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Foreword

A Consequential Justice

Robert A. Stein[†]

Antonin Scalia served as Associate Justice of the Supreme Court of the United States for more than twenty-nine years from his appointment by President Ronald Reagan in 1986 to his death in 2016. At the time of his death, Justice Scalia was the senior Justice on the Court. Justice Scalia's length of service on the Court ranks 15th longest among the 112 Justices in Supreme Court history.¹

It is not the length of Justice Scalia's service on the Court, but rather the consequence of his opinions that most distinguishes him. During his years on the Court, Justice Scalia was able to lead the Court to the right in a number of areas of law.

When Justice Scalia visited the University of Minnesota Law School for a lecture and conversation on October 20, 2015,² he described Justice William Brennan as "the most influential Justice of the twentieth century."³ In fact, Justice Scalia and Justice Brennan together represent two of the most consequential Justices on the Court during the sixty years since Justice Brennan's appointment in 1956—Justice Brennan moving the Court to the left, and Justice Scalia subsequently moving the Court to the right.

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1. See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members_text.aspx (last visited July 6, 2016).

2. *The 2015 Stein Lecture: U.S. Supreme Court Justice Antonin Scalia*, UNIVERSITY OF MINNESOTA LAW SCHOOL, <https://www.law.umn.edu/events/2015-stein-lecture-us-supreme-court-justice-antonin-scalia> (last visited July 6, 2016).

3. Justice Antonin Scalia, *The 2015 Stein Lecture at the University of Minnesota* (Oct. 20, 2015) [hereinafter *The 2015 Stein Lecture*].

The manner by which Justice Brennan and Justice Scalia led the Court, however, was quite different. Justice Brennan, perhaps more than any other Justice in Supreme Court history, was a master in drafting an opinion to secure at least five votes to decide a case. Justice Scalia, however, has emphasized that his originalist and textualist jurisprudence left him with “nothing to trade.”⁴ Rather, Justice Scalia shifted the Court to the right through sheer intellect and combative opinion-writing, which emphasized his own constitutional ideology. By comparing Justice Scalia to Justice Brennan, it becomes clear that, like Justice Brennan, Justice Scalia was a consequential Justice.

To those monitoring Justice Brennan’s appointment in 1956, it would come as a shock that he would lead the Warren Court’s expansion of civil rights, liberties, and judicial power.⁵ Amidst a presidential election, President Dwight Eisenhower hoped to use the appointment of Justice Brennan to appease Catholic voters and the Association of State Court Judges.⁶ Attorney General Herbert Brownell suggested Justice Brennan for Justice Sherman Minton’s seat following a speech given by Justice Brennan, which Brownell believed “seemed markedly conservative.”⁷ To Brownell, the future-Justice Brennan appeared more concerned with judicial administration than constitutional issues—a conservative Justice, but a Democrat, who could balance the Warren Court’s penchant for constitutional activism.⁸

Brownell was wrong. Chief Justice Warren, a man with a vision, and Justice Brennan, a negotiator and tactician, formed an immediate alliance. As he was instrumental to the Warren Court’s project of constitutional expansion, his colleagues on the Court referred to Justice Brennan as “Deputy Chief.” Justice Brennan mastered the art of writing a majority opinion that could secure five votes.

4. *Id.* (“The originalist has nothing to trade.”).

5. See KIM ISAAC EISLER, *THE LAST LIBERAL: WILLIAM J. BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA* 13 (1993) (“Who was this Brennan, who had managed to attract five other Justices to his opinion and accomplish in an easy 6 to 2 majority, something Black had failed to do in sixteen years? Who was this man, virtual unknown, appointed by the conservative President Eisenhower, who seemed to be stepping past even the most tepid predictions of his influence?”).

6. *Id.* at 89.

7. *Id.* at 85.

8. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Prior to Justice Brennan's arrival, scholars questioned whether the Warren Court would continue its constitutional push for civil rights, started in *Brown v. Board of Education*.⁹ *Cooper v. Aaron* afforded Justice Brennan the opportunity to revitalize the Court's liberal agenda.¹⁰ During oral arguments, Justice Brennan drilled the state government on its failure to pursue desegregation as a violation of the Constitution's Supremacy Clause. Justice Brennan's Supremacy Clause comments formed the crux of the majority opinion, ghost-written by Justice Brennan on behalf of Chief Justice Warren.¹¹ Justice Brennan's early efforts to restore judicial supremacy to the Court paved the way for future holdings, as well as building trust among the Court's more absolutist judges, such as Justice William O. Douglas.¹²

Perhaps no opinion demonstrates Justice Brennan's ability to negotiate and expand the Court's power than *Baker v. Carr*.¹³ Justice Brennan's majority opinion in *Baker* recast the political question doctrine and held that redistricting issues presented justiciable questions.¹⁴ The road to such a momentous holding, however, was turbulent and fraught with contention. After two days of oral arguments, the Justices found themselves confronted with a 4–4 split, with Justice Potter Stewart refusing to decide at the first conference.¹⁵ Chief Justice Warren pushed the decision to the next term and called for a second round of arguments. This time, Justice Stewart admitted that Justice Brennan's arguments convinced him to join the majority.¹⁶ At the request of Justice Stewart, Justice Brennan limited his opinion to the federal court's jurisdiction.¹⁷ But Justice Brennan's coalition began to shake. Justice Tom

9. See Harry H. Wellington & Alexander M. Bickel, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 4 (1957) ("More strikingly, since handing down its judgment in the *Segregation Cases*, the Court has declined to write further on the general subject, disposing by per curiam orders of a number of other cases which can only in the loosest way be held to be governed by the decision of May, 1954.") (citations omitted).

10. See generally *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that states are bound by Supreme Court decisions under the Supremacy Clause).

11. See EISLER, *supra* note 5, at 152–53.

12. See *id.* at 157.

13. 369 U.S. 186 (1962).

14. *Id.*

15. See EISLER, *supra* note 5, at 171.

16. EISLER, *supra* note 5, at 172.

17. EISLER, *supra* note 5, at 173.

Clark switched from the dissent to the majority, Justice Douglas threatened to write his own opinion believing Justice Brennan was not going far enough (a view Justice Clark soon took himself), and Justice Stewart moved closer toward the dissent. The drama of the case led Justice Charles Evans Whittaker to recuse himself—and eventually retire from the Court. Justices Douglas and Clark called for a stronger opinion in light of Clark’s more recent opinion, but Justice Brennan had promised to support Justice Stewart. Justice Brennan scurried from chamber to chamber in an effort to maintain his majority.¹⁸ On March 26, 1962, Justice Brennan announced his opinion, joined by Justice Hugo Black and Chief Justice Warren. Justices Douglas, Clark, and Stewart all wrote separately. In the end, only Justice Felix Frankfurter and Justice John Marshall Harlan dissented. Justice Brennan turned a 5–4 into a 6–2 decision, with one Justice succumbing to the mental anguish *Baker* brought before the Court.

Baker v. Carr demonstrates Justice Brennan’s uncanny ability to write an opinion that could draw five votes for a majority holding. Fuelled by his willingness to compromise, Justice Brennan would tell his clerks, “With five votes around here you can do anything.”¹⁹ In *New York Times Co. v. Sullivan*, Justice Brennan wrote eight majority opinion drafts before eventually securing the votes of six Justices.²⁰ Unlike Justice Brennan, other liberal Justices, notably Justice Black and Justice Douglas, often refused to negotiate their position. Justice Brennan recognized that if the Court was to pursue a liberal agenda and secure strong majorities, he had to meet his more conservative colleagues in the middle. As a result of his ability to form coalitions, Justice Brennan authored some of the most influential constitutional law opinions of the twentieth century, expanding civil rights, First Amendment rights,²¹ and substantive due process.²² Justice Brennan became a consequential Justice not by virtue of strong, uncompromising ideology, but rather his results-oriented approach to coalition building.

18. EISLER, *supra* note 5, at 174–75.

19. EISLER, *supra* note 5, at 178.

20. EISLER, *supra* note 5, at 186.

21. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Roth v. United States*, 354 U.S. 476 (1957).

22. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

When President Ronald Reagan appointed Justice Scalia to the bench in 1986, commentators suspected he would play a similar coalition-building role for the conservatives as Justice Brennan had for the liberals.²³ Coalition-building did not interest Justice Scalia. Rather, Justice Scalia compares more readily to the absolutist positions of Justices Douglas and Black. Justice Scalia felt bound by his views as a textualist and originalist, both of which provided him a formulaic way of answering legal questions. Yet Justice Scalia was an intellectual juggernaut. His colorful rhetoric, unapologetic dissents, and vigorous defense of his ideology reverberated throughout the conservative legal community. Justice Scalia fiercely criticized the judicial activist and “living constitution” philosophies of his colleagues, such as Justice Brennan.²⁴ Even absent the same cooperative attitude of Justice Brennan, Justice Scalia managed to shift the Court right in a number of areas.

