

Antonin Scalia: A Study in Contradictions

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On February 13, 2016, Supreme Court Associate Justice Antonin Scalia died. His quiet passing in the middle of the night, in a remote West Texas town, garnered much public interest and commentary. Public officials lauded him for his intellectual contributions to American jurisprudence; lay persons wished him well in the fiery pits of hell. When I received the news, I was taken aback; I felt as if a member of my own family had died.

Scalia's death was profound in my life for multiple reasons. First, I had been studying Scalia for almost two decades. I spent countless hours reading his judicial opinions, speeches, and extra-judicial writings, as well as listening to his questioning during oral arguments and his responses during taped interviews. Second, I was concluding a manuscript about his jurisprudence when it occurred. My personal communication devices and social media "blew up," with friends and family reaching out to me to make sure I was aware Scalia had died and to see how I was taking the news. Overnight my research shifted from being one analysis of Scalia's jurisprudence to being a definitive reading of his decision-making. His death occurred unexpectedly; all Supreme Court observers anticipated Scalia sitting for many more years on the bench. I expected him to give more speeches and to write more opinions—to contribute more to the body of knowledge about textualism, originalism, and the areas of law I studied.

The arch of my intellectual growth, in a very significant way, tracked with my study of Scalia—beginning relatively early in his tenure on the Supreme Court and culminating in his death. When I began studying Scalia, I was a relatively young conservative interested in the forceful articulation of conservative values. A friend dubbed me a "thinking conservative"—someone who would not adhere to conservative principles just for the sake of the ideology. My friend's reasoning was that I question

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issues, attempting to take positions that remain logically consistent with my intellectual commitments yet maximize my compassion for my community. Prior to studying Scalia, I thought the Justice to be a “thinking conservative” as well. My analysis of his opinions led me to conclude that he was not. As I reflected upon his passing, I had a heightened awareness of how my analysis of his work had altered my intellectual and social space. Although I believed then, similarly to Scalia, that a strict reading of the constitutional text is integral to the stability of our constitutional democracy, I have become convinced that such a reading is improbable, if not impossible. I reached my conclusion through my close textual analysis of Scalia’s opinions in three different areas of law—church and state, capital punishment, and abortion. In his judicial opinions, I observed a justice unable to engage in strict interpretation. Rather, he used doctrinal arguments, ethical reasoning, and prudential weighing of the facts to reach his conservative ends. He also twisted the meaning of terms to fit his conservative agenda. Scalia’s assertion of how the law should be interpreted, versus how he actually interpreted the law, seemed to me a study in contradiction.

Scalia was a man of many contradictions. Over the years, Scalia made headlines for refusing to allow his speech accepting the Citadel of Free Speech Award to be recorded;¹ for cherry picking examples that support his textualism/originalism;² supporting the government’s right to restrict individual rights during times of war;³ for recusing himself in the “under God” case⁴ but for not recusing himself from a case involving Dick Cheney’s energy task force meetings shortly after going duck hunting with the then-Vice President.⁵ These actions raised questions about Scalia’s personal ethics and seemed hypocritical for a man who openly promoted his judicial philosophy through many means, including books, judicial opinions, law review articles, and speeches. Scalia’s contradictions constructed easy categories through which his supporters and his opponents characterized him. Yet these contradicting categories did not allow Scalia to remain firmly fixed in either category. Whereas some cast him as an institutional hero, others painted him as a master villain. Scalia was both judicial jokester and the author of a poison pen. He was a self-proclaimed textualist, and a self-

actualized interpretive pluralist. He was, in other words, a complex character who ultimately escaped easy classification.

Contradiction 1: Institutional Hero or Master Villain

The first way in which Scalia was a study in contradiction was the ways in which he simultaneously embodied good and evil. The framing of Scalia through a dualistic lens—either the institutional hero or the master villain—echoes the dualistic nature of America’s adversarial system. Our system is rife with winners and losers. Scalia presents an interesting case study, however, because he embodied both hero and villain within the figure of *one* person. In an earlier essay, I argued how the law and its ends are framed as “good” within landmark judicial dissents.⁶ Included within this framing is the Constitution and the majority will as good. Landmark judicial opinions frame “evil” as “whatever contradicts the Constitution, hinders the will of the people, or works toward the antithesis of the Constitution’s telic ends.”⁷ Whether Scalia was hero or villain depended upon who did the talking, and how they framed Scalia’s argumentation and jurisprudence.

Institutional decorum appears to regulate how most public figures memorialized Scalia. His peers on the Court characterized him as a “one of the most important figures” in judicial history.⁸ It is no secret that Ruth Bader Ginsburg, the Notorious RBG, liberal darling of the High Bench, was one of his closest friends. Upon hearing of his death, Ginsburg remembered Scalia as “a jurist of captivating brilliance and wit.”⁹ Elected officials on both sides of the aisle characterized him as “brilliant,”¹⁰ “an American hero,”¹¹ “influential,”¹² and “consequential.”¹³ Legal scholars described him as a passionate and articulate advocate of his values, as well as an affable person to be around.¹⁴ Scalia was “transformational,”¹⁵ altering both the way in which the legal community approached the law, and how the lay community talked about legal issues. *CNN* correspondent Carolyn Shapiro recounted how, more than thirty years ago, constitutional law textbooks did not include a copy of the Constitution. Following Scalia’s ascension to the High Bench, and his widespread advocacy of the constitutional text, the Constitution was included as an appendix to textbooks before working its way

up into the front matter.¹⁶ When asked about her thoughts on originalism as a form of judicial interpretation, Justice Elena Kagan explained during her Senate confirmation hearing, “we are all originalist” now.¹⁷ Because of Scalia’s activism, no appellate attorney dare craft an appeal that does not consider the language of the law. Perhaps most importantly, however, Scalia had the ability to advocate and to explain difficult legal concepts in a way that was accessible to the average American. Smart and witty, this infamous Justice knew how to turn a phrase.

