit. These cases raise important issues, some of constitutional magnitude, but they rarely raise the kind of hot-button issue that would cause trouble in a confirmation hearing or be the subject of a public controversy. In fact, Judge Scalia did have a record in administrative law on the issue of standing, and while he was less willing to allow cases to proceed than others, his views at that time could not have been characterized as extreme.

Second, the criminal docket of direct appeals is small, but the distinguishing feature in this subject area is that there are no prisons in the District of Columbia from which state and federal habeas corpus cases emanate. By contrast, other federal circuits and the Supreme Court have very significant habeas dockets, so a nominee from another circuit might have more of a record on issues such as the reach of the Fourth Amendment, the applicability of the Confrontation Clause to hearsay allowed under state law, and the extent to which the right to trial by jury applies to criminal sentences—and the retroactivity of new rules of criminal procedure—, all of which

became subjects on which he had much to say on the Supreme Court.<sup>4</sup>

Third, the issues with which he is most strongly identified today—abortion, affirmative action, free speech (often in an election context), the religion clauses, and gun rights—were not litigated in the D.C. Circuit either while he was there or afterwards, with the exception of gun cases and a few election law cases. Part of this is explainable because those cases are generally based on state or local laws: the D.C. Circuit’s one jurisdiction generally stays away from controversies in these areas, or is overruled by Congress if the city oversteps what its overseers see as its proper boundaries.

To be sure, Judge Scalia served on the D.C. Circuit for only four years, whereas the current nominee, Chief Judge Merrick Garland, has been on that Court for almost twenty years. But those seeking reasons to reject the Garland nomination have found that he has not sat on many controversial cases, and when he has, he has taken largely mainstream positions. Judge Garland is a moderate person, by temperament and judicial philosophy, but to many who thought they knew Judge Scalia reasonably well when he was appointed, he turned out to be a much different Justice than they had expected. The bottom line on this point is Justice Scalia’s tenure on the Court shows that Yogi Berra was correct when he observed, “predictions are very difficult, especially when they are about the future.”

## II. CHALLENGES AT ORAL ARGUMENT

Any lawyer who will argue a case before the Supreme Court either knows or is told well beforehand not to plan on speaking very long and be prepared to answer a barrage of questions. Except for Justice Thomas, the other Justices are all very active. Even with the death of Justice Scalia, who was probably at the top of the list of questioners for most arguments, the Court is not likely to revert to the days when counsel could make lengthy openings and get questions from only a few of the Justices.

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4. His views on the death penalty had not been the subject of his decisions in the D.C. Circuit, but that would not have been different had he been on other circuit courts in the early 1980s because the surge in post-*Furman* cases had not yet percolated to the federal courts of appeals. See *Furman v. Georgia*, 408 U.S. 238 (1972).

In many cases, you knew where Justice Scalia was likely to come out, and you had to be prepared for very tough questions, with no opportunity to give an answer designed to hide a weakness and hope to move on. If you did not answer his question, Justice Scalia did not let go, or at least not until he became convinced that you had no answer, or none that would satisfy him. He often spoke early in the argument, but if he did not pose a question for the petitioner, respondent's counsel had better be ready. The Justice would often rock back in his chair and then pounce on counsel with a question that was rarely neutral, but at least you knew what he thought about the issue.

In his informal talks, Justice Scalia often spoke about oral arguments, and the one thought that has always stayed with me is his question, "what are the five worst words counsel can utter in response to a hypothetical question?" Answer: "that is not this case," to which the Justice would always say something along the lines of, "of course we know what this case is about; we are not morons." He would then tell his audience that the judge is asking about the next case to help the judge decide which way to go on this one. He would then add that once you have answered the question the judge has asked, not the one you wish had been asked, you can then explain why that case is different from this, or why your position in this case does not lead inexorably to the undesirable outcome in the next one. His point, which is not limited to next-case questions, is that questions should be seen as opportunities and not obstacles, because you have the judge's attention and perhaps can dispel a misguided notion that might otherwise doom your case.