At his confirmation hearing, Senator Strom Thurmond asked Justice Scalia why the U.S. Constitution had endured as “the oldest existing Constitution in the world today.”²⁵ Justice Scalia responded:

What makes it work, what assures that those words [in the Bill of Rights] are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches, in particular, so that no one of them is able to “run roughshod” over the liberties of the people as those liberties are described in the Bill of Rights.²⁶

Justice Scalia valued the strict structural guarantees of the U.S. Constitution, namely separation of powers and federalism. His adherence to these ideals shaped American law and Supreme Court jurisprudence over the course of three decades.

In *Morrison v. Olson*, the Supreme Court held that the appointment of an independent counsel to prosecute high-ranking executive branch officials did not violate the separation of powers.²⁷ Justice Scalia was the lone dissenter. He feared that Congress could “effectively compel[] a criminal

23. The 2015 Stein Lecture, *supra* note 3 (“Scalia, he’s such a likeable fellow, he’s going to put together a new conservative coalition. That was foolish.”).

24. See, e.g., RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION 25, 207, 222 (2006).

25. *Id.* at 53.

26. *Id.* (alteration in original).

27. 487 U.S. 654 (1988).

investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch.”²⁸ In passing the Ethics in Government Act of 1978, Congress revoked the President’s investigative and charging authority as the federal government’s sole executive under Article II, Section I of the Constitution, handing those powers instead to a “mini-Executive that is the independent counsel.”²⁹ Thus, the statute “deprive[d] the President of exclusive control over that quintessentially executive activity.”³⁰ *Morrison* resulted in the most complete statement of Justice Scalia’s beliefs on the separation of powers:

Where a private citizen challenges action of the Government on grounds unrelated to separation of powers, harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches in what is agreed, between themselves at least, to be within their respective spheres. But where the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: “The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right to settling the boundaries between their respective powers” *Federalist* No. 49, p. 314. The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt.³¹

Justice Scalia’s defense of the Constitution’s structural balance struck a chord with Congress and others aligned with his views. At his confirmation hearings, Justice Samuel Alito told the Senate that *Morrison* “hit the separation of powers doctrine ‘about as hard as heavyweight champ Mike Tyson usually hits his opponents.’”³² After a growing number of scandals, Congress grew weary of the often political and partisan nature of the independent counsel—even allowing the law to lapse for eighteen months in 1992.³³ In 1999, Senator

28. *Id.* at 703 (Scalia, J., dissenting).

29. *Id.* at 732.

30. *Id.* at 706.

31. *Id.* at 704–05.

32. Carl Hulse & David D. Kirkpatrick, *After Memo, Democrats Are Taking Firmer Stance Against Alito Nomination*, N.Y. TIMES, Dec. 2, 2005, at A24.

33. *Independent Probes of Clinton Administration Cost Nearly \$80 million*, CNN (Apr. 1, 1999, 11:32 AM), <http://edition.cnn.com/ALLPOLITICS/>

Christopher Dodd echoed Justice Scalia's sentiments: "For 180 years, we had a good system. It can work. It can work again. We don't need this independent counsel statute."³⁴ On June 30, 1999, the independent counsel law lapsed, reverting prosecutorial authority to the Justice Department.³⁵

Morrison and its aftermath exemplify Justice Scalia's influence on the separation of powers within the branches of the federal government. Similarly, Justice Scalia's majority opinion in *Printz v. United States* demonstrates his efforts to curb federal encroachment on states' rights.³⁶ *Printz* concerned the constitutionality of the Brady Handgun Violence Prevention Act, which commanded local law enforcement officers to conduct background checks on individuals seeking to purchase handguns.³⁷ Examining eighteenth century statutes, Justice Scalia argued that the "utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power."³⁸ The Constitution established a system of "dual sovereignty."³⁹ Justice Scalia concluded his opinion by stating:

Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally⁴⁰ incompatible with our constitutional system of dual sovereignty.