The same qualities that institutional personalities identified as his strengths presented as weaknesses to Scalia’s detractors. Multiple journalists over the years covered how Scalia was the Justice people loved to hate. Following his death, professional and lay commentators described Scalia as a “homophobe,”¹⁸ a “racist,”¹⁹ a “bigot,”²⁰ “the worst person in America,”²¹ “evil, soulless, and hateful man,”²² “a monster,”²³ a “cartoon supervillain,”²⁴ “cruel” and “demeaning,”²⁵ and “a titanic, sweeping, one-man disaster”²⁶ for human decency. Tweets promised to urinate on his grave, questioned how long until they could publicly rejoice at his death, and proclaimed that he was rotting in hell.

Encased in the protective cloak that life tenure on the High Bench, public discourse personified Scalia as an essentialized, polarizing figure: he was either good *or* bad; he was not a combination of the two. Legal titan or a devil incarnate—there seemed to be no Scalia of middle-earth. Institutional figures, represented by our judicial, executive, and legislative branches as well as by many of our journalists, talked about Scalia as an institutional hero. Scalia was the great conservative hope—an intellectual giant who had the ability to articulate conservative values and to advance the conservative cause. The judicial robes, however, did not have a halo effect upon Scalia’s public persona. Progressive journalists and lay individuals presented Scalia as a cartoonish-like villain. To critics, Scalia was not a good man with flaws; he was an evil creature imbued with great power. To his detractors, Scalia used his institutional power to harm minorities within American society.

Contradiction 2: Judicial Jokester and Poison Pen

Scalia's prose was a manifestation of his personality: immensely entertaining and/or maddeningly enraging. Scalia's skill with the English language made him a masterful communicator—someone able to translate difficult legal concepts or controversial social issues into language the average person could understand. Scalia's comments during oral arguments stood out from the other justices on the bench. His judicial opinions included memorable phrases and metaphors. His language use was quotable, which made his remarks usable as sound bites in news reports or weblogs. His personality and his prose resulted in him being perceived as a judicial jokester or a poison pen—possibly both.

His oral arguments best illuminate Scalia as judicial jokester. In her remarks following his death, Justice Ginsburg maintained that Scalia “had the rare talent to make even the most sober judge laugh.”²⁷ In a study of laughter during Supreme Court oral arguments, law professor Jay Wexler found Scalia to be “the funniest justice” on the Court. In his analysis of Supreme Court oral arguments, Wexler discovered that Scalia's commentary from the bench elicited the most laughter from the gallery.²⁸ Wexler explains, “Justice Scalia was a brash questioner and would say things people didn't necessarily expect, which helps account for his laughs.”²⁹ In a later study, legal communication scholar Ryan Malphurs confirmed Wexler's findings.³⁰ According to Malphurs, Scalia relied upon hypothetical examples, self-deprecating humor, and banter with advocates and other justices. As an example of his self-deprecating humor, in a speech given in 2005 Scalia used a zombie-like affliction to describe his form of judicial interpretation. Scalia stated, “This is such a minority position in modern academia and in modern legal circles that on occasion I'm asked when I've given a talk like this a question from the back of the room—‘Justice Scalia, when did you first become an originalist?’—as though it is some kind of weird affliction that seizes some people—‘When did you first start eating human flesh?’”³¹ On another occasion he justified his acceptance of the death penalty by framing it as a matter of job security: “I like my job and would rather not resign.”³² The tone of Scalia's joking, Malphurs

explains, depended upon whether Scalia agreed with his opposition. If he did, his joking was good-natured. If he did not, he would be taken as “sarcastic and belittling.”³³

Some of Scalia’s humor used irony to highlight a fallacy of argument. In *Holt v. Hobbs* (2015) the Supreme Court debated an inmate’s religious right to grow a beard. The inmate’s attorney advocated allowing him to grow a half-inch beard, although his religious beliefs directed the inmate to grow a full beard. During oral arguments Scalia joked, “Well, religious beliefs aren’t reasonable. I mean, religious beliefs are categorical. You know, it’s ‘God tells you.’ It’s not a matter of being reasonable. God be reasonable? He’s supposed to have a full beard.”³⁴ Scalia’s ironic humor challenged the sincerity of the inmate’s religious belief by playing upon rigid religious doctrine. Scalia also used ironic humor, albeit dark humor, when he was asked about the fairness of the death penalty. Scalia proclaimed, “You kill; you die. That’s fair.”³⁵ Scalia’s macabre humor does not allow space to question the validity of capital punishment. In these examples, Scalia’s humor remained good-natured. His humorous barbs did not “cut down” any person in particular. Humor is relative, however, and can easily—and quickly—cross the line from ironic or witty commentary to scathing criticism.

The reason so many people perceived Scalia as a villain was because of his use of the poison pen—or the poisonous remark during oral arguments. In his judicial opinions Scalia wrote disparaging comments both toward identifiable minority groups as well as about his fellow justices. Scalia’s most scathing remarks were directed toward queer individuals, with Scalia rejecting queer identity as a valid identity before the law. In his opinions, Scalia supported institutional efforts to discriminate against queer rights.³⁶ He also rejected affirmative action policies and efforts to protect racial minorities against racial discrimination.³⁷ Scalia largest volume of abusive remarks, however, were directed to his peers on the High Court. Most likely his peers were his most frequent target because he had a chance to criticize them hundreds of times a year—every single time the Supreme Court handed down an opinion. Scalia missed no opportunity to challenge the Court’s decision to hear cases as well as the reasoning via which the Court decided a case.

