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# DEDICATION

## ON GETTING IT RIGHT: REMEMBERING JUSTICE ANTONIN SCALIA

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In the summer of 1985, when then-Judge Antonin Scalia's three law clerks were finishing their term at the D.C. Circuit Court of Appeals, we<sup>1</sup> gave him a plaque emblazoned with the phrase, "It's hard to get it right." That was a phrase that Judge, and later Justice, Scalia's law clerks heard often—never in anger, never in rebuke, but always as a reminder (often accompanied by a wry smile) that . . . well, sometimes it's hard to get it right.

Justice Scalia cared deeply and profoundly about getting it right. Law clerks learned early on about "the cart," on which we had to put every source that we cited in a draft so that he could read the sources for himself to make sure that we characterized them correctly. The fact that he would usually delete whatever drafts we had given him and start over from scratch made that practice seem a tad puzzling at times, but he maintained that the drafts helped him. And it was certainly better for us to believe that than to believe the alternative.

The most important part of the emblazoned aphorism on our plaque, though, was "it." The "it" to which Judge/Justice Scalia so frequently referred was the law.

Many legal questions are difficult, even if one does not fully endorse the "selection hypothesis" which posits that difficult cases are more likely to wind their way through the appellate system.<sup>2</sup> Getting difficult cases right often

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<sup>1</sup> I was Judge Scalia's fifth choice out of three for the position that year, but that is another story.

<sup>2</sup> See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). The selection hypothesis may well be an accurate account of common law adjudication, but it does not describe large segments of public law adjudication. From the standpoint of law (at least as that term was understood by Justice Scalia), a good number of the constitutional cases that reach the Supreme Court are preposterously easy and are made to look difficult only because they are typically decided on some basis other than constitutional meaning (or they both are and look preposterously easy because they are overturning some particularly absurd ruling of the Ninth Circuit). It is absolutely not true that deciding cases based on personal policy preferences is always easy while deciding them based on law is always hard. Often quite the opposite is true. I

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requires thought, research, more thought, a willingness to reconsider premises, careful consideration of the strongest arguments on all sides (including sides that one might not be personally inclined to take), multiple drafts to see what arguments work and don't work, and long hours. All of that was necessary, Justice Scalia believed, because "close enough for government work" might be an apt aphorism for deferential review of agency decisions but was not appropriate for judicial law-finding. The law mattered.

Of course, everyone in the legal culture—including people who find buried in the Constitution sweet mysteries of life that would evade detection even by Nicholas Cage, Diane Kruger, and Jon Voigt armed with lemon juice and hair dryers—says that getting "it" right matters to them. But Justice Scalia had a very concrete "it" in mind. For Justice Scalia, legal reasoning, at least in the public law world,<sup>3</sup> was principally a deductive enterprise in which answers flowed from careful examination of authoritative sources external to the decisionmaker. Legal texts, he maintained, have objective meanings, and when the meanings of those texts are relevant to deciding a case, the judicial task is to ascertain those meanings as they would have been ascertained by an informed audience at the time of their promulgation. The pursuit of that common-sense understanding of communicative meaning—which I believe describes how virtually all legal academics generally expect their own work to be read (and generally expect judicial opinions of which they approve to be read)—has acquired the rarefied label of "originalist interpretation." Some of us would not give it a rarefied label. We would call it "interpretation."

Justice Scalia's forthright, persistent, and often witty articulation of an originalist methodology of textual interpretation is quite possibly the most important legal development of my lifetime. It is fair to say that before Justice Scalia, there was no serious and sustained intellectual engagement with this methodology. Some very important prior figures—most notably Raoul Berger and Robert Bork—made important observations about the intentions of historical persons and the consistency of modern judicial decisions with those expressed intentions, but Justice Scalia was the first prominent jurist to set forth a systematic methodology for understanding the content of legal texts by

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specifically recall one case from the Supreme Court (providing any specifics would, in my judgment, be a breach of confidentiality) in which the majority of the Court agonized endlessly over a case which was exceedingly difficult on policy grounds, whatever your policy preferences might have been, because the consequences of the practice in question were extraordinarily difficult to assess. It was an easy case for Justice Scalia because, as a matter of law, it was completely obvious that the Constitution had nothing to say on the question one way or the other, which meant that the legislative judgment stood. But many cases are genuinely hard on the law.

