ESSAY

MANNERS MAKYTH MAN: THE PROSE STYLE OF JUSTICE SCALIA

CHARLES FRIED*

Much has been written about Justice Antonin Scalia's work in the few years he has sat on the Supreme Court. Given his strong and clear approach, he has presented an unusually broad target for academic and journalistic critics. My subject allows me to be unqualifiedly praiseful. I discuss Justice Scalia's prose style.

Let me begin by illustrating good style by the rods of a master, Robert Jackson. I quote extensively from Justice Jackson's concurring opinion in the *Steel Seizure Case*[1] because it illustrates the characteristics of his use of the English language. Here is a passage from that famous opinion:

> A judge, like an executive advisor, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.[2]

What is most striking is the cadence of the passage. There is standard legal terminology at the beginning of the sentence, although even this is put in the least hackneyed and bureaucratic form. He speaks not of "officers" or "officials" but of "executive advisors," not of a "court" but of a "judge"—this is more personal, less official. His first sentence states a puzzle. The second sentence begins with words of interrogation—"just what"—and leads to the startling biblical allusion, ending with the wonderfully sounding word "Pharaoh," which a Lexis search confirms has never before or since appeared in a

* Carter Professor of General Jurisprudence, Harvard Law School. The following is adapted from a luncheon address delivered by Professor Fried at a symposium entitled "The Jurisprudence of Justice Antonin Scalia," sponsored by the Jacob Burns Institute for Advanced Legal Studies in 1990. The full proceedings of the symposium were published in the Cardozo Law Review. *See* 12 CARDOZO L. REV. 1583-1868 (1991).

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

2. *Id.* at 634.

Supreme Court opinion. The effect is heightened by the touch—surely unplanned, but instinctively knowing—of leaving the word "Pharaoh" standing alone, unmodified by a definite article.

This sense of cadence shows up in a different way later in the opinion in Justice Jackson's ranking of types of executive authority:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .[3]

The first paragraph says flatly when the power is "at a maximum"—note the precision and focus of the two balanced terms: "all that he possesses in his own right plus all that Congress can delegate." Compare this to the last phrase of the last paragraph, where the same structure is reversed and the word "minus" appears.

The second degree of power is a "zone of twilight"—note here that this is quite a familiar metaphor and therefore risks degenerating into cliche. Jackson rescues it, however, by the high degree to which it is apt and by syntactically reviving its literal meaning: He does not use the cliche "twilight zone," but speaks instead of a zone of twilight.

The third state is where the President's power is "at its lowest ebb." Again, this teeters on the edge of cliche but is saved because its presence as the third term in a cadence—maximum, twilight, lowest ebb—brings to mind the literal image of a sea shore where the tide has receded and left exposed the widest expanse of beach.

Finally, there is what I would call the music of reason: where a logical point is put with such magical conciseness that it at-

3. *Id.* at 635-637 (footnotes omitted).

tains elegance in that way alone. This happens in the phrase in which Justice Jackson dismisses Chief Justice Vinson's contention that the President, even in the absence of legislative authorization, has an inherent power to take action in a national emergency. "Such power," Justice Jackson replied, "either has no beginning or it has no end."[4]

These are touches which cannot be contrived. Law clerks cannot do it for you—or if they do, the voice will not be consistent from opinion to opinion, from Term to Term. They come from being a well-read, literate person; perhaps it helps not to have attended law school—as was the case with Justice Jackson. But they also come from a natural talent, an ear. This talent is the kind which distinguishes a Mozart from a Salieri, and it is a talent which Justice Scalia shows to a higher degree than any other member of the current Court—although the Chief Justice sometimes runs a close second (he was, after all, Justice Jackson's law clerk during the *Steel Seizure Case* Term).

Exquisite though it is, Justice Scalia's prose style is not just a matter of delight in the often dreary corpus of the United States Reports. Like Justice Jackson's style, which in some measure it resembles, Justice Scalia's style has resonance in substance. George Orwell, in his great essay, *Politics and the English Language*,[5] gives this example of the modern bureaucratic style—a style typical of the law clerk-drafted effluvia of most of our courts and even of the Supreme Court, with its two-part, three-pronged tests ineffectively lightened (as with lumpy roux mixed into an already heavy sauce) by heavy-handed sarcasms and ponderous moralisms:

> Objective consideration of contemporary phenomena compels the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must invariably be taken into account.[6]

This translates the famous passage from Ecclesiastes:

> I returned and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all.[7]

4. *Id.* at 653.
5. George Orwell, *Politics and the English Language*, *in* COLLECTED ESSAYS 337 (1961).
6. *Id.* at 344.
7. *Id.* at 343 (quoting *Ecclesiastes* 9:11).

Orwell's great point is that the modern bureaucratic mode of expression hides the truth of what you are really getting at:

> Such phraseology is needed if one wants to name things without calling up mental pictures of them. Consider for instance some comfortable English professor defending Russian totalitarianism. He cannot say outright, "I believe in killing off your opponents when you can get good results by doing so." Probably, therefore, he will say something like this:
> "While freely conceding that the Soviet regime exhibits certain features which the humanitarian may be inclined to deplore, we must, I think, agree that a certain curtailment of the right to political opposition is an unavoidable concomitant of transitorial periods, and that the rigours which the Russian people have been called upon to undergo have been amply justified in the sphere of concrete achievement."
> The inflated style is itself a kind of euphemism. A mass of Latin words falls upon the facts like soft snow, blurring the outlines and covering up all the details. The great enemy of clear language is insincerity.[8]

This bureaucratic language, so typical of most Supreme Court opinions, is on Orwell's view a mask for insincerity, a way of hiding what you are really getting at, maybe even from yourself. The devices are the use of cliches—that is metaphors and similes—that once had a vividness but from which all life has drained away; the use of multi-syllabic, abstract, latinate words, where simple, concrete Anglo-Saxon words will do; and the reflexive recourse to groups of words and even whole phrases so that, as Orwell puts it:

> prose consists less and less of *words* chosen for the sake of their meaning, and more and more of *phrases* tacked together like the sections of a prefabricated hen-house.[9]

Surely most Supreme Court opinions are just that, collections of ready-made phrases tacked together. And that, as I shall demonstrate, is just what Justice Scalia's opinions are not.