Some of Scalia's worst remarks were made about queer individuals. Scalia's poisoned pen compared homosexual behavior to actions considered by most members of the public to be the worst activities in which humanity can engage. Scalia maintained that refusing to extend protections to queer individuals based upon their sexuality was constitutional. In *Romer v. Evans* (1996) Scalia identified sexual orientation as an acceptable form of conduct for the government to regulate. Discriminating against homosexuals, Scalia opined, is no different than regulating other behavior society deems "reprehensible," such as "murder, for example, or polygamy, or cruelty to animals."³⁸ In *Romer* Scalia criticized queer rights as a form of "special rights." Scalia's opinion rejected a legal, queer identity by disallowing homosexual conduct. In *Lawrence v. Texas* (2003), Scalia validated communities' determination that homosexual sexual behavior is "immoral and unacceptable," comparing same-sex sodomy laws to laws against "fornication, bigamy, adultery, adult incest, bestiality, and obscenity."³⁹ Scalia's parade of horrors provided a list of deviants whose behavior society has seen fit to ban—including queer persons.

Scalia's poisoned pen also garnered many headlines when it was directed toward affirmative action policies. Scalia attracted attention during oral arguments in *Fisher v. University of Texas at Austin* (2013), when he asserted that Black scientists do not attend elite schools; rather, they "come from lesser schools where they do not feel that they're being pushed ahead in classes that are too fast for them."⁴⁰ Scalia portrayed Black Americans as less capable, and as better served by attending a lesser quality university or college for their schooling. Scalia also proclaimed that current affirmative action policies perpetuate the idea that a certain class of people are owed something because of their race. In the oral arguments for *Shelby County v. Holder* (2013), which debated Section 5 of Voting Rights Act, Scalia characterized the act as the "perpetuation of a racial entitlement."⁴¹ Framed as entitlements rather than protections, Scalia validated White fear that Black Americans are unjustly advantaged with one sweep of his pen. Scalia's statements in *Fisher* and in *Shelby County* were not an anomaly in Scalia's race jurisprudence; he had a long history of advocating the termination of affirmative action and equal protection policies.⁴²

Scalia's colleagues on the Supreme Court were his most consistent recipients of his poison pen. Scalia criticized his peers frequently about their opinions—chastising their decision to hear a case, the reasoning they used to decide a case, and the results of the case. Unlike the examples provided in the brief case studies of queer and racial rights, his attacks upon his peers combined humor with his poison pen. In his *Obergefell v. Hodges* (2015) dissent, Scalia compared the reasoning used by other justices “to the mystical aphorisms of the fortune cookie.”⁴³ He described a church state issue in *Lamb's Chapel v. Center Moriches Union Free School District* (1993) to “a ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried.”⁴⁴ “The Imperial Judiciary lives,” Scalia declared in *Planned Parenthood v. Casey* (1992).⁴⁵ In *King v. Burwell* (2015) he famously depicted a colleague's reasoning as “interpretive jiggery-pokery” and “pure applesauce.”⁴⁶ In his *United States v. Virginia* opinion, Scalia referred to the majority as “this most illiberal Court,” “which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter majoritarian preferences of the society's law trained elites) into our basic law.”⁴⁷ He critiqued one opinion as a “tutti-frutti opinion”⁴⁸ and another one as “argle-bargle.”⁴⁹ When dissenting from the *PGA Tour v. Martin* (2001) opinion, Scalia mocked the Court's decision to even hear the case: “It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuant of the Federal Government's power ‘to regulate Commerce with foreign Nations, and among the several States,’ to decide What Is Golf.”⁵⁰ He so disagreed with the majority's opinion in *King v. Burwell*, a case about the Affordable Care Act (also known as Obamacare), that he proposed the opinion be known as “SCOTUScare.”⁵¹ Time and time again Scalia asserted that his peers were deciding cases that should not be decided by the Supreme Court. His descriptions, sometimes taken from other languages, sometimes made-up, and sometimes a creative replacement for a curse word, argued that his peers did not interpret the law in a fashion that made sense. When he was in the minority, Scalia presented the majority as nefarious, haunting, or incompetent—none of which are good.

Both Scalia's judicial jokester and poison pen function rhetorically by making the law—a complex system with its own language and reasoning—accessible to his auditor. During his oral arguments, Scalia interacted with advocates and his colleagues with a mind for his larger audience: the public bearing witness to the appellate argument. A consummate showman, Scalia's remarks in the courtroom, in his speeches and interviews, and in his judicial opinions sought to be understood, remembered, and repeated by his auditors. The vast proportion of his auditors did not know legal concepts or doctrinal arguments. They also did not know what “argle-bargle” (British for nonsensical) or “tutti-fruti” (Italian for all fruits) really meant, but they have a general sense that the terms indicate a lack legal validity. They also would like the sonic play of the words and phrases upon their ears and the sound of the words coming out of their mouths as they recounted excerpts from his opinion to friends. The formality of the law infused with the informality of Scalia's language created a juxtaposition that welcomed the average person into a legal argument.

Scalia's poison pen also manifested a heteronormative, White perspective. When discussing queer and racial rights, Scalia embodied the White heterosexual fear pervasive in that demographic. Scalia attacked queer individuals by throwing them into a class of behavior outside the normal of normative behavior.⁵² He maintained that Black Americans are not as intelligent as other races and decried reverse discrimination.⁵³ Scalia also contended his colleagues on the High Court did not respect the boundaries of federalism and failed to properly interpret the law.⁵⁴ These abbreviated case studies are not meant to be exhaustive, but offer evidence of Scalia's poison pen commentary in his judicial opinions. Sadly, his poison pen became more frequent throughout his tenure on the bench. “In his last years on the bench,” constitutional scholar Mark Graber tells us, Scalia “increasingly turned to insult rather than argument.”⁵⁵ It appeared as if Scalia was fed up with his colleagues, and did not want to waste his time constructing a well-reasoned argument, offering instead a quick barb.

Scalia's persona as judicial jokester or poison pen manifested both as a contradiction and as two sides of the same coin. As a judicial jokester, Scalia endeared

himself to his peers and admirers. As a poison pen, Scalia antagonized progressive advocates and decreased the decorum of the Court. What we see in the examples provided is that Scalia's judicial opinions would combine his humor and his poison pen—to offer vivid critiques of his colleagues, their opinions, and the state of the law.