Over the years, I have done a number of moot courts for lawyers arguing in the Supreme Court for the first time, and the subject of what to do about Justice Scalia's likely hostile questions often was raised. My answer was that you had to do your best to respond, but recognize that your answer may not persuade him, and then remember that Justice Scalia had only one vote. That was meant not only as a factual assertion, but as a reminder not to answer a question in a way that you hoped would get the Scalia vote, if it meant sacrificing other votes you needed to get to five. It also meant that you sometimes needed to try to shift gears and hope to engage other Justices who were more likely to agree with you than Justice Scalia.

### III. THE USE AND MISUSE OF LEGISLATIVE HISTORY

Before Judge Scalia became Justice Scalia, Supreme Court

advocates as well as the Justices would use legislative history extensively to support their preferred reading of federal statutes. This included not only committee reports and statements by the main sponsors, but also discussions at committee hearings on a bill and floor statements by random members, including some from an era when the Congressional Record did not distinguish between those statements actually delivered on the floor, and those simply inserted into the Record. Justice Scalia would have none of that. His view was that the only thing that mattered was the text of the law actually voted on by both Houses of Congress and signed into law by the President, and so for him, all legislative history was out of bounds.

The Justice advanced his positions in opinions in which he explained why he considered the use of legislative history to be illegitimate, but he found a unique way to express his continued opposition to its use once his main argument had become clear to all. In cases in which he agreed with the outcome and the basic reasoning of the majority, but in which the author of the opinion included a section using legislative history to support the outcome, Justice Scalia would file an opinion concurring, except as to the legislative history section or sometimes excepting to a footnote in which some mention of the forbidden subject was made. Finally, as time passed and other Justices continued to use legislative history, that section of their opinion would begin with a phrase such as “for those who find legislative history useful . . . ,” from which Justice Scalia apparently concluded that he had largely won the battle and no longer felt the need to concur, except as to that section.

Justice Scalia did not win the legislative history war, but he did succeed in narrowing the battlefield considerably. While I have not attempted (and do not intend to attempt) to do a scientific survey of the average number of legislative history citations per case or per 100 words of Supreme Court opinions in the past decade as compared to the years before Justice Scalia joined the Court, I am confident, as a regular reader of Court opinions, that the number is way down. But perhaps more important than the numbers are the portions of legislative history cited. Now the citations are to the conference committee reports (which are often the only thing members read because they are written in non-legalese) or perhaps to the portions of the House or Senate committee reports that explain, in broad terms, what the law is designed to accomplish. These

reports, which may be written by staff, but are reviewed by the committee chairs, ranking members, and others most interested in the bills, often explain the purpose behind the law and help illuminate the meaning of provisions that otherwise seem quite opaque. In other situations, when the issue relates to a particular subsection, and everything in the legislative history points in one direction, most Justices are still willing to take that information into account in trying to understand what the enacted text means. And Justice Scalia's main point—that at best statements by individual members reflect only their views, no matter what position they held in relation to a particular bill—has been largely (if silently) accepted, most of the time, by most of the Justices. That may not be total victory, but it is a major accomplishment, neither liberal nor conservative, for which Justice Scalia deserves most of the credit.

There is one category of legislative history that the Justice opposed on which he is off the mark. The process by which the Federal Rules of Civil Procedure (as well as those for Appellate Procedure, Criminal Procedure, Evidence, and Bankruptcy) are amended is a very thorough and complicated one. For each of these areas there is a committee which is comprised of judges, practicing lawyers, and academics, as well as one or more law professor reporters with expertise in that area. Before an amendment is approved by the Supreme Court, it goes through an extensive notice and comment process, often with public hearings and with committee meetings open to all interested persons. Accompanying each amendment are what are called Advisory Notes, which are initially drafted by the reporters, but thoroughly reviewed and edited in detail by the committee members, although not by the Justices whose approval is needed before they become effective. Despite this pedigree, Justice Scalia stated in his concurrence in *Krupski v. Costa Crociere S.p.A.* that these notes were simply another form of legislative history, not worthy of consideration except to the extent that it is like other scholarly commentary<sup>5</sup>—a belief for which he was rightly taken to task by Duke Law Professor Paul Carrington, who was the Civil Rules Committee Reporter at the time that the offending notes were written.<sup>6</sup>

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5. 560 U.S. 538, 557 (2010) (Scalia, J., concurring).

