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Introduction

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Justice Antonin Scalia's seat on the Supreme Court of the United States will be filled by the time you read this, but his shoes can never be. Short and stout, the late jurist nonetheless towered over the institution he served, his sharp and sarcastic voice dominating oral argument in the ornate marble courtroom, his pen—or, in later years, his iPad—producing piercing opinions that provoked a disproportionate share of acclaim and outrage.

That the Court had never seen a wit like Scalia's, or such a highbrow intellect suffused with the common touch, is beyond dispute. Other aspects of Scalia's legacy, however, will be the stuff of debate for years. The range of essays in this volume offers some opening salvos in what may be a long war over how—and how much—Scalia shaped jurisprudence in America and beyond.

Scalia intended his opinions, in particular his dissents, to be memorable, and they are widely quoted in legal casebooks. But Scalia was more than a jurist or scholar, he was a symbol—on the broadest level, to the general public, of judicial conservatism; within the conservative legal movement, of a strictly-constructed counterrevolution to undermine the broad constitutional visions of equality and liberty laid out during the Warren era of the 1950s and '60s. Brian Christopher Jones, of Liverpool Hope University, and Austin Sarat, of Amherst College, set the stage by highlighting Scalia's symbolic, not to say superficial, significance, something powerful enough to inspire at least a marginal number of right-leaning voters to pull the lever for Donald Trump in November 2016 after his pledge to fill Scalia's seat with a nominee in Scalia's "mold."[1]

As a legal intellectual, Scalia is best known not for a particular doctrine but rather for a method, originalism, which, broadly stated, aims to interpret laws according to the original meaning their text conveyed at the time it was adopted. Not for nothing did Joan Biskupic title her Scalia biography *American Original*, a play on words immediately recognizable to any law professor.[2]

Scalia was originalism's evangelist, traveling the nation to deliver a stump speech touting it not simply as the best interpretive method, but as the o*nly* one of any consistency. While originalism might have flaws, he would say, "you can't beat something with nothing."

Others saw originalism differently, perhaps most nefariously as a stratagem to undo the jurisprudence of the New Deal and postwar eras under the guise of fealty to the framers. "It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact," the late Justice William Brennan said in a 1985 critique. "But in truth it is little more than arrogance cloaked as humility."[3]

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1 Brian Christopher Jones & Austin Sarat, *Justices as "Sacred Symbols": Antonin Scalia and the Cultural Life of the Law*, 6 Br. J. Am. Leg. Studies 1-17 (2017).

2 Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia (2009).

3 Justice William J. Brennan, Jr., Speech given at the Text and Teaching Symposium, Georgetown University Oct. 12, 1985, Washington, D.C., available at http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html (last visited Apr. 12, 2017).

There are debates about originalism, including the meta-originalist question of whether the framers originally intended that Americans centuries later apply their work according to its original meaning in the 18th century—or that the bewigged would not feel betrayed if the legal significance of broad terms such as *liberty, equality* and *the people* grew alongside the American polity's own understanding of the full significance of the founding document's commitments.

Nevertheless, while the substance of originalism may remain in dispute, the method certainly has prevailed in the optics of constitutional interpretation. Sometimes, the framers "laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they tried to do," Justice Elena Kagan, nominated by President Barack Obama, said at her confirmation hearingas in 2010. "In that way, we are all originalists."[4]

The conservative federal appeals judge President Donald Trump selected to succeed Scalia, Neil Gorsuch, calls himself an originalist. At his confirmation hearings in March 2017, Judge Gorsuch sought to dispel Democratic senators concerns that originalism was a stalking horse for right-wing jurisprudence by observing that liberals use it, too.

Gorsuch invoked *District of Columbia v. Heller;*[5] Scalia's triumph, which for the first time found that the Second Amendment afforded individuals a right to possess firearms, at least as far as keeping handguns in the home for self-defense. The question split the court 5-4, with Justice John Paul Stevens writing for the liberal minority. "Justice Scalia and Justice Stevens both, majority and dissent, wrote opinions that are profoundly thoughtful in examining the original history of the Constitution," Gorsuch said. "I guess I'm with so many other people who've come before me, Justice Story, Justice Black and yes, Justice Kagan, who sitting at this table said, 'We're all originalists,' in this sense. And I believe we are."[6]

Perhaps we're all originalists, but we're not all original originalists. When the method was defined in the 1980s, it often was stated as "original intent." Later that was refined to "original meaning," and later still, further clarified as "original public meaning" of the text.