<sup>3</sup> The Supreme Court decides relatively few common-law cases in the strict sense of the term. To be sure, it is possible to describe, and perhaps quite accurately, much of the Court's work product in common-law terms in a broader sense, *see* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010), but Justice Scalia roundly rejected that approach to public law adjudication.

reference to their original public communicative meanings. That was a revolutionary development.

On June 14, 1986, shortly before he took a seat on the Supreme Court, then-Judge Scalia gave a speech at the United States Department of Justice in which he laid out the theory of original meaning and recommended that self-described originalists “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.”<sup>4</sup> Persons within the Reagan Administration were already starting to work out the idea of original meaning, but Judge Scalia’s articulation of the principles behind it was so clear and powerful that it shaped and energized the emerging originalist movement. The audience, which consisted of a rather spectacular collection of high-powered legal minds, knew that it had just witnessed something important. Indeed, even before the speech was finished, the Counselor to the Attorney General, T. Kenneth Cribb, taped a handwritten sign to the podium saying (if I recall it correctly): “Stipulated.” That speech was thus “a convenient marker of the formal ascendancy of the doctrine of original meaning in modern times.”<sup>5</sup>

Three months later, Judge Scalia became Justice Scalia. His title changed, but “it” did not. Justice Scalia brought his methodology of original meaning to the Supreme Court, and the legal world has not since been the same. From a purely intellectual standpoint, of course, it should not matter whether ideas appear in blogs, law reviews, the Federal Reporter, or the United States Reports. Good ideas are good ideas, and bad ideas are bad ones. It is nonetheless a fact—a fact that should be shameful to an academy that is not, as it happens, always distinguished by its capacity for shame—that originalism was at best ignored or mocked, and at worst hissed (literally in law school classes, as some of us who attended law school in the pre-Scalia days can attest), until Justice Scalia espoused originalist ideas with unprecedented eloquence in a forum that had to be taken seriously by lawyers, and therefore by those persons who purported to be training lawyers. To see the effect of having a living, breathing, and undeniably intelligent originalist on the Supreme Court, run a Westlaw search of the law review database for the term “original meaning” before 1986 and see what turns up.

To be sure, Justice Scalia was the first word rather than the last word on originalist interpretation. Indeed, I specifically disagree with some important features of Justice Scalia’s methodology, which I think sometimes confuses questions of meaning (which pertain to the act of interpretation) with very different questions of judicial role (which pertain to the act of adjudication). I have co-authored two articles specifically taking issue with Justice Scalia’s views on, respectively, the extent to which the Constitution must be read to

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<sup>4</sup> Antonin Scalia, Speech Before the Attorney General’s Conference on Economic Liberties (June 14, 1986), in OFFICE OF LEGAL POLICY, ORIGINAL MEANING: A SOURCEBOOK 106 (U.S. Dept. of Justice 1987).

<sup>5</sup> Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 n.10 (2006).

embody rules rather than standards<sup>6</sup> and whether the Constitution allows Congress to remove Article III cases from the Supreme Court's jurisdiction.<sup>7</sup> None of that changes the fact that without Justice Scalia, I simply would not exist as a legal scholar. He not only inspired me to pursue an academic career, but I really cannot envision a world in which I could get a job as a law professor without Justice Scalia clearing the path.

Those of us who pursue originalist projects are not standing on the shoulders of a giant. We are standing on the shoulders of Atlas. On February 13, 2016, the Earth shuddered a bit.

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<sup>6</sup> See Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2015).

<sup>7</sup> See Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007).