6. Paul Carrington, *Commentary: Showing Disdain for Official Legislative History*, NAT'L L. J. (Aug. 11, 2010), <http://www>

Justice Scalia's distaste for legislative history did not extend to constitutional history, as best exemplified in his detailed reliance on it in *District of Columbia v. Heller*,<sup>7</sup> in sustaining a broad reading of the right to bear arms under the Second Amendment. His consideration there included English history, the colonial experience, what the states were doing at the time the amendment was enacted, and even what happened in the states after it became law. To be sure, the analogies to legislative history in statutes are not precise, but they are close enough to require some explanation for their differing treatment; however, the Justice (to my knowledge) never attempted to defend those differences. Moreover, to the extent that Justice Scalia found the Federalist Papers to be helpful in other cases, they suffer from three deficiencies that should have made them at least as suspect as conventional legislative history: they were (anonymous) advocacy pieces, written by only one person (per paper), and they appeared after the language in the Constitution had already been agreed upon.<sup>8</sup>

#### IV. THE LONE DISSENTER

Early in his time on the High Court, Justice Scalia demonstrated his willingness to stand by his views, even in the face of unanimous opposition in cases of major constitutional and practical significance. I refer to his dissents in the separation of powers challenges to the independent counsel statute<sup>9</sup> and the federal sentencing guidelines.<sup>10</sup> As the junior Justice in both cases, and with the outcome not in doubt, many judges would have simply gone along or written brief dissents, but that was not Justice Scalia. In both cases, he wrote impassioned dissents explaining at great length why the Constitution did not allow either scheme.

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.nationallawjournal.com/id=1202464644806?keywords=Showing+disdain+for+official+legislative+history&publication=National+Law+Journal.

7. 554 U.S. 570 (2008).

8. The notes from the Convention are further suspect because, unlike proceedings in Congress, which are taken verbatim by a court reporter, the notes are those of participants in the deliberations. I shudder to think that anyone would ever rely on my notes of a meeting or even a lecture, assuming that my handwriting and abbreviations could be deciphered.

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

10. *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).



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Today, the independent counsel act is no longer on the books, although attorneys general continue to appoint them from time to time. Congress's decision not to renew the law was prompted by the many practical problems that resulted from its operation in several situations, most notably and probably of greatest influence, the Whitewater investigation and the eventual, but unsuccessful, impeachment of President Clinton. The sentencing guidelines, which were actually much less flexible than their name implied, eventually became advisory, the result of a series of decisions interpreting the constitutional right to trial by jury as precluding judges from making factual findings that increased the sentence of a defendant. In neither case would it be accurate to say that Justice Scalia's opinions became the law by changing the views of his colleagues on the original issues, but the concerns that he expressed in both dissents became part of the reason why those schemes no longer exist in their prior form.

To be sure, Justice Scalia was not always a lone dissenter, some of his dissents became the views of the majority, and he is surely not the only Justice who was ever, or even often, a lone dissenter. But these two dissents are special because they were early in his time on the Court, the cases were of great significance, and he expressed his views at length and in very passionate terms. Thus, they can be seen as a harbinger of opinions to come and of his willingness to stand his intellectual ground even when no one else agreed with him.

#### V. THE DOOMSDAY FORECASTER

Justice Scalia was well-known for his attacks, sometimes bordering on the personal, on the opinions of other Justices, especially in his concurrences and dissents. What has been less noted were his doomsday predictions of what would happen in the wake of a majority opinion with which he disagreed. One famous example is his dissent in *Lawrence v. Texas*,<sup>11</sup> in which he predicted that striking down the ban on sodomy would lead to the invalidation of laws that limited marriage to opposite sex couples.<sup>12</sup> He reinforced that prediction in his dissent in *United States v. Windsor*,<sup>13</sup> striking down the Federal Defense of Marriage Act (DOMA), and these predictions came true in

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11. 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

12. *Id.* at 604–05

13. 133 S. Ct. 2675, 2709–11 (2013) (Scalia J., dissenting).