Printz demonstrates Justice Scalia's veneration of federalist principles. During his time on the Court, Justice Scalia joined and authored other opinions stripping the federal

stories/1999/04/01/counsel.probe.costs; David Johnston, *Weinberger Faces 5 Counts in Iran-Contra Indictment*, N.Y. TIMES (June 17, 1992), <http://www.nytimes.com/1992/06/17/us/weinberger-faces-5-counts-in-iran-contra-indictment.html>.

34. *Senators Predict End to Independent Counsel Act*, CNN (Mar. 1, 1999), <http://www.cnn.com/ALLPOLITICS/stories/1999/03/01/independent.counsel/>.

35. Roberto Suro, *Power Shifts to Reno Without Special Counsel*, WASH. POST (June 30, 1999), <http://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel063099.htm>.

36. 521 U.S. 898 (1997).

37. *Id.* at 902.

38. *Id.* at 907–08.

39. *Id.* at 918.

40. *Id.* at 935.

government, namely Congress, of the authority to infringe on states' rights.⁴¹ Thus, Justice Scalia suppressed many of the Supreme Court holdings of the Warren Court that strengthened federal supremacy.⁴²

In the realm of individual rights, Justice Scalia believed that his ideology "handcuffed" him, preventing him from pursuing the "nasty, conservative things" many accused him of wanting to do.⁴³ At times, his personal beliefs clashed with originalism. In *Texas v. Johnson*, in which the Supreme Court held that the First Amendment protected flag burning, Justice Scalia joined Justice Brennan's majority opinion.⁴⁴ Left to his personal beliefs, Justice Scalia has stated that he would throw all flag burners in jail.⁴⁵ But his originalist reading of the First Amendment broadly protects freedom of speech and, therefore, Justice Scalia's personal preferences succumbed to his ideological adherences.

In other policy areas, Justice Scalia found an originalist basis for opinions he otherwise agreed with. No case demonstrates this more than *District of Columbia v. Heller*.⁴⁶ *Heller* questioned whether a District of Columbia law prohibiting the possession of handguns violated the Second Amendment.⁴⁷ Pointing to the operative clause of the Second Amendment, Justice Scalia contended that "bear arms" was

41. See *United States v. Morrison*, 529 U.S. 598 (2000) (Congress exceeded its authority under the Commerce Clause in enacting the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (the Commerce Clause did not permit Congress to regulate the carrying of handguns). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005) (Congress may regulate and ban medical marijuana).

42. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that Congress could use the Commerce Clause to force businesses to comply with the Civil Rights Act of 1964).

43. The 2015 Stein Lecture, *supra* note 3.

44. 491 U.S. 397 (1989).

45. The 2015 Stein Lecture, *supra* note 3. During his lecture, Justice Scalia also included a personal anecdote about *Texas v. Johnson*:

I was the fifth vote in the flag vote in the flag burning case . . . I don't like people who go around burning the American flag. If it was up to me, I would put them all in jail. But, I am not a king. And as I interpret the First Amendment, they are entitled to burn the flag—their own flag—to protest the country. So, I was the fifth vote. I come down for breakfast the next morning. My wife, who is a very conservative woman (she stops me from sliding to the left), she is scrambling eggs or something at the stove and humming "It's a Grand Old Flag."

46. 554 U.S. 570 (2008).

47. *Id.* at 574.

unambiguously used to refer to the carrying of weapons outside of an organized militia.”⁴⁸ The prefatory clause—centered on “a well regulated Militia”—simply denoted the purpose of the Second Amendment: “to prevent elimination of the militia.”⁴⁹ Justice Scalia acknowledged that the right secured by the Second Amendment is not unlimited.⁵⁰ While “the Constitution leaves the District of Columbia a variety of tools for combating [gun violence],” an absolute prohibition on handguns is not one of them.⁵¹

Gun advocates praised Justice Scalia’s opinion in *Heller*.⁵² Liberals claimed Justice Scalia’s love of hunting tainted his opinion. Judge Richard Posner criticized Justice Scalia’s opinion as “faux originalism” with a “historicizing glaze on personal values and policy preferences.”⁵³ Regardless of Judge Posner’s attacks, Justice Scalia still founded his opinion in originalism through historical support for his arguments. Juxtaposed to cases like *Texas v. Johnson*, it is hard to contend Justice Scalia merely embraced originalism when it best advanced his own beliefs. In sum, Justice Scalia’s originalism informed the Court’s decisions concerned not only with the *structure* of U.S. government, but also the *substance* of U.S. law.