Contradiction 3: Self-Proclaimed Textualist, Self-Actualized Interpretive Pluralist

As I began examining Scalia's textualism, I sought first to understand what Scalia said textualism should be. As a former academic and public intellectual, Scalia provided a road map for how the law should be interpreted in his many speeches and extrajudicial writings. The law should restrain judges; judges should not be able to engage in what he referred to as "judicial legislating"—making up the law as they go along. According to Scalia, this narrow form of judicial interpretation—the method he calls 'textualism'—can protect against judicial whimsy. It does so by making the Constitution resistant to change. His judicial opinions did not follow the roadmap he set forth in his speeches and his extrajudicial writings, however. Rather, his opinions relied upon the loose forms of interpretation Scalia so frequently critiqued.

Although Scalia never labeled his particular brand of textualism, scholars have identified three forms of textualism: strict, rigorous, and new.⁵⁶ Strict textual construction limits judicial interpretation to the language of a particular article or amendment. Rather than hold the entire document to have significant meaning, strict textualists emphasize key articles or amendments. Moreover, for strict textualists, language has limited meaning that does not change quickly. Strict textualism's limited perspective on language use gives stability and continuity to constitutional meaning, yet it cannot respond to changes in the popular understanding of language. While strict textualism examines distinct elements of the Constitution, rigorous textualism emphasizes the importance of the Constitution in its entirety. "A rigorous textualism," constitutional scholar Mark Tushnet explains, "insists that every constitutional provision—every jot and tittle—contributes meaningfully to the creation of a constitution structured by a set of principles, all of which cohere tightly with each other."⁵⁷ Rigorous textualism relies upon the premise that the constitutional text asserts its own abiding

purpose, extrinsic of meaning created by a judge's opinion. "Rigorous textualism reasons from textual meaning to purposes," Tushnet explains.⁵⁸ For rigorous textualists, linguistic meaning remains consistent throughout the document. In contrast with the first two forms of textualism, both of which assert that the constitutional text has meaning within the boundaries of the text itself, new textualists believe that the Constitution has meaning only within certain linguistic contexts. New textualists "believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understandings to words and phrases, and relies on shared conventions for deciphering those words and phrases in particular contexts."⁵⁹ Therefore, new textualists place agency within the text only when the text is "clear." When the text is not clear, the new textualist defers to the legislature, granting Congress the agency for interpreting the meaning of the text. Meaning derived from context allows the new textualist greater flexibility in interpretation. New textualists recognize that law toggles back and forth between constituting community and being constituted by community, a concept elaborated by James Boyd White in "Law as Language: Reading Law and Reading Language." In that essay White argues that law has a limited, fairly stable, range of meanings. Law is, in a sense, a language; it operates within a community in which meanings are stable, but depends upon particular situational contexts.⁶⁰

Each type of textualism relies upon the actual text of the Constitution to respond to constitutional questions. Each type favors judicial restraint, prefers that the legislature clarify non-legal issues, and denies the role of the judge in determining legal outcomes. Each type has a different strength. Strict textualism simplifies constitutional law by holding that a few principles take primacy over other legal considerations. Rigorous textualism's breadth means that most legal questions can be answered by looking to the overall purpose of constitutional provisions. And new textualism, with its emphasis on constitutive meaning constantly recreated by community interaction with the law, has the flexibility to respond to shifts in contemporary understanding of legal principles.

In the broad debate about the strengths and weaknesses of textualism, many scholars offer Justice Scalia as a case study. Scalia advocated textualist readings of the Constitution in his opinions, writings, and speeches, claiming that expansive, or living, interpretations ultimately would destroy the integrity of the Constitution. In general, scholars sought to classify Scalia's form of textualism and to critique his use of, and departure from, textualism in his judicial opinions.

First, some scholars reclassified Scalia's approach to constitutional interpretation. Aileen Kavanagh, in an article in *The American Journal of Jurisprudence*, informs us that Scalia was an originalist as well as a textualist.⁶¹ Kavanagh distinguishes original intent from original meaning, claiming that Scalia sought to understand the text in light of how the common person would have understood it at the time of ratification, not necessarily what the founders intended the text to mean. Michael McConnell also reclassified Scalia, concluding that Scalia "interprets the text in light of three supplemental jurisprudential principles: originalism, traditionalism, and restraint."⁶² While originalism ties the meaning of the text to its meaning at the time of ratification, traditionalism relies upon the common understanding of the text historically. Restraint refers to the belief that unless the text is clear, the judiciary should defer to the legislative branch for statutory meaning.

Other scholars critiqued Scalia's justification for a textual approach to constitutional interpretation. In "Realizing the Rule of Law in the Human Subject," Patrick McKinley Brennan asserts, "What I am after is an account of what Justice Scalia thinks he is *doing* when he is knowing law," examining in particular Scalia's claims that a constitution should not be read strictly, nor leniently, but reasonably.⁶³ "Reason has been invoked and relied on, but is never explained; and the text—presumably the two-dimensional black marks on the page—has been said to be containers of meaning."⁶⁴ Brennan's critique challenges the assertion that textual interpretation negates judges employing their own beliefs and values in judicial decision-making. He argues that Scalia "regards the black marks as containers, bins of objectified intent. . . . Meaning, which is something only persons make, has been banished, driven out to be replaced by the black marks that (we are told) contain objectified intent."⁶⁵ Brennan's criticism of

Scalia echoes criticism of textualism in general. Texts cannot have agency; only subjects can make meaning. As Thomas Merrill explains, “the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning.”⁶⁶ William Eskridge concurs, declaring, “Scalia deploys a language game in which users of legislative history are looking for a ‘legislative intent,’ which is labeled subjective and unknowable, while users of *The Federalist* are looking for an ‘original understanding,’ which is labeled objective and knowable.”⁶⁷ For Eskridge, Scalia splits interpretive hairs by seeking meaning in a propaganda pamphlet rather in legislative debates.