*Obergefell v. Hodges*.<sup>14</sup> It is doubtful that opponents of the ban on same-sex marriage were buoyed by the Scalia dissents to challenge those laws, but there is no doubt that his dissent in the DOMA case was cited by many lower court judges to justify taking the next step that led to *Obergefell*.<sup>15</sup>

As the term wound down last June, it seemed to me that Justice Scalia's doomsday predictions were on the increase and that the tones of his disagreements were raised a notch, if not a decibel, or two. I collected a half-dozen of my favorites from that term in an essay titled "Summersaults of Statutory Interpretation,"<sup>16</sup> a Scalia quote from *King v. Burwell*.<sup>17</sup> In his dissent in *Zivotofsky v. Kerry*,<sup>18</sup> he likened the power given to the President to that possessed by the King of England and prophesized that the decision "will systematically favor the unitary President over the plural Congress in disputes involving foreign affairs," which will result in a foreign policy "perhaps as effective as that of a monarchy."<sup>19</sup> But, he continued, "[i]t is certain that, in the long run, it will erode the structure of separated powers that the People established for the protection of their liberty."<sup>20</sup>

In *Obergefell* he decried that the majority "says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."<sup>21</sup> He viewed the decision as "tak[ing] from the People a question properly left to them" and "unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court,"

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14. 135 S. Ct. 2584 (2015).

15. See, e.g., *Condon v. Haley*, 21 F. Supp. 3d 572, 582 (D.S.C. 2014) ("Although the *Windsor* holding dealt only with the validity of certain provisions of federal statutory law, Justice Scalia, writing in dissent, correctly predicted that an assault on state same sex marriage bans would follow *Windsor*.")

16. Alan B. Morrison, *Somersaults of Statutory Interpretation*, SLATE (July 22, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/07/antonin\\_scalia\\_s\\_angry\\_opinions\\_the\\_supreme\\_court\\_s\\_decisions\\_are\\_dangerous.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/07/antonin_scalia_s_angry_opinions_the_supreme_court_s_decisions_are_dangerous.html). My original title, which was changed without notice at the last minute, was "Crying Wolf."

17. 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting) ("The somersaults of statutory interpretation they have performed . . . will be cited by litigants endlessly, to the confusion of honest jurisprudence.")

18. 135 S. Ct. 2076, 2116 (2015) (Scalia, J., dissenting).

19. *Id.* at 2123.

20. *Id.*

21. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015).

from which he concluded that “we move one step closer to being reminded of our [the People’s] impotence.”<sup>22</sup>

His dissent in *King v. Burwell*,<sup>23</sup> the most recent Affordable Care Act decision, concluded that, based on the majority’s opinion, “[w]ords no longer have meaning” and that it “is hard to come up with a clearer way” to say the opposite of how the majority read the law.<sup>24</sup> After proceeding through what he saw were fatal defects in the majority’s opinion, prefaced by phrases such as “making matters worse,”<sup>25</sup> “for its next defense of the indefensible,”<sup>26</sup> and “even less defensible, if possible,”<sup>27</sup> the Justice zeroed in on what he saw as the heart of the problem: “[t]oday’s opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act” because of “the Court’s decision to take matters into its own hands” instead of allowing Congress to address whatever problems there might be.<sup>28</sup>

Perhaps the most overstated of Scalia’s dissents was *Alabama Legislative Black Caucus v. Alabama*.<sup>29</sup> His opinion began: “[t]oday, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections.”<sup>30</sup> He predicted that the “consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case,” suggesting that the majority had made a major change in the law.<sup>31</sup> However, his disagreement was only over whether it was proper to allow the plaintiffs to make certain allegations before the Supreme Court that they had omitted below and thus keep the case alive. How that irreparably damaged the principle of one person, one vote is far from clear.

Whenever one dissents, whether in a judicial decision or a faculty committee, a choice must be made between attempting

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22. *Id.* at 2631.

23. 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting).

24. *Id.* at 2497.

25. *Id.* at 2498.

26. *Id.* at 2502.

27. *Id.* at 2506.

28. *Id.*

29. 135 S. Ct. 1257, 1274 (2015) (Scalia J., dissenting).

30. *Id.*

31. *Id.* at 1281.

to narrow the majority's decision or pointing out its potentially apocalyptic consequences. Justice Scalia has chosen the second option as his preferred choice in most cases. It no doubt made him feel better that he had fully expressed his misgivings in clear terms, but whether it helped his long range goals of reigning in a Court that he concluded was no longer interpreting the law, but making it up, remains to be seen.