Justice Scalia’s prominence comes not only from his majority opinions, but also with his ability to sway the other branches and the Court through robust and well-argued opinions. As an ideologue, Justice Scalia preferred his subjectively “correct” answer to the most mutually agreeable answer.⁵⁴ Justice Scalia cites his adherence to originalism and textualism as the reason for his inability to form coalitions. Another, perhaps pettier, view suggests that Justice Scalia isolated himself by attacking his colleagues. Asked whether his strong language ever made it difficult to secure five votes, Justice Scalia responded, “You really think my colleagues are going to mess up American law because they are peeved at me?”

48. *Id.* at 584.

49. *Id.* at 599.

50. *Id.* at 626.

51. *Id.* at 636.

52. *Heller: The Supreme Decision*, NRA-ILA (June 27, 2008), <https://www.nra-ila.org/articles/20080627/heller>.

53. Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 26, 2008), <https://newrepublic.com/article/62124/defense-looseness>.

54. The 2015 Stein Lecture, *supra* note 3 (“I’d rather be right.”).

. . . It's certainly not hampered by the fact that I criticize my [colleague's opinions]."⁵⁵

One still wonders whether Justice Scalia's sharp tongue earned him any grudges. In *United States v. Windsor*, Justice Scalia dismissed the majority's opinion as "legalistic argle-bargle."⁵⁶ In the spiritual successor to *Windsor*, *Obergefell v. Hodges*, he called the majority's opinion "as pretentious as its content is egotistic," contending that its "profundities are often profoundly incoherent."⁵⁷ Concurring in *Glossip v. Gross*, Justice Scalia attacked the dissent: "Even accepting Justice Breyer's rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledygook."⁵⁸ His colorful and entertaining opinions captured the attention of the media and law students. Indeed, he admitted that he wrote his "interesting" and "memorable" dissents for law students in hopes for that "next generation" may adopt his ideologies.⁵⁹ In contrast, majority opinions confined Justice Scalia to write "what [his] colleague would let [him] write."⁶⁰ But if Justice Scalia developed a reputation for harsh language (which he most certainly did), it perhaps made his more malleable colleagues reluctant to join coalitions backed by Justice Scalia's originalist or textualists opinions. Without internal confirmation, we may never know if Justice Scalia's inability to form coalitions, like Justice Brennan was able to do, was in part due to his aggressive language.

A comparison of Justice Brennan and Justice Scalia illustrates at least two ways a Justice can become "consequential." Justice Brennan is consequential because he formed coalitions, mobilizing the court to pursue a liberal agenda—even if this agenda was more moderate than he would have wanted. Justice Brennan moved the court through negotiation and willingness to meet his conservative colleagues halfway. Justice Scalia is consequential for nearly opposite reasons. Justice Scalia pursued ideology over cooperation. His unrelenting stances and intellectual prowess made fellow

55. *Id.*

56. *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

57. *Obergefell v. Hodges* 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting).

58. *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring).

59. The 2015 Stein Lecture, *supra* note 3.

60. *Id.*

judges, lawyers, and lawmakers think about the proper structure of our government. He moved the Court right by injecting originalist viewpoints into precedent. Justice Brennan and Justice Scalia's goals differed. Whereas Justice Brennan sought to garner power for the Court to protect civil rights, Justice Scalia sought to preserve the balance of government. Both offer invaluable perspectives on the role of the judiciary, the structure of the federal government, and the substance of U.S. law. Had their terms overlapped more than four years, we would have witnessed a proverbial clash of titans on many of the questions raised by their methodologies and philosophies. Indeed, in those mere four years Justice Brennan and Justice Scalia often dueled in conflicting dissents and concurrences.⁶¹ Absent a persistent battle royale, however, we must analyze the consequence of Justice Brennan and Justice Scalia's jurisprudence on the Supreme Court and U.S. law as ships passing in the night.

61. See, e.g., *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) (clashing on First Amendment rights of corporations); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (disagreeing on the extent of due process rights and the meaning of "liberty" and "freedom"); *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354 (1988) (disputing the extent of *Chevron* deference).