At least one scholar criticized Scalia’s textualism as he applied it in a particular judicial case. In “Battered Women & Justice Scalia,” David Zlotnick tests Scalia’s textualism and finds it failing. Using *United States v. Dixon* (1993) as a case study, Zlotnick concludes that Scalia abandons textualism when this form of interpretation does not mesh with his political ideology. “The proven failure of Scalia’s methodology in *Dixon* rebuts Scalia’s assertion that his system is superior at cabining judicial discretion,” Zlotnick maintains.⁶⁸ Moreover, using Scalia’s own criteria and its reliance on the clearness of the text and historical practice, argues that neither supports a textualist reading of the Constitution.

Constitutional scholar Michael Gerhardt argues that textualism cannot accurately reflect constitutional meaning. In his article, “A Tale of Two Textualists,” Gerhardt delves into the similarities and differences between the textualisms of “liberal” Hugo Black and “conservative” Antonin Scalia. In his analysis Gerhardt finds that both men agree on questions of the commerce clause, substantive due process rights, equal protection, separation of powers, freedom of speech, and searches and seizures. He also finds that they disagree on religion law cases and the use of tradition in constitutional decision-making. Gerhardt concludes that the difference between the two men and their forms of constitutional interpretation is not textualism itself, but the different political and personal predilections of the two justices. Black favored judicial activism while Scalia preferred judicial restraint. Specifically, Scalia would defer to the traditions of the people in order “to defeat individual rights claims as sacrificing the constitutional text to enhance majoritarianism and judicial restraint.”⁶⁹ Gerhardt does

not criticize the justices for the different results their textualisms produce. Rather, he blames the form of constitutional interpretation itself. According to Gerhardt:

In confronting ambiguous text, an interpreter must choose the appropriate level of generality at which to state the constitutional norm at its core. In making this choice, the interpreter must be guided by something. Textual ambiguity makes this choice possible. And it makes relying solely on the text for guidance impractical. The critical debate in constitutional adjudication is not about whether the constitutional text is binding. Instead, it is about the propriety of the premise—or guiding principle—of one’s constitutional interpretation, which inevitably turns on one’s moral or political judgments regarding the proper role of federal courts in our society. Nor is it possible, as a general matter, for a judge confronted with an interpretive question to ignore completely the influence of his or her professional and personal experience and character on his or her judgments about judicial activism or restraint.⁷⁰

In short, it is impossible for anyone to interpret the Constitution on its own terms, devoid of human influence.

In my own analysis of Scalia’s jurisprudence, I found that Scalia’s textualism was neither objective nor replicable. Scalia ignored the rhetorical choices he himself made when applying (or failing to apply) a textualist reading to a particular case. An analysis of Scalia’s opinions in three areas of law (cruel and unusual punishments, church and state, and abortion) makes evident that textualism does not have clear, predictable outcomes; how a justice reads a case and what text he or she chooses to include or emphasize actualizes the justice’s underlying political ideology.⁷¹ Through his opinions Scalia constituted a particular communal vision—one of increased judicial deference for the legislature and decreased national control over everyday life. His ideological preference for legislative deference and states’ rights appeared to be the guiding factor in how he adjudicated the law, not the politically neutral results that, according to Scalia, should be produced from a textual interpretation of the law.

As one of America’s greatest public intellectuals, and the intellectual base for the conservative revival of the Court, we would expect Scalia to be well-versed in the literature regarding different forms of interpretation and of textualism in particular. What I found, however, is that Scalia never acknowledged the literature, but only broadly gestured to different forms of interpretation. An examination of the different

forms of textualism highlights the fact that it is not clear what type of textualist Scalia was, or if he was a combination of several types. Scalia's discussions about textualism in his judicial opinions remained fairly broad, and he never responded to charges that he would abandon textualism to achieve his judicial ends. Scalia acted as if he only used textualism (and originalism); he never acknowledged his use of other, loose forms of interpretation. So although Scalia was a self-proclaimed textualist, he was a self-actualized interpretive pluralist in his jurisprudential record.

Conclusion

What is the common thread that runs through each of these contradictions? At first glance, nothing more than how an auditor views Scalia. If you liked him, he was a hero and a jokester; if you did not like him, he was a villain and a poison pen. Vary rarely in his career did Scalia get challenged on his method of interpretation for how he deployed it. Do not get me wrong; critics challenged Scalia with every opinion he published; most took him at his word that he interpreted the Constitution as he said a person should, disagreeing rather with his conclusion. In other words, critics disagreed that the Constitutions should be construed narrowly and disagreed with the conclusions he reached; they ignored that Scalia did not actually interpret the Constitution narrowly. The criticisms offered by Zlotnick and myself are but a few of hundreds—possibly thousands—of analyses of Scalia's jurisprudence. Overwhelmingly people just accepted Scalia at his word—that the Constitution should be interpreted according to the plain meaning of the text—they did not challenge him for failing to interpret the law as he claimed one should. So my third contradiction is not one familiar to most of Scalia's fans or foes.

For me, the thread that runs through this essay is that for Scalia to 'be Scalia,' you cannot examine his work too closely. The construction of a hero or a villain essentializes Scalia and does not allow him to be a three-dimensional character. He was not 'mostly a good guy' with a bias here or there; he was not 'generally a bad man' with a redeeming streak. He was either the heights of cerebral attainment or the depths of the darkest soul. But no public constructions of Scalia craft him as a nuanced persona.

His two-dimensional nature results in his actions being bifurcated as well. His goodness or his badness manifests in his oral arguments and his judicial opinions. His persona as judicial jokester is the positive manifestation of his intelligence. His framing as a poison pen is the negative manifestation of his wicked soul. If we were to complicate his character, we would have to complicate his public remarks and his judicial opinions as well. In order to make them more nuanced, we would be forced to place them into context—be that context Scalia’s personal narrative or a national narrative that does not necessarily rely upon an exceptionalist version of American history. We would be forced to examine his opinions more closely. Rather than reach for the pithy comment or the denigrating remark, we would need to understand what rights and liberties the Constitution affords and challenge a justice’s opinion that does not interpret the text in a limited fashion. We would not assume that just because a justice had attained the highest promotion possible that he would know how to perform his job according to the strictures that he set forth himself.

The reading of Scalia’s public persona as one of two diametric oppositions ultimately is consistent with how Scalia himself wanted to be viewed by the public. He wanted to be simplistic. To be simplistic is not to lack intellectual depth or rigor. It is, on the other hand, to be without complication. According to Scalia, the constitutional text should be understood via its plain meaning. The text should not be read through the persona of a Justice; rather, it should be viewed on its own terms. If Scalia were to be a nuanced character, we would write Scalia into the analysis of a judicial question. As a simplistic character, he is dismissed easily. For Scalia, he can be disregarded because the constitutional text stands on its own. The problem, of course, is for Scalia’s critics who challenge his jurisprudence as a manifestation of his evil nature. For them, the opinion should be dismissed because the justice who interpreted the law was flawed. Scalia never saw himself as important to the interpretation of the text, however. According to Scalia, his form of interpretation is scientific—it is objective and replicable.⁷² When followed, textualism should produce the same results regardless of who is the author of the opinion.

As I write this essay more than 10 months have passed since Scalia died. In the months since his death, the Republicans in Congress have refused to allow President Obama to fulfill Scalia's vacancy, hoping—successfully—that a Republican would win the presidency and be able to appoint another conservative to fill Scalia's shoes. Other conservatives cut from the same cloth as already sit on the Supreme Court. The Supreme Court has many White, middle-to-upper-class, Harvard-educated, Catholic males. One in particular, Samuel Alito, was supposed to be so Scalia-like he was given the moniker "Scalito." Yet no other Justice has the gravitas (or hubris) that Scalia had. It is likely that none ever will.

When Scalia assumed his seat on the Supreme Court, only one other conservative sat on the bench—William Rehnquist. The two men were part of the "conservative revival" that took place in the 1980s, following Ronald Reagan's assumption of the presidency, Reagan's appointment of Edwin Meese as Attorney General, and Meese's advocacy of this generally newfangled thing called "originalism." Scalia took up Meese's banner and marched forth, proclaiming the intellectual consistency, rigor, and appropriateness of textualism and originalism. Scalia left an indelible mark upon the legal system, with law schools shifting how they taught constitutional law and appellate advocates crafting arguments using originalist and textualist readings of the law. The genie cannot be put back in the box and the conservative revival cannot be recreated—it merely continues.

So the moral of this story is that Scalia was a man of contradictions. In order for his legacy to be maintained he should not be observed too closely. For if he is, his persona might just begin to unravel.

Notes

¹ Awarded by the City Club of Cleveland. See "Free Speech? No Press Allowed," *Houston Chronicle*, March 20, 2003, A2.

² Richard A. Posner, "The Incoherence of Antonin Scalia," *New Republic*, August 24, 2012, <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.

³ In a speech given at John Carroll University. See Michael Doyle, "Justice Scalia Says War Warrants Rights' Recess," *Sacramento Bee*, March 18, 2003, B6.

⁴ James Gill, "Court Faces One Showdown, Under God," *Times-Picayune*, October 17, 2003, 7.

⁵ David G. Savage, "Trip with Cheney Puts Ethics Spotlight on Scalia: Friends Hunt Ducks Together, Even as the Justice is Set to Hear the Vice President's Case," *Los Angeles Times*, January 17, 2004, 1.

⁶ Catherine L. Langford, "Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents," *Argumentation and Advocacy* (Winter 2008): 119-129.

⁷ Langford, "Appealing to the Brooding Spirit of the Law," 119.

⁸ See "Supreme Court Justices Weigh in on Antonin Scalia's Death," *USA Today*, February 15, 2016, <http://www.usatoday.com/story/news/politics/2016/02/14/statements-supreme-court-death-justice-scalia/80375976/>.

⁹ "Supreme Court Justices Weigh In On Antonin Scalia's Death," *USA Today*, February 15, 2016, <http://www.usatoday.com/story/news/politics/2016/02/14/statements-supreme-court-death-justice-scalia/80375976/>.

¹⁰ Barack Obama, "The President on the Passing of Supreme Court Justice Antonin Scalia," *The White House*, February 13, 2016, <https://www.whitehouse.gov/photos-and-video/video/2016/02/13/president-passing-supreme-court-justice-antonin-scalia>.

¹¹ Ted Cruz, Twitter post, February 13, 2016, 4:27 p.m., <http://twitter.com/tedcruz>.

¹² Godfrey Hodgson, "Antonin Scalia Obituary: Influential Justice of the U.S. Supreme Court Who Defended the Original Text of the Constitution," *The Guardian*, February 15, 2016, <https://www.theguardian.com/us-news/2016/feb/15/antonin-scalia-obituary>.

¹³ Marco Rubio, "Marco Rubio's Statement on Justice Antonin Scalia's Passing," February 13, 2016, <http://blog.4president.org/2016/2016/02/marco-rubio-statement-on-justice-antonin-scalia.html>.

¹⁴ See, for example, Cass R. Sunstein, "The Scalia I Knew Will Be Greatly Missed," *BloombergView*, February 13, 2016, <http://www.bloombergview.com/articles/2016-02-14/the-scalia-i-knew-will-be-greatly-missed>. Richard Epstein, "Antonin Scalia, a Most Memorable Friend," *Hoover Institute*, February 15, 2016, <http://www.hoover.org/research/antonin-scalia-most-memorable-friend>.

¹⁵ "Supreme Court Justices Weigh In On Antonin Scalia's Death," *USA Today*, February 15, 2016, <http://www.usatoday.com/story/news/politics/2016/02/14/statements-supreme-court-death-justice-scalia/80375976/>.

¹⁶ Carolyn Shapiro, "How Scalia Played with Fire," *CNN*, February 16, 2016, <http://www.cnn.com/2016/02/16/opinions/antonin-scalia-shapiro/index.html>.

¹⁷ Elena Kagan, The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Hearing Before the Committee on the Judiciary, United States Senate, One Hundred Eleventh Congress, Second Session, June 28-30 and July 1, 2010, 111th Congress 2 (2010), 62.

¹⁸ Steven Rosenfeld, "Is Scalia the Most Vile Person in Washington?" *Salon*, March 5, 2013, http://www.salon.com/2013/03/05/is_scalia_the_most_vile_person_in_washington/.

¹⁹ Tal Kopan, "Harry Reid, John Lewis Assail 'Racist' Scalia Comments," *CNN*, December 10, 2015, <http://www.cnn.com/2015/12/10/politics/harry-reid-antonin-scalia-racist-comments/index.html>.

²⁰ Rachel Anspach, "Scalia Was Not a Hero. He Was a Bigot," *The Huffington Post*, February 17, 2016, http://www.huffingtonpost.com/rachel-anspach/scalia-was-not-a-hero-he-_b_9245850.html; Eric Zuesse, "Face It: Antonin Scalia Is Just a Bigot in a Black Robe," *Washington's Blog*, March 27, 2013, <http://www.washingtonsblog.com/2013/03/face-it-antonin-scalia-is-just-a-bigot-in-a-black-robe.html>.

²¹ Tom Gualtieri, "The Worst Person in America: Antonin Scalia," *The Weeklings*, July 2, 2015, <http://www.theweeklings.com/tgualtieri/2015/07/02/the-worst-person-in-america-antonin-scalia/>.

²² Rachel Dicker, “The 8 Most Horrible Reactions to Justice Scalia’s Death,” *U.S. News & World Report*, February 16, 2016, <http://www.usnews.com/news/articles/2016-02-16/antonin-scalias-death-unleashes-a-twitter-hate-storm-against-the-late-justice>.

²³ Tomás Ríos, Twitter post, February 13, 2016, 4:35 p.m., <https://twitter.com/TheTomasRios>.

²⁴ Dahlia Lithwick, “Why Liberals Loved to Hate Antonin Scalia: He Presented Cruel, Demeaning Views in Thought-Provoking and Stirring Ways,” *Slate*, February 14, 2016, http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/why_liberals_loved_to_hate_antonin_scalia.html.

²⁵ Lithwick, “Why Liberals Loved to Hate Antonin Scalia.”

²⁶ Anna Merlan, “A Brief List of Some of the Many Terrible Things Antonin Scalia Said and Wrote,” *The Slot*, February 15, 2016, <http://theslot.jezebel.com/a-brief-list-of-some-of-the-many-terrible-things-antoni-1759174371>.

²⁷ Daniel Politi, “Read Justice Ruth Bader Ginsburg’s Touching Statement on Scalia,” *Slate*, February 14, 2016. Available at http://www.slate.com/blogs/the_slatest/2016/02/14/read_justice_ruth_bader_ginsburg_s_touching_statement_on_scalia.html.

²⁸ J.D. Wexler. “Laugh Track,” *The Green Bag* 9, no. 1 (2005): 59-61.

²⁹ Linda Qiu, “Colbert: Scalia ‘Told More Jokes and Got More Laughs Than Any of the Other Justices,’” *Politifact*, February 17, 2016, <http://www.politifact.com/punditfact/statements/2016/feb/17/stephen-colbert/colbert-scalia-told-more-jokes-and-got-more-laughs/>.

³⁰ Ryan A. Malphurs, “‘People Did Sometimes Stick Things in my Underwear’: The Function of Laughter at the U.S. Supreme Court,” *Communication Law Review* 10, no. 2 (2010): 48-75.

³¹ Antonin Scalia “Constitutional Interpretation the Old Fashioned Way,” *CFIF.org*, last modified March 14, 2005, http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf.

³² Mary Schultz, “Scalia Calls Death Penalty Constitutional, Not Immoral: Supreme Court Justice Speaks on Religion, Politics and the Death Penalty at Pew Forum Conference,” *Pew Research Center: Religion & Public Life*, February 4, 2002, <http://www.pewforum.org/2002/02/04/scalia-calls-death-penalty-constitutional-not-immoral/>.

³³ Qiu, “Colbert.”

³⁴ Barnes, “Supreme Court Debate Over Inmates’ Religious Rights Gets a Little Hairy.”

³⁵ Mary Schultz, “Scalia Calls Death Penalty Constitutional, Not Immoral: Supreme Court Justice Speaks on Religion, Politics and the Death Penalty at Pew Forum Conference,” *Pew Research Center: Religion & Public Life*, February 4, 2002, <http://www.pewforum.org/2002/02/04/scalia-calls-death-penalty-constitutional-not-immoral/>.

³⁶ See, for example, *Romer v. Evans*, 116 S.Ct. 1620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁷ See, for example, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) and *Shelby County, Ala. V. Holder*, 133 S.Ct. 2612 (2013).

³⁸ *Romer*, 116 S.Ct. at 644.

³⁹ *Lawrence*, 539 U.S. 558 at 590.

⁴⁰ Janell Ross, “Antonin Scalia’s Strange Idea that Blacks Might Do Better in ‘Less Advanced Schools,’” *Washington Post*, December 10, 2015, https://www.washingtonpost.com/pb/news/the-fix/wp/2015/12/10/justice-scalias-strange-but-all-too-familiar-theory-on-the-victims-of-affirmative-action/?outputType=accessibility&nid=menu_nav_accessibilityforscreenreader.

⁴¹ Ryan J. Reilly, “Voting Rights Act Supreme Court Case: Scalia Condemns the ‘Perpetuation of Racial Entitlements,’” *The Huffington Post*, February 27, 2013, http://www.huffingtonpost.com/2013/02/27/voting-rights-act-supreme-court_n_2768942.html.

⁴² See, for example, James L. McAlister, “A Pigment of Imagination: Looking at Affirmative Action Through Justice Scalia’s Color-Blind Rule,” *Margquette Law Review* 77, no. 2 (2009): 327-359.

⁴³ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

⁴⁴ *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) at 2149.

⁴⁵ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 996.

⁴⁶ *King v. Burwell*, 135 S.Ct. 2480 (2015) at 2500 and 2501.

⁴⁷ *United States v. Virginia*, 518 U.S. 515 (1996) at 567.

⁴⁸ *Sykes v. United States*, 131 S.Ct. 2267 (2011) at 2285.

⁴⁹ *United States v. Windsor*, 133 S.Ct. 2675 (2013) at 2709.

⁵⁰ *PGA Tour, Inc. v. Martin*, 121 S.Ct. 1879 (2001) at 700.

⁵¹ *King v. Burwell*, 135 S.Ct. 2480 (2015) at 2507.

⁵² See, for example, *Romer*, 116 S.Ct. at 644 and *Lawrence*, 539 U.S. 558 at 590.

⁵³ See, for example, *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013) and *Shelby county, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

⁵⁴ See, for example, *Lamb’s Chapel*, 508 U.S. at 2149; *Casey*, 505 U.S. at 996; *Burwell*, 135 S.Ct. at 2500 and 2501; *U.S. v. Virginia*, 518 U.S. at 567; *Sykes*, 131 S.Ct. at 2285; *Windsor*, 133 S.Ct. at 2709; and *PGA Tour, Inc.*, 121 S.Ct. at 700.

⁵⁵ See “Legal Experts Remember Scalia’s Best and Worst Opinions,” *WNYC*, February 19, 2016, <http://www.wnyc.org/story/legal-experts-remember-scalias-best-and-worst-opinions/>.

⁵⁶ A 1998 issue of *George Washington Law Review* was devoted to textualism. See Jed Rubenfeld, “Textualism and Democratic Legitimacy: The Moment and the Millennium,” *George Washington Law Review* 66 (1998): 1085-1111; Lillian R. BeVier, “Textualism and Democratic Legitimacy: The Moment and the Millennium; A Question of Time, or Law?” *George Washington Law Review* 66 (1998): 1112-18; Frank H. Easterbrook, “Textualism and Democratic Legitimacy: Textualism and the Dead Hand,” *George Washington Law Review* 66 (1998): 1119-1126; Michael W. McConnell, “Textualism and Democratic Legitimacy: Textualism and the Dead Hand of the Past,” *George Washington Law Review* 66 (1998): 1127-1147; Suzanna Sherry, “Textualism and the Bill of Right: Textualism and Judgment,” *George Washington Law Review* 66 (1998): 1148-1152; David A. Strauss, “Textualism and the Bill of Right: The New Textualism in Constitutional Law,” *George Washington Law Review* 66 (1998): 1153-1160; Bradford R. Clark, “Textualism and Federalism: A Structural Approach,” *George Washington Law Review* 66 (1998): 1161-1197; Gregory E. Maggs, “Textualism and Federalism: Translating Federalism; A Textualist Reaction,” *George Washington Law Review* 66 (1998): 1198-1268; Michael Kent Curtis, “Textualism and the Civil War Amendment: Two Textual Adventures; Thoughts on Reading Jeffrey Rosen’s Paper,” *George Washington Law Review* 66 (1998): 1269-1300; William N. Eskridge Jr., “Textualism and Original Understanding: Should the Supreme Court Read the Federalist but Not Statutory Legislative History?” *George Washington Law Review* 66 (1998): 1301-23; Ira C. Lupu, “Textualism and Original Understanding: Time, the Supreme Court, and The Federalist,” *George Washington Law Review* 66 (1998): 1324-1336; John F. Manning, “Textualism and Original Understanding: Textualism and the Role of the Federalist in Constitutional Adjudication,” *George Washington Law Review* 66 (1998): 1337-1372; Steven G. Calabresi, “Concluding Essay: Textualism and the Counter-majoritarian Difficulty,” *George Washington Law Review* 66 (1998): 1373-1394.

⁵⁷ Mark Tushnet, “The Possibilities of Comparative Constitutional Law,” *Yale Law Journal* 108 (1999): 1289.

⁵⁸ Tushnet, “The Possibilities of Comparative Constitutional Law,” 1290.

⁵⁹ John F. Manning, “Textualism and the Equity of the Statute,” *Columbia Law Review* 101, (2001): 108-109.

⁶⁰ James Body White, "Law as Language: Reading Law and Reading Literature," *Texas Law Review* 60 (1982): 415.

⁶¹ See Aileen Kavanagh, "Original Intention, Enacted Text, and Constitutional Interpretation," *American Journal of Jurisprudence* 47, (2002): 255-298.

⁶² McConnell, "Textualism and Democratic Legitimacy," 1136.

⁶³ Patrick McKinley Brennan, "Realizing the Rule of Law in the Human Subject," *Boston College Law Review* 43, (2002): 306.

⁶⁴ Brennan, "Realizing the Rule of Law in the Human Subject," 308.

⁶⁵ Brennan, "Realizing the Rule of Law in the Human Subject," 310 & 312.

⁶⁶ Thomas Merrill, "Textualism and the Future of the *Chevron* Doctrine," *Washington University Law Quarterly* 72 (1994): 372.

⁶⁷ Eskridge, "Textualism and Original Understanding," 1314.

⁶⁸ David M. Zlotnick, "Battered Women & Justice Scalia," *Arizona Law Review* 41 (1999): 935.

⁶⁹ Michael J. Gerhardt, "A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia," *Boston University Law Review* 74 (1994): 27.

⁷⁰ Gerhardt, "A Tale of Two Textualists," 63-64.

⁷¹ See Catherine L. Langford, *Textual Tales: Justice Antonin Scalia's Approach to Constitutional Interpretation* (Tuscaloosa: Alabama University Press, forthcoming).

⁷² See Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997).