

THE UNKNOWN ACHIEVEMENTS OF JUSTICE SCALIA

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The death of Justice Antonin Scalia marks the end of an era in the history of the Supreme Court. One of President Ronald Reagan's greatest gifts to the country he so loved has passed away. The Reagan Supreme Court, which once had four Reagan-appointed Justices, is now passing into history.

A new generation of Americans voting in the 2016 presidential election will have to decide whether to follow the originalism and textualism of Justice Scalia or the left wing policy-maker jurisprudence of Justice Stephen Breyer and the Supreme Court's other liberal Justices. A huge amount is therefore at stake this November.

Many have noted that Justice Scalia was a legal giant who single-handedly restored textualism and originalism in Supreme Court constitutional and statutory interpretation. I will write at length on this subject in a forthcoming book and have mentioned it as well in several tributes to the Justice since his death. But, while it is true that the Justice transformed American legal culture, and while knowing this helps to explain why Justice Scalia was the greatest Justice ever to sit on the Supreme Court, not all of Justice Scalia's triumphs as a Justice were as publically visible as his opinions in *Heller* and in *Morrison v. Olson* or as the restoration of textualism and of originalism. As Justice Scalia told me when I was his law clerk in 1987–1988, Justice Scalia's greatest triumphs were often not publically visible at all. For example, he played a key role in persuading the Justices to stop hearing and deciding 150 decisions a year and to aim at only 80 decisions a year instead. Justice Scalia believed that the Supreme Court ought to hear fewer cases and do a better job with them than it had been doing prior to 1986. Justice Scalia's views prevailed and for the last ten years the Supreme Court has on average decided about 80 cases a year. Justice Scalia realized that judicial restraint

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could often be best accomplished by not hearing a case and by getting his colleagues to do a better job on fewer cases.

Another thing that Justice Scalia often did that was publically invisible but was of vital importance was keeping what lawyers call dicta out of his colleague's opinions. Justice Scalia scrutinized all of the majority, concurring, and dissenting opinions he joined, and he often held out on joining them unless activist language that could cause trouble in the lower federal courts and in future Supreme Court opinions was taken out. Justice Scalia told me when I clerked for him that the most important thing he did as a Justice was to keep out of his colleague's opinions language that could cause trouble in the future. Justice Scalia's actions in this regard were totally invisible to the public, but they were hugely consequential. Now that role that Justice Scalia played in editing his colleagues' opinions will have to be played by someone else.

I first met Justice Scalia in April 1982 at the first-ever national conference of the Federalist Society, an organization of conservative and libertarian law professors with chapters at every law school in the country and in all major cities. Justice Scalia was then Professor Scalia at the University of Chicago School of Law. Professor Scalia not only offered to be our faculty advisor—he also raised the money we needed to fund our first conference. Without Professor Scalia's help, the Federalist Society would never have gotten off the ground! Justice Scalia continued to help the Federalist Society throughout his tenure on the bench. He spoke at countless events and promoted the legal careers of hundreds of former students and law clerks, including my own. Justice Scalia, Judge Robert H. Bork, and former Attorney General Edwin Meese III all made the Federalist Society what it is today.

Justice Scalia was a public intellectual, in addition to writing hundreds of textualist-originalist opinions and a book on constitutional interpretation as well as a treatise on statutory interpretation—a feat accomplished only by one other Justice, Joseph Story. As a public intellectual, Justice Scalia championed original meaning textualism in interpretation, but he also spoke out actively on the importance of his religious faith for all that he did in life. He said that we are all fools for Christ, and he recognized that there is a lot of discrimination on the basis of religion that goes on in the United States today.

Justice Scalia stood up for the importance of his faith and was not afraid to defend it in the highly secular legal environment that constitutes the nation's law schools and courts.

As a public intellectual, Justice Scalia traveled the globe and the United States spreading the gospel on original public meaning textualism. He feared that decisions on cultural matters were more and more being made in this country and abroad by an elite oligarchy of judges instead of by the people through the democratic process. Justice Scalia called the Supreme Courts and the Constitutional Courts of the Western constitutional democracies the "Ayatollahs of the West" in an allusion to the Guardian Council of Ayatollahs in Iran, which tells the democratically elected government of Iran what it can and cannot do with respect to everything from headscarves for women to nuclear weapons. Justice Scalia's conclusion is a fair one. Our Supreme Court in its substantive due process opinions has all too often functioned as a kind of elite oligarchy that is incompatible with a republican form of government.

Justice Scalia had a great sense of humor, and he never let power and fame go to his head. He once told an audience that he had been driving across the country with one of his nine children when they stopped in Kansas to spend the night at a motel. He went up to the desk clerk and asked for a room, and the clerk asked, "What is your name?" The Justice said "Scalia," and the clerk replied by asking him to spell it. The Justice spelled out S-C-A-L-I-A. The desk clerk wrote this down and said, "Oh, Skal-Ya. Just like the Supreme Court Justice!" The Justice informed the clerk that he in fact was the person standing before him.

Another example of Justice Scalia's sharp sense of humor and of his wit came when I went to complain to him, while I was clerking, about the misbehavior of one of my co-clerks. The Justice looked at me sympathetically with a slightly wry smile and said: "It must be terribly difficult to have major disagreements with your colleagues in the workplace!" I instantly realized he was wryly referring to his own situation and politely excused myself.

A final example of Justice Scalia's sense of humor came when he was nominated to be a federal appeals court judge while on the faculty at the University of Chicago Law School. As anyone who has served in a high government post knows, such a

nomination can only be made after the FBI has done a background check on the nominee to make sure his neighbors and friends do not know of anything scandalous about the nominee. While Justice Scalia and his family were living in Chicago, they refused to attend mass at the University's Catholic chapel, which they considered to be too liberal and too much in favor of the Vatican II reforms. Instead, they went to mass in Chicago's ethnic Italian neighborhood where the priest was more conservative and orthodox. One Sunday after mass, the priest grabbed Scalia's arm as he was leaving church. He pulled Scalia aside saying he was very worried about him. Scalia asked the priest why he has worried and the priest said, "Nino, it is the FBI. They were here yesterday asking all kinds of questions about you. But, Nino, don't worry—I told them nothing!" Scalia reassured the priest that this was not a matter of concern.

As these three anecdotes reflect, Justice Scalia had a great sense of humor and loved to poke fun at himself. Whenever I think of Justice Scalia, I will always smile because he was such a charming, engaging, and brilliant person. Let us hope that his seat is filled with someone who has all of these wonderful attributes while being a first rate lawyer as well.