Many Court opinions are so turgid, I suspect, because most Justices over the last generation do not write their own opinions—they are at best editors of the work of their law clerks. When I was clerking, it was notorious that Justice Douglas—who, incidentally, could write some of the most brilliant and

8. *Id.* at 347-348.
9. *Id.* at 339-340 (emphasis in original).

pointed prose of any Justice—would often describe his vote to his law clerk and instruct the clerk by memo to draft an opinion justifying it. The reductio ad absurdum of this practice occurs in the regulatory agencies where the commissioners turn over the task of justifying what they do to staffs which are explicitly designated "opinion writing sections." When Justices resort to this method, the work product inevitably shows it. The delegation of opinion-writing has an impact first on the style and then on the content of the opinions, and finally on the whole tenor of the Court's work, what it means, how we take it.

A young man just out of law school with no independent standing—no one publicly appointed or elected him; unlike even the attorneys who sign their briefs, he remains anonymous—is going to hide his personality behind a screen of technical-sounding verbiage. He will not feel entitled—a perfectly appropriate modesty, really—to display his person in words that will appear under someone else's name.

By contrast, the Justice who writes his own opinions takes responsibility from the start for the very incarnation of his thought. When you have to write your own opinion, your own justification from scratch, that imposes a harsh and often unforgiving discipline. The bright youngster cooking up a justification for someone else's vote is loosened by the authorized hypocrisy of a subordinate's role; he is authorized to hide behind euphemisms and technical obscurities. After all, that's the job. But not many people writing for themselves in their own names would think of their work that way. Justice Scalia plainly does not.

Here is an example of a Scalia cadence in a dissent rejecting an argument I had made to the Court in one of the drug-testing cases:

> What is absent in the government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of even a single instance in which any of the speculated horribles really occurred. . . .[10]

The Justice is talking to us. He is first struck by an absence. It shows him something, and the more he considers it, the more striking it becomes, so that finally what it shows clinches the

10. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 683 (1989).

matter for him. This impression of a man thinking through a problem and letting us in on his thought processes is powerfully, politically reassuring. We are getting what we paid for—an experienced, mature person working through a problem and deciding on the basis of what he has puzzled out, not the pompous after-the-fact rationalization of a politician's vote by a smart youngster.

Here is another example of the Scalia cadence, from his dissent in *Webster v. Doe*:[11]

> Neither the Constitution, nor our laws, nor common sense gives an individual a right to come into court to litigate the reasons for his dismissal as an intelligence agent.[12]

Note here the juxtaposition and climax of the cadence in the words "common sense": they imply that our Constitution and our laws, after all, have something to do with common sense.

There is another quality that distinguishes Justice Scalia's style: the use of short, emphatic phrases that work in both logical and syntactic apposition with others to build an argument. Here is a passage from his dissent in *Webster v. Reproductive Health Services*:[13]

> The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. *It is not that*, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.[14]

The crucial phrase has no word longer than "that". And for a sustained, almost Homeric use of metaphor it is hard to beat this sentence from the same opinion:

> It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.[15]

11. 486 U.S. 592 (1988).
12. *Id.* at 620.
13. 492 U.S. 490 (1989).
14. *Id.* at 532 (emphasis added).
15. *Id.* at 537.

Not only is the image apt, the metaphor illuminatingly clear, but it climaxes at the wonderfully concrete, Anglo-Saxon housewright's term, "doorjamb"—which even has a striking appearance on the printed page because of the silent "b." Incidentally, the word only appears three other times in the United States Reports, each time in a case involving a doorjamb.

Here is an example of logical cadence, from *Rutan v. Republican Party of Illinois*,[16] last term's public employee case:

> Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.[17]

What is nice is the logical syncopation, the deliberate lack of parallelism between "what is wrong"—which refers to an abstraction, an argument—and the answer to the implicit question—the Court, which, of course, is a concrete collection of persons who have just announced a judgment.

Finally, let me give you an extended example where aptness of metaphor clinches an argument as novel and illuminating as is the language in which it is put. This is from Justice Scalia's dissent in *Mistretta v. United States*,[18] the Sentencing Guidelines case:

> The whole theory of lawful congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of law-making, inheres in most executive or judicial ac-

16. 497 U.S. 62 (1990).
17. *Id.* at 92-93.
18. 488 U.S. 361 (1989).

> tion, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. . . .
> In the present case, however, a pure delegation of legislative power is precisely what we have before us. It is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation. . . .
> I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new branch altogether, a sort of junior-varsity Congress.[19]

Needless to say, the term "junior-varsity" appears only one other time in the *United States Reports*, and that is in a case involving an actual junior-varsity sports organization.

Justice Scalia's style has a point beyond mere delight. By writing simply, clearly, directly, and forcefully he makes a moral and political point about judging, about the law, and about the kind of institution the Supreme Court should be. Orwell, too, recognized how style reveals the underlying substance of the message. In this point Orwell was not original, for it was marked a long time ago by William of Wykeham, the fourteenth century Bishop of Winchester and founder of New College, Oxford, who had as his motto "Manners Makyth Man."

19. *Id.* at 417-427.