Professor James Allan, a Canadian who teaches at the University of Queensland in Australia, is not subtle about his admiration for Scalia, not when he titles his essay, *One of My Favorite Judges*. But he takes issue, if gently, with the brand of originalism Scalia espoused, the original public meaning variety, which he explains as applying the text according to what a reasonable member of the public in 1789 might have given it.

"Within the broad church that is originalism, then, I think Scalia was in the wrong denomination," Allan contends. "He should have sought the meaning of the U.S. Constitution in the actual intended meanings of the real life people who framed and ratified it, not in 'how it was originally understood' by some non-actual person at the time."[7]

To James Pfander of Northwestern University, however, Scalia's originalism in some instances might be considered akin to the suspension of disbelief necessary for a night at the theater. He examines Scalia's efforts to narrow access to the courts by a strict application of limits on legal standing, which Pfander says is not compelled by the Constitution's text but rather accretions of common law he chose to elevate over legislative efforts to create judicial remedies.

"He was, in short, something of a living constitutionalist in the realm of standing law and was only too ready to invalidate generous federal legislative grants of standing on the

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4 Transcript available at http://edition.cnn.com/TRANSCRIPTS/1006/29/cnr.01.html (last visited Apr. 12, 2017).

5 554 U.S. 570 (2008).

6 Transcript available at http://transcripts.cnn.com/TRANSCRIPTS/1703/21/cg.01.html (last visited Apr. 12, 2017).

7 James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 Br. J. Am. Leg. Studies 10 (2017).

ground that they violated judge-made limits on the right of individuals to sue," Pfander writes.[8] "By preserving the myth of originalist constitutionalism and avoiding inconvenient historical truths, Justice Scalia performed the inevitable judge's task of fashioning new law out of old."[9]

Professor Richard Epstein, of the University of Chicago, calls himself a "classical liberal"—by which he means not a liberal at all, at least in the modern sense. In his focused review of property-rights, Epstein comes at Scalia from the right, reaching the contrarian conclusion that his opinions simply were not conservative *enough*.

Epstein accepts the narrow results Scalia wrought in some of his opinions, cases such as *Nollan v. California Coastal Commission*[10] and *Lucas v. South Carolina Coastal Council*[11] that were regarded as near-revolutionary in limiting regulatory authority over land use, effectively removing it from the police powers reserved to the states by the 10th Amendment by subjecting certain environmental and housing decisions to Takings Clause analysis.

Like Justice Brennan, who dissented in *Nollan*, Epstein regards Scalia's analysis as cramped. Brennan lamented that Scalia's narrow focus on the burden a beach access easement placed on a single property owner obscured the comprehensive approach California sought to apply to management of its coastline. Epstein, on the other hand, complains that Scalia squandered an opportunity to junk decades of deferential precedent to democratic institutions in favor of a bold approach that simultaneously elevates private property rights and cripples state environmental, housing and other policies by requiring government payouts when enacting regulations landowners find inconvenient.[12]

Jane Marriott, of Royal Holloway, University of London, professes to find a blind spot in Scalia's critical view of campaign-finance regulation. He was unabashedly suspicious of such laws, asserting that the politicians who enact them were compromised by a natural inclination to protect their own incumbency from challengers.

Examining certain kinds of enactments—say, restrictions on gay rights or criminalization of abortion—Scalia regularly celebrated the superiority of the democratic process to the wisdom of the courts. But, Marriott asks, "do courts, insulated from politics as they supposedly are (but clearly are not) possess the requisite institutional and democratic competence to allow themselves to overrule the conclusions of legislators on political realities?" [13]

To ask the question that way is of course to answer it, but Scalia had to wait a long time for a real-world test. For his first 20 years on the court, he was in dissent, fulminating as the majority upheld an increasingly complicated regulatory architecture intended to mitigate the corrupting potential of political spending. The bellwether decision, *Buckley v. Valeo*, came in 1976, well before Scalia joined the court, and it professed a distinction that he—as well as some of his liberal counterparts—found problematic: limits on political contributions were a permissible prophylactic against corruption, but restrictions on election spending infringed First Amendment free-speech rights.[14]

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8 James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 Br. J. Am. Leg. Studies 3 (2017).

9 *Id.* at 4.

10 483 U.S. 825 (1987).

11 505 U.S. 1003 (1992).

12 Richard A. Epstein, *Missed Opportunities,Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 Br. J. Am. Leg. Studies 19-11 (2017).

13 Jane Marriott, *Justice Scalia: Tenured Fox in the Democratic Hen-House?* 6. Br. J. Am. Leg. Studies 11 (2017).

14 424 U.S 1 (1976).

It wasn't until 2006, when the appointment of Justice Samuel Alito created a five-member bloc convinced that restrictions on political spending should be scrutinized like regulation of political speech, that Scalia's views commanded a majority. Year by year, the court struck down various campaign finance regulations, reaching a high-water mark in 2010 with the *Citizens United* decision, overruling a 1990 opinion by Justice Thurgood Marshall—from which Scalia had dissented—to remove limits on political spending by independent organizations such as corporations and unions.[15]

Marriott tells us that the theoretical line Scalia embraced on campaign-finance amounted to "denial" of the damage unchecked spending by special interests does to the democratic process. Scalia might say, though, that that *is* the democratic process.

Scalia joined the court in September 1986, barely missing the chance to participate in its most notorious gay-rights decision, *Bowers v. Hardwick*, which the previous June had capped the term by upholding Georgia's criminal sodomy law.[16] There's little doubt where Scalia would have stood, however, because he stood by its result, dissenting from each of the major succeeding cases that over the next 30 years not only would see *Hardwick* overruled by the Constitution applied to extend marriage rights to same sex couples.[17]

Scalia could claim he simply remained consistent with originalist principles, in that the framers of the Fourteenth Amendment were unlikely to have expected it to apply to homosexuals. Ian Loveland, of the City Law School, University of London, doesn't buy it.

"Scalia's opinions repeatedly mischaracterized the positions adopted by members of the court with whom he disagreed and invoked quite absurd analogies to sustain his own," he writes. Rather than antiseptically apply the text, Scalia revealed his personal bias through a "repeatedly derogatory, almost demonising portrayal, of the litigants and organisations seeking to promote the cause of sexual orientation equality," Loveland says.[18]

To be sure, Scalia never suggested the Constitution prohibits government from protecting gay rights. In his dissent from *Obergefell v. Hodges*, he asserted that he cared little over the outcome of the marriage battle, but exclusively was concerned with where the battlefield was located. "An unelected committee of nine" was the wrong arena, he said, as the rights of same-sex couples should instead be decided through the political process.

"Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best," is how he saw it, noting that despite the prevalence of marriage bans 11 states had legalized same-sex marriage through legislative or voter initiatives. [19]

Loveland, perhaps inspired himself to hyperbole, writes that Scalia's frothing dissents from gay-rights decisions might find an "ideological bedfellow" in Donald Trump. "Both men persistently displayed in their respective legal and political spheres a disdain for the truth of their empirical observations and a contempt for the arguments advanced by their opponents," he writes.[20]

Of course, a politician's utterances, while subject to review and criticism, ultimately are aimed at a mass audience, an electorate whose members may pay only glancing attention to their substance or treat them with skepticism. A judicial opinion has a narrower, specialized audience that is able to seriously evaluate the arguments. A dissent is about as important as the losing candidate's reflections the day after the election. Scalia liked to say he wrote his

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15 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
16 Bowers v. Hardwick, 478 U.S. 186 (1986).
17 Obergefell v. Hodges, 576 U.S. ___,135 S. Ct. 2584 (2015).
18 Ian Loveland, *The Sexual Orientation Cases*, 6 Br. J. Am. Leg. Studies 3 (2017).
19 Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584, 2627 (2015).
20 Loveland, *supra* note 15, at 25.

dissents sharply, hoping they would be picked up for legal casebooks, offering him a venue to influence future generations of law students.[21]

Trump may have understood little about Scalia's work beyond the symbolic resonance that Jones and Sarat describe. As it happens, the justice he appointed, Neil Gorsuch knew Scalia and called him a "very, very great man,"[22] but had direct experience working for two other justices most influential in the gay rights debate. Gorsuch was hired by the just-retired Byron White, author of *Hardwick*. As is typical, he also did work for an active justice—Anthony Kennedy, author of four major gay-rights rulings, including ones that overruled *Hardwick* in 2003[23] and codified marriage rights in 2015.[24]

Gorsuch refