

## Justice Scalia's Communication Legacy: Going Public and the Republican Rhetorical Style

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Called the “most influential justice of the last quarter-century,” the recent passing of Justice Antonin Scalia gives us reason to pause and evaluate how his influence may linger.<sup>1</sup> Our goal is to contribute to that project by offering the insights afforded by a rhetorical analysis of Scalia’s discourse on law. As rhetoricians, it would be difficult to overlook Scalia’s regular and strategic use of rhetorical devices. We know from his published work that he was versed in the classical rhetorical tradition. In their co-authored book, *Making Your Case: The Art of Persuading Judges*, Justice Scalia and Bryan A. Garner demonstrated their knowledge of classical rhetorical theory. Drawing from Aristotle, Isocrates, Demetrius, Cicero, and Quintilian, they explained to the reader that to persuade the court “you must know what motivates the court,” and the importance of recognizing the “human proclivity to be more receptive to argument from a person who is both trusted and liked.”<sup>2</sup> Even when not cited directly, the influence of these rhetoricians is clear in sections concerning argument, oral presentation, and writing style. Others have also noted that Scalia was the Supreme Court’s “chief wordsmith” who, “more than anyone who has served on the High Court in recent history, has given life to Aristotle’s injunction that ‘it is not enough to know what to say—one must know how to say it.’”<sup>3</sup>

It is not surprising, then, that many of those who have reflected on Scalia’s legacy often referenced his style. Stanford Law Professor Hank Greely argued that “Justice Scalia played the prophet for nearly 30 years with brilliance, biting wit and blazing prose. He may have been, with Justices Holmes and Jackson, one of the three

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best writers in the Court's history."<sup>4</sup> Perhaps this explains Brian T. Fitzpatrick's finding that Scalia is one of the "most cited Supreme Court justices of all time."<sup>5</sup> Many scholars have praised Scalia for his ability to "combine metaphors with witty aphorisms and sharp turns of phrase."<sup>6</sup> Scalia's legal explanations, "executed with panache," have led many people who agree and disagree with him to appreciate his style.<sup>7</sup> In addition to an appreciation for "well-written prose," Yury Kapgan argued that "judicial opinions that are thought provoking tend to be the ones that are well written, most like literature."<sup>8</sup> For Kapgan, Scalia's "memorable writing embodies . . . stylistic clarity and his substantive preference for clear rules" is evidence of his "rhetorical power."<sup>9</sup> While we agree that Scalia's command of language gave life to his expression and spoke to a kind of rhetorical power, in this essay we want to broaden this notion of style to assess its substance beyond the categories of clarity and literary longevity. We seek to investigate the relationship between Justice Scalia's substance and style as interrelated and inseparable.

Historically, rhetoricians have disagreed over the connection between substance and style. This anxiety goes back to the writings of "ancient rhetorical theorists who saw the canon of style as frosting on the cake, as manipulation of mere language after the important work of argument had been established."<sup>10</sup> But classical rhetoricians like Cicero also theorized the connection between substance and style through *decorum*, which is the "use of language to adapt to the expectations of the audience," and *ornatus*, which is a linguistic strategy used to "attain and retain the hearer's state of mind," to "unsettle emotion," and that functions as an intellectual pursuit that "actually belongs to *inventio*."<sup>11</sup> Seen in this way, style is a means of accomplishing a task and, therefore, a kind of power.

Consistent with such a notion of style, this essay will examine the substance of Justice Scalia's *rhetorical style* as a means of accomplishing his objective of establishing and advancing his judicial philosophy of textualist-originalism. Toward that end we make two arguments about Justice Scalia's style that we will explore in the balance of this essay. First, we argue that Justice Scalia was unique as a Supreme Court justice in the style of his politics, or put otherwise, how he forwarded his

agenda. This is not to be conflated with ‘legislating from the bench.’ Instead, Justice Scalia took his case for textualist-originalism to the public to effect the creation and interpretation of law. The second argument we make will consider the politics of Justice Scalia’s style. We argue that Justice Scalia’s republican rhetorical style often found expression through the jeremiad and consistently produced conservative results while inhibiting progressive possibilities. We organize our essay by analyzing Justice Scalia’s style in what Samuel Kernell called “going public.”<sup>12</sup> We then examine his republican rhetorical style before offering our conclusions.

### Going Public

To argue that Justice Scalia had a style of politics is to recognize that “relations of control and autonomy are negotiated through the artful composition of speech, gesture, ornament, décor, and any other means for modulating perception and shaping response.”<sup>13</sup> To forward his agenda, we argue that Justice Scalia went public. “Going public” was the phrase Kernell used to describe the strategies U.S. Presidents use to increase the popularity of their initiatives and the likelihood that they would pass through Congress. “Going public,” Kernell argued, was a “class of activities that presidents engage in as they promote themselves and their policies before the American public,” but the “ultimate object . . . is not the American voter, but fellow politicians in Washington.”<sup>14</sup> Although Justice Scalia did not have any policies, he did have a particular perspective that influenced the public and lawmakers alike regarding how the law should be interpreted. To argue for textualism-originalism, Justice Scalia went public in two ways that we will explore in this section. The first was to publicly promote his textualist-originalist approach to constitutional interpretation in the courts and in public appearances. The second was to make his communication about his approach and the law both accessible and understandable to the American public.

When Justice Scalia was confirmed in 1986, he was “billed as the intellectual lodestar who would pull the Court to the right by the force of his brilliance.”<sup>15</sup> By 1991, the Supreme Court had a conservative majority and it was thought that Justice Scalia would play a leading role in the reversal of many of the liberal judicial

decisions of the Warren Court. Although the Court has certainly moved to the right, Christopher E. Smith's assessment suggested that it "stopped short of a complete alteration of the high court's doctrines and role within the political system" in part because Justice Scalia "had less influence on the Court than his admirers originally predicted and his critics continually feared."<sup>16</sup> More recent assessments of Justice Scalia's influence on the Court suggest that although he was well liked as a person, his "overt criticisms of the Court and his colleagues likely impaired his ability to persuade the Court to join his opinions."<sup>17</sup> We cannot know if it was his frustration with his inability to sway his colleagues or his enjoyment of public forums, but either way Justice Scalia took his case for textualism-originalism and justifications of his opinions to the public to affect his agenda of instituting textualism-originalism as a judicial norm.

Defined in the preface of their co-authored book, *Reading Law*, Justice Scalia and Garner tell the reader

Both of your authors are textualists: We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters extratextually derived purposes and the desirability of the fair reading's anticipated consequences. We hope to persuade our readers that this interpretive method is the soundest, most principled one that exists.<sup>18</sup>

They spend the next 414 pages justifying and describing their method. In addition to Justice Scalia's written textualist-originalist apologetics, he regularly spoke at law schools, gave interviews, appeared on television news shows, and wrote articles where he included his justification of textualism-originalism into his decisions. Indeed, Justice Scalia was set apart from his colleagues "because of his persistent efforts to espouse and explain his textualist and originalist approaches to constitutional interpretation through speeches, articles and judicial opinions."<sup>19</sup>

Justice Scalia's efforts to affect the law from outside of the court room have not been in vain. The purpose of going public is ultimately to influence politics in realms beyond the judiciary (i.e., to influence the way the public thinks about the Constitution). In this way, Justice Scalia has had some measure of success. Smith

argued that Justice Scalia “forced members of Congress to rethink their approach to creating new statutes” and offered the development of a 1991 crime bill as an example:

When the House Judiciary Committee was drafting an anti-crime bill two weeks ago, some members suggested resolving a dispute by putting compromise language into a committee report, which accompanies a bill to the floor. But Barney Frank, D-Mass., warned off colleagues with just two words: ‘Justice Scalia.’<sup>20</sup>

Justice Scalia convinced conservatives that the best way to secure their goals is to nominate a judge who is also an originalist. In response to his death, then Republican-candidate Donald Trump tweeted “The totally unexpected loss of Supreme Court Justice Antonin Scalia is a massive setback for the Conservative movement and our COUNTRY!”<sup>21</sup> Indeed, “all of the people on Trump’s announced Supreme Court judicial short-list are there because they have shown their preference for Originalism,” defined as “the meaning of our basic law by asking what the drafters of the articles and amendments intended.”<sup>22</sup> President Trump is likely to have one Supreme Court nominee and possibly more get confirmed by the Senate. Given President Trump’s affinity for Justice Scalia, his “judicial legacy stands a chance of being vindicated” and “poised to set the tone for future constitutional battles in a way not seen since the 1935 death of Oliver Wendell Holmes.”<sup>23</sup> Thus, Justice Scalia’s legacy may extend for years to come because he was able to influence lawmaking in both specific and general ways.

The second way that Justice Scalia went public was through the language he chose to fashion his Supreme Court decisions. In his review of judicial rhetoric, Robert A. Ferguson reminded us that the function of a judicial opinion is not simply to offer reasons. Using advice handed down from classical rhetoricians, Ferguson cited Aristotle who argued in *On Rhetoric* that what distinguishes the political from the judicial is that the judicial not only must show that circumstances are as the speaker says, but also to gain over the hearer.<sup>24</sup> Cicero went further and argued that the judicial rhetor has the obligation to “move” or “gain over” the understanding.<sup>25</sup> The implied audience for both Aristotle and Cicero was not other judges, but citizens

in the public sphere. Maria A. Failinger echoed this observation when she argued that the general public is, perhaps, the most important audience for Supreme Court decisions.<sup>26</sup>

On multiple occasions, Justice Scalia told audiences of law students that he wrote dissents with their case books in mind.<sup>27</sup> However, the rhetorical choices he made in his written opinions, dissents, and concurrences show a consideration for a wider audience. Michigan Supreme Court Justice Joan Larsen argued that Justice Scalia's opinions were "eloquent, often potent and thoroughly enjoyable to read, but also accessible."<sup>28</sup> And Toni M. Massaro, the Dean of University of Arizona James E. Rogers College of Law, Tuscon, Arizona, gave examples of Justice Scalia's style to highlight "lexicon surprises," like "pure applesauce" and "jiggery-pokery," that would appeal to legal and non-legal audience alike.<sup>29</sup>

In her review of Justice Scalia's use of metaphors, colloquialisms, and humor, Meghan J. Ryan argued that his use of metaphors, "served to form a bond with many of his readers," his colloquialisms "were effective in communicating with a lay audience" and "establish[ed] rapport with them," and his humor "served to make his opinions memorable and drew in audiences who might otherwise have been uninterested in reading judicial opinions."<sup>30</sup>

While Failinger argued that Justice Scalia's written decisions, in particular his dissents, violated the "warranted trust" with his sarcasm and cynicism, it seems that those very elements were sources of interest and identification with at least part of the American public.<sup>31</sup> Justice Scalia often portrayed liberal Justices as elitist and power-hungry. For example, in *Obergefell v. Hodges*, Justice Scalia argued:

Today's decree 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. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>32</sup>

In this way, Justice Scalia identified with those who believe that the Court is out of control, a perception shared by many conservatives and which prompted Justices Breyer, O'Connor, and Scalia to respond publicly in 2005 to criticisms that the Court was "running amok."<sup>33</sup>

In an era of an increasingly divided court, Justice Scalia's choice to go public was, perhaps, a choice to play the long game. In his review of *Scalia: A Court of One* by Bruce Allen Murphy, David Fontana argued that Justice Scalia will be "one of the more influential justices of his time . . . because influence on the Court today increasingly comes not from persuading immovable justices on the Court in the short term, but from changing how we talk about constitutional law outside of the Court in the longer term."<sup>34</sup> In this way, Justice Scalia forged news paths by which a Justice can affect the law in the same style that American Presidents have popularized. Although popular and increasingly easy, the success of going public as a particular style of politics is not guaranteed. Going public "may not provide the forum to explain complicated policies and to attempt to build alliances in support of these policies over a lengthy period of time."<sup>35</sup> Justice Scalia, however, is not bound to a specific policy, just a perspective—which he made not only understandable, but ideologically pleasing to many conservatives through his linguistic aptitude.

Going public about his constitutional philosophy functions as a style of politics that makes sense for Justice Scalia given the way such style allowed him to appear to resist the urge to legislate from the bench. For example, in a *60-Minutes* interview, Justice Scalia argued, "You think there ought to be a right to abortion? No problem. The Constitution says nothing about it. Create it the way most rights are created in a democratic society. Pass a law."<sup>36</sup> For Justice Scalia, the decisions he made that had legislative impact were the result of correctly interpreting the Constitution, which he argued was his only responsibility.<sup>37</sup> Any other changes would have to be brought about through the legislative branch of government. As suggested above, Justice Scalia's advocacy of textualism-originalism has and will likely continue to impact the laws of the land. By going public, Justice Scalia circumvented

the limitations of his position to influence others to either adopt his perspective or to curtail the efforts of those who disagreed with him.

In many ways, the kind of discourse in which Justice Scalia regularly engaged both frustrated and infuriated his critics. William B. Gould IV held little back when he argued that Justice Scalia's "position was one of near unrelenting hostility to the victims of discrimination. . . . [H]is opposition to the court's 2015 view that gays have a constitutional right to marry was so obdurate that his intemperate criticism of Justice Anthony Kennedy went far beyond the bounds of judicial civility."<sup>38</sup> Failinger wrote a lengthy assessment of Justice Scalia's jurisprudence from a rhetorical perspective to argue that Justice Scalia abused the "warranted trust" given to political officials in democracies by writing his opinions in divisive and dismissive terms.<sup>39</sup> A case in point is Justice Scalia's interaction with Princeton student, Duncan Hosie, who asked Justice Scalia if he had any regret or shame about "comparing gays to people who commit murder or engage in bestiality." Hosie concluded, "I'm gay, and as somebody who is gay I find these comparisons extraordinarily offensive." Unsurprisingly, Justice Scalia did not confess to any regrets and, instead, with "a note of something between sarcasm, condescension, and stubbornness"<sup>40</sup> proceeded to explain that the comparison was not direct, but a strategic choice: "It's a type of argument that I thought you would have known. . . . I'm surprised you aren't persuaded." For those who disagree with Justice Scalia, he might be easy to dismiss as arrogant or rude, but we believe to do so is to underestimate the power of Justice Scalia's rhetorical aesthetics.

For Justice Scalia, his style was also a way of affirming a certain way of relating with the Constitution because it invited a kind of perspective. Richard Posner explored the connections between the law and literature recognized that style in judicial opinions contributed to "making the reader believe, not merely enjoy the writer."<sup>41</sup> Moreover, "matters of style" are "densely interrelated" with "community identity" and "[m]odes of verbal, written or symbolic style enable one to participate in strategies of communication favorable to sustaining an array of social relations."<sup>42</sup> Constitutional matters are the core of the American identity, which guides written

opinions, concurrences, and dissents. To the extent that the success of the justifications contained within a court decision “turns on rhetorical finesse” they “involve conventions of persuasive composition that depend on aesthetic reactions.” Thinking about style in this way allows us to assess style as a “kind of discourse that influences political action.”<sup>43</sup>

### The Republican Rhetorical Style

While Justice Scalia’s public rhetoric allowed him to encourage policy makers and the public to identify with his perspective, his perspective was also stylized in a way consistent with the republican rhetorical style. Robert Hariman described a number of political styles, which he defined as “a coherent repertoire of rhetorical conventions depending on aesthetic reactions for political effect.”<sup>44</sup> One of those is the republican rhetorical style, which was “designed to maximize the political opportunities available within electoral campaigning and parliamentary deliberation” and epitomized by the Roman orator, Cicero.<sup>45</sup> It is a political style that “seems to be particularly imbued with a set of ideas about human nature and good government.”<sup>46</sup> The republican rhetorical style “begins with a relish for the pleasures of composing and delivering persuasive public discourse, . . . defining consensus as the foundational means and ends of governance, and it culminates in a model of leadership that features personal embodiment of the civic culture.”<sup>47</sup> The republican rhetorical style privileges leaders who use discourse to “form the virtuous community” rather than public servants who “represent it,” by enacting the “specific practices of cultural memory that are themselves of little importance within contemporary culture.”<sup>48</sup>

Consistent with his interpretive ethos, Justice Scalia cultivated the republican rhetorical style that he often deployed in jeremiadic form. As John Murphy argued, the jeremiad “reaffirm[s] the viability and nobility of the American experiment” and “carries with it “fundamental assumptions that make serious consideration of structural change difficult.”<sup>49</sup> To be an American is to accept the terms of those who created the Constitution. In this way, the jeremiad is a genre that is conducive to the principle elements and politics of the republican rhetorical style. The substantive

expectations of the jeremiad fit well with the republican rhetorical style's ideas on governing, concern for the stability of the republic, making enemies of those who disagree, and enacting the cultural forms of memory.

Justice Scalia's jeremiadic rhetorical form provided argumentative grounds, ethos, and pathos to advance a fairly consistent conservative project. Justice Scalia's republican rhetorical style may be recognized in his love of words and regular use of public forums to espouse the benefits of textualism-originalism as a means of preserving the democracy set forth by the founders. The style is evident in his writing and speeches. For example, Justice Scalia fiercely defended his interpretive approach to the Constitution and warned against the perils of a 'Living Constitution' perspective. In a speech to the Federalist Society, Justice Scalia argued that "you would have to be an idiot" to believe that the Constitution should "change with society, like a living organism" because the "Constitution is not a living organism; it is a legal document. It says something and doesn't say other things."<sup>50</sup> In a speech at Southern Methodist University, Justice Scalia stated that the Constitution is "not a living document;" it is "dead, dead, dead."<sup>51</sup> And the "worst thing about the living constitution" he argued, "is that it will destroy the constitution."<sup>52</sup>

Given the republican rhetorical style's emphasis on consensus, it is odd that Justice Scalia would choose to frame, as he so often did, his opponents in unflattering terms and finding little or no common ground. His dissent in *Obergefell v. Hodges* is representative and worth quoting at length:

I write separately to call attention to this Court's threat to American democracy. . . . This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.<sup>53</sup>

Where the republican rhetorical style requires a politician, Justice Scalia was a prophet. He positioned himself outside of the political elite class of which he was squarely a part. From his privileged, yet outside position, he predicted doom and

gloom for American democracy with little effort to find consensus, although he did offer an alternative elsewhere in which the republican rhetorical style takes the form of the American jeremiad.

The republican rhetorical style easily finds articulation within the jeremiadic form because they share a similar ethos, pathos, and logos. The jeremiad or “‘political sermon’ . . . arrived with the Puritans in North America” and provided “renewal in a time of troubles.”<sup>54</sup> Although originally based in the Judeo Christian tradition, the modern form of a jeremiad is secular. The cycle of the modern jeremiad suggests that the “difficulties of the day” are the result of failing to adhere to “principles articulated by patriots such as Jefferson and Lincoln,” but a “bright future can become reality” if there is a renewed commitment to “the American covenant” and the “principles of the past.”<sup>55</sup> For example, in *Morrison v. Olson*, Justice Scalia’s dissent warns not only of the dangers of the Court’s decision to uphold the Independent Counsel Act, but also the means by which they arrived at their decision. He argued that the content of the case signaled a time of trouble for it was unlike other separation of powers cases that are “clad, so to speak, in sheep’s clothing, . . . But this wolf comes as a wolf.” Equally troubling for Justice Scalia was the mode of decision making. He argued that the Court’s decision was evidence that “the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.” This current malaise is the result of the lack of the Court’s fidelity to the Constitution. Justice Scalia reasoned, “Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court’s opinion is that it does not even purport to give an answer.”<sup>56</sup> Consistent with the jeremiadic form, the means by which the U.S. could avoid such undesirable conditions would be to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says quite plainly that “[t]he executive Power shall be vested in a President of the United States.”<sup>57</sup>

In his dissent to *Morrison v. Olson*, Justice Scalia identified the dire consequences associated with falling away from what he deemed to be a departure from the true meaning of the Constitution; a text whose wisdom protects our liberties. Implied in Justice Scalia's dissent is that his, rather than the Court's, interpretation of the text is correct and must be adopted to avoid a government not subject to laws (but, rather, to the Constitution). Perhaps the most efficient and clear example of Justice Scalia's use of the jeremiadic form is found in the preface to *Reading Law*, which begins:

Our legal system must regain a mooring that it has lost: a generally agreed-on approach to the interpretation of legal texts. In this treatise we seek to show that (1) established methods of judicial interpretation, involving scrupulous concern with the language of legal instruments and its meaning, are widely neglected; (2) this neglect has impaired the predictability of legal dispositions, has led to unequal treatment of similarly situated litigants, has weakened our democratic processes, and has distorted our system of governmental checks and balances; and (3) it is not too late to restore a strong sense of judicial fidelity to texts.<sup>58</sup>

Contained within this paragraph is the cycle of the jeremiad, complete with an articulation of current anxieties caused by a lack of fidelity to the past that can be remedied by adopting the textualist method.

Textualism-originalism as an interpretive method is a form of adhering to the principles of the Founders because, as explained above, one interprets the sacred words of the Constitution in a way that the average person alive at the time of its writing would have understood them. Justice Scalia argued that his interpretive method was not ideological and regularly referred to his decision in *Texas v. Johnson* that protected flag burning under the First Amendment,<sup>59</sup> or his personal objection to flogging as a form of acceptable punishment<sup>60</sup> as examples. The definition of words like "flogging" or acts like "flag burning" and how they relate to the text of the Constitution are, according to Justice Scalia, culturally bound to that historical moment and would reflect the values of that America. As Justice Scalia stated, "[w]ords have meaning. And their meaning doesn't change," even though that means that "a lot of stuff that's stupid is not unconstitutional."<sup>61</sup>

Textualism-originalism, bound to the definitions of included terms when the Constitution was ratified, is a philosophy of interpretation of the U.S. Constitution that requires deference to the values of a particular historical period. Words may not change, but the cultural composition of the United States has. Justice Scalia's argument that the 14<sup>th</sup> amendment does not apply to women, that African Americans may be better served at "less advanced" or "slower-track" schools, or his objection to constitutional protection for same sex marriage are forms of adherence to values that would be consistent with the values of the Founders.<sup>62</sup> The jeremiad's emphasis on the negative—articulation of current ills in terms of what we are not valuing or enacting—enabled and gave urgency to Justice Scalia's republican rhetorical style, which allowed him to be influential "even when he was on the losing side." Like many politicians, Justice Scalia may be most remembered for the moments when he went negative while resonating with many who perceived him "as speaking for fundamental national values."<sup>63</sup>

### Conclusion

The purpose of this essay was to assess Justice Scalia's legacy from a communicative standpoint. We have argued that going public was the style of Justice Scalia's rhetoric and an examination of Justice Scalia's republican rhetorical style, particularly in its jeremaidic form reveals Justice Scalia's rhetorical style. The result was a jurist who could not be ignored for reasons beyond being a Supreme Court Justice in an administrative capacity.

There are at least two conclusions about the connection between rhetoric and style that we wish to explore in concluding our study. First, taken together, the two rhetorical styles—jeremiad and republican—were mutually reinforcing. His style of advocating for textualist-originalist forms of constitutional interpretation was successful because of his discursive style, and his discursive style was successful because of his style in going public. If going public allowed Justice Scalia to circumvent the limitations of his position to effect the law, his republican rhetorical style often articulated through the familiarity and drama of the jeremiad, gave Justice

Scalia an appearance of presumption, efficiency, and consistency—all features necessary for taking a case public.

Justice Scalia's charm and affability in his public appearances (also a feature of the republican rhetorical style) made it difficult to argue against him. His demeanor forced the opposition into using an argumentative form reliant on knowledge of the law. And if Justice Scalia did not approve of the opposing side, he often simply mocked them and/or made other claims to discredit their decision. For example, in *Webster v. Reproductive Health Services*, Justice Scalia directly attacked Justice Sandra O'Connor when he declared "Justice O'Connor's assertion that a 'fundament rule of judicial restraint' requires us to avoid considering *Roe* cannot be taken seriously."<sup>64</sup> In making this statement, Justice Scalia's purpose appears to be to "label O'Connor as a 'hypocrite' for refusing to tackle the abortion issue."<sup>65</sup> In *NEA v. Finley*, Justice Scalia took on the opinion of the Court by arguing: "The Court devotes so much of its opinion to explaining why this statute means something other than what it says that it neglects to cite the constitutional text governing our analysis."<sup>66</sup> For the plaintiffs in the case, Justice Scalia had this to say: "Avant-garde *artistes* . . . remain entirely free to *épater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of dangerous ideas.'"<sup>67</sup> As Jeffery M. Shaman observes, this sentence was the "quintessential Scalia: poison pen, sarcasm, and irony encased in two cunning foreign phrases."<sup>68</sup> In this way, Justice Scalia's style was concerned with impact by attempting to undermine the conditions necessary for productive civic participation and discussion. In other words, labeling ideas with terms like "preposterous," lacking "seriousness," and charging "hypocrisy" are typically used in public discussion and civic participation to disengage, to not take seriously, or if preposterous, then to not even be worthy of further engagement. In legal argument, these words are supplemental to the Constitution. Far from legal arguments, they are not textualist-originalist in nature, but rather are stylistic supplements to the reasoning.

If Justice Scalia's style supplemented the conditions for productive public and political discussion, his style also functioned as a way for answering many inconsistencies. Pamela S. Karlan observed that "Justice Antonin Scalia was an influential justice not because he was right, but because he could write."<sup>69</sup> Always willing to publicly chastise those who did not share his philosophy, Justice Scalia was either blinded to his own inconsistencies or used his style to cover the inconsistencies in his argument. Andrew Koppelman points out that at times Justice Scalia was "prepared to interpret the Constitution very creatively."<sup>70</sup> A case in point was the *Bush v. Gore* decisions in which the Court's decision halted counting the Florida ballots and installed George W. Bush as president, even though they are given no constitutional power to resolve disputed elections. Conversely, in *Parents Involved in Community Schools v. Seattle School District*, Justice Scalia declined to discuss the evidence provided to them in briefs that explained the way race-conscious strategies of achieving integration were consciously adopted by the framers of the Fourteenth Amendment.<sup>71</sup> Indeed, Justice Scalia's decisions on the Court created a cottage industry in law schools that regularly demonstrated that Justice Scalia deployed the interpretive method of textualism or originalism when it suited his interests.<sup>72</sup> These inconsistencies are simply asserted as true and detractors to this approach are framed as unreasonable, which makes for fun reading, but fails to practice the values at the heart of the republican rhetorical style from which he preaches.

Admiration for Justice Scalia is consistent with observations about the coarsening of American politicization of the Court.<sup>73</sup> Going public is consistent with the republican rhetorical style, but Justice Scalia's enactment of it suggests that he exploited the style for his own political gain rather than in the defense of the republic. As evidenced above, Justice Scalia neglected the "code of civility" in the republican rhetorical style by allowing "the legislative process to encompass conflict" to achieve "the political education that is designed to perpetuate the republic."<sup>74</sup> Justice Scalia's style was also at odds with the generic need for Jurists to render judgment "while also covering the distance between winners and losers. The language used must be circumspect as well as declarative in tone."<sup>75</sup> In other words, the judicial decisions

and its reasoning must bind the tear in community exacerbated by the case under consideration. The public nature and appeal of Justice Scalia's style may only serve to create a wider divide even as we admire his ability to bend language to his will.

### Notes

<sup>1</sup> Richard A. Posner, "The Court of Celebrity," *New Republic*, May 05, 2011, <https://newrepublic.com/article/87880/supreme-court-burger-blackmun-media-celebrity>.

<sup>2</sup> Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul, MN: Thomson/West, 2008), xxi, xxiii.

<sup>3</sup> Antonin Scalia and Kevin A. Ring, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice* (Washington, D.C.: Regnery Pub., 2004), ix.

<sup>4</sup> "Stanford Law Faculty on Justice Scalia's Legacy," *Stanford Law School*, <https://law.stanford.edu/2016/02/15/stanford-law-faculty-on-justice-scalia/>.

<sup>5</sup> "Style or Substance? Which Made Scalia (In)Famous?" *Big Law Business*, last modified November 21, 2016, <https://bol.bna.com/style-or-substance-which-made-scalia-infamous/>.

<sup>6</sup> Yury Kapgan, "Of Golf and Ghouls: The Prose Style of Justice Scalia," *The Journal of the Legal Writing Institute* 9 (2003): 71, [http://www.law2.byu.edu/Law\\_Library/jlwi/archives/2003\\_1.htm](http://www.law2.byu.edu/Law_Library/jlwi/archives/2003_1.htm).

<sup>7</sup> Andrew Koppelman, "Passive Aggressive: Scalia and Garner on Interpretation," *Boundary 2: An International Journal of Literature and Culture* 41, no. 2 (2014): 227.

<sup>8</sup> Kapgan, "Golf and Ghouls," 73.

<sup>9</sup> *Ibid.*, 72.

<sup>10</sup> Barry Brummett, "Introduction" in *The Politics of Style and the Style of Politics*, ed. Barry Brummett (Lanham, MD: Lexington Books, 2011), xxx.

<sup>11</sup> Craig R. Smith, *Rhetoric and Human Consciousness*, 2nd ed. (Long Grove, IL: Waveland Press, 2003), 137, 141.

<sup>12</sup> Samuel Kernell, *Going Public: New Strategies of Presidential Leadership*, 4<sup>th</sup> ed. (Washington, D.C.: CQ Press, 2007).

<sup>13</sup> Robert Hariman, *Political Style: The Artistry of Power* (Chicago: University of Chicago Press, 1995), 2.

<sup>14</sup> Kernell, *Going Public*, ix.

<sup>15</sup> Tony Mauro, "High Court Adjourns for the Summer Intact," *Legal Times*, July 9, 1990, p. 10.

<sup>16</sup> Christopher E. Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Moment* (Westport, CT: Praeger, 1993), 3.

<sup>17</sup> Ryan, J. Meghan, "Justice Scalia's Bottom-Up Approach to Shaping the Law," *William & Mary Bill of Rights Journal* 25, no. 1 (2016): 313.

<sup>18</sup> Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson/West, 2012), xxvii.

<sup>19</sup> Smith, *Supreme Court's Conservative Movement*, 30.

<sup>20</sup> *Ibid.*

<sup>21</sup> Donald Trump, Twitter post, February 13, 2016. 2:34 p.m. [https://twitter.com/realDonaldTrump/status/698636369229385728?ref\\_src=twsrc%5Etfw](https://twitter.com/realDonaldTrump/status/698636369229385728?ref_src=twsrc%5Etfw) (emphasis in original).

<sup>22</sup> George Leef, "The Ideal Trump Supreme Court Pick: An Originalist Who Isn't A Fan Of Stare Decisis," *Forbes*, November 18, 2016, <http://www.forbes.com/sites/georgeleef/2016/11/18/the-ideal-trump-supreme-court-pick-an-originalist-who-isnt-a-fan-of-stare-decisis/#5b7db7792f13>.

<sup>23</sup> Noah Feldman, "In Death, Antonin Scalia Became one of 2016's Most Influential Figures," *Star Tribune*, December 30, 2016, <http://www.startribune.com/in-death-antonin-scalia-became-one-2016-s-most-influential-figures/408781105/>.

<sup>24</sup> Robert A. Ferguson, "Judicial Rhetoric and Ulysses in Government Hands," *Rhetoric & Public Affairs* 15, no. 3 (2012): 437.

<sup>25</sup> *Ibid.*, 437.

<sup>26</sup> Maria A. Failing, "Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia," *University of Toledo Law Review* 43 (2003): 472.

<sup>27</sup> For example, see David Lat, "How Justice Scalia's Writing Style Affected American Jurisprudence." *Above the Law*, November 21, 2016, <http://abovethelaw.com/2016/11/how-justice-scalias-writing-style-affected-american-jurisprudence/>; See also, Jerry de Jaeger, "Justice Scalia Comes Home to the Law School." *University of Chicago Law School*, Spring, 2012, <http://www.law.uchicago.edu/alumni/magazine/spring12/scalia>.

<sup>28</sup> Kimberly Robinson, "Style or Substance? Which Made Scalia (In)Famous?" *Bloomberg Law*, November 21, 2016, <https://bol.bna.com/style-or-substance-which-made-scalia-infamous/>.

<sup>29</sup> Robinson, "Style or Substance?" <https://bol.bna.com/style-or-substance-which-made-scalia-infamous/>.

<sup>30</sup> Meghan J. Ryan, "Justice Scalia's Bottom-Up Approach to Shaping the Law," *William & Mary Bill of Rights Journal* 25, no.1 (2016): 304.

<sup>31</sup> Failing, "Not Mere Rhetoric," 429, 475.

<sup>32</sup> *Obergefell v. Hodges*, 576 U. S. \_\_\_\_\_ (2015), 2.

<sup>33</sup> David Stout, "3 Justices Respond Personally to Criticisms of U.S. Judiciary," *New York Times*, April 22, 2005, <http://www.nytimes.com/2005/04/22/politics/3-justices-respond-personally-to-criticism-of-us-judiciary.html>.

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<sup>35</sup> Matthew Corrigan, "The Transformation of Going Public: President Clinton, the First Lady, and Health Care Reform," *Political Communication* 17, no. 2 (2000): 160-161.

<sup>36</sup> "Justice Scalia on the Record," by Lesley Stahl. *CBS*. April 24, 2008.

<sup>37</sup> Antonin Scalia and Kevin A. Ring, *Scalia's Court: A Legacy of Landmark Opinions and Dissents* (Washington, D.C.: Regnery Pub., 2016), Kindle edition, chap. 1.

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<sup>39</sup> Failing, "Not Mere Rhetoric," 429.

<sup>40</sup> Davidson, Amy. "The Animus of Antonin Scalia." *Daily Comment. The New Yorker* Last Modified December 12 2012. <http://www.newyorker.com/news/daily-comment/the-animus-of-antonin-scalia>

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<sup>42</sup> Vivian, Bradford. Preface to *The Politics of Style and the Style of Politics: The Problems and Promises of Rhetorical Style* (Lanham, MD: Lexington Books, 2011), xvi.

<sup>43</sup> Brummett, Barry. *A Rhetoric of Style*. (Carbondale: Southern Illinois University Press, 2008), 80.

<sup>44</sup> Hariman, *Political Style*, 2, 3, 4.

<sup>45</sup> *Ibid.*, 95.

<sup>46</sup> *Ibid.*, 96.

<sup>47</sup> *Ibid.*, 102.

<sup>48</sup> *Ibid.*, 110, 129.

<sup>49</sup> Murphy, “Time,” 412.

<sup>50</sup> Melissa McNamara, “Scalia Raps ‘Living Constitution,’” *CBS News*, February 14, 2006, <http://www.cbsnews.com/news/scalia-raps-living-constitution/>.

<sup>51</sup> Clare Kim, “Justice Scalia: Constitution is ‘Dead,’” *MSNBC*, October 2, 2013, <http://www.msnbc.com/the-last-word/justice-scalia-constitution-dead>.

<sup>52</sup> Antonin Scalia, “The Worst Thing about the Living Constitution is that it Will Destroy the Constitution: Constitutional Interpretation the Old Fashioned Way” (remarks at the Woodrow Wilson International Center for Scholars, Washington, D.C., March 14, 2005).

<sup>53</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>54</sup> John Murphy, “A Time of Shame and Sorrow: Robert F. Kennedy and the American Jeremiad,” *Quarterly Journal of Speech* 76, no. 4 (1990): 403.

<sup>55</sup> Murphy, “Time,” 404.

<sup>56</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

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<sup>58</sup> Scalia and Garner, *Reading Law*, xxvii.

<sup>59</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

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<sup>61</sup> Jennifer Senior, “In Conversation: Antonin Scalia.”; See also, Jeffrey Rosen, “What Made Antonin Scalia Great,” *The Atlantic*, February 15, 2016, <https://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/>.

<sup>62</sup> Yanan Wang, “Where Justice Scalia Got the Idea that African Americans Might be Better off at ‘Slower-Track’ Universities,” *The Washington Post*, December 10, 2015, [https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/where-justice-scalias-got-the-idea-that-african-americans-might-be-better-off-at-slower-track-universities/?utm\\_term=.2b3931d86941](https://www.washingtonpost.com/news/morning-mix/wp/2015/12/10/where-justice-scalias-got-the-idea-that-african-americans-might-be-better-off-at-slower-track-universities/?utm_term=.2b3931d86941).

<sup>63</sup> *Ibid.*, 411.

<sup>64</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

<sup>65</sup> Smith, *Supreme Court’s Conservative Movement*, 94.

<sup>66</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

<sup>67</sup> *Ibid.*, 7.

<sup>68</sup> Jeffrey M. Shaman, “Justice Scalia and the Art of Rhetoric,” *Constitutional Commentary* 28, no. 2 (2012): 292.

<sup>69</sup> “Stanford Law Faculty on Justice Scalia’s Legacy,” *Stanford Law School*, last modified February 15, 2016, <https://law.stanford.edu/2016/02/15/stanford-law-faculty-on-justice-scalia/>.

<sup>70</sup> Koppelman, “Passive Aggressive,” 233.

<sup>71</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

<sup>72</sup> See, for example, Erwin Chemerinsky, “The Jurisprudence of Justice Scalia: A Critical Appraisal”, *U. HI. L. Rev.* 22 (2000). (“Justice Scalia uses [original meaning jurisprudence] selectively when it leads to the conservative results he wants, but ignores [it] when it does not generate the outcomes he desires.”): 385; Christopher L. Eisgruber, “Birthright Citizenship and the Constitution,” *N.Y.U. L. Rev.* 72 (1997): 54, 89. (“Scalia prefers a Constitution that authorizes the judiciary to protect certain libertarian rights”); Gene R. Nichol, “Justice Scalia and the *Printz* Case: The Trials of an Occasional Originalist,” *U. Colo. L. Rev.* 70, (1999): 953, 968. (“[Originalism’s] principal advocates relentlessly refuse to stick by it. Originalism works if they agree with the outcome dictated by history. If history does not lead them where they want to go,

they simply reject it.”); see also David M. Zlotnick, “Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology,” *Emory Law Journal* 48 (1999): 1377, 1423.

<sup>73</sup> This is apparent in, for example, the political scrutiny of judicial candidates in the Senate confirmation hearings for Supreme Court nominees since Reagan’s Bork nominee. The length of those hearings, and framing judicial nominees in political terms, is mostly absent prior to this last 30 year period.

<sup>74</sup> Hariman, *Political Style*, 122-123.

<sup>75</sup> Robert A. Ferguson, “Judicial Rhetoric and Ulysses in Government Hands,” *Rhetoric & Public Affairs* 15, no. 3 (2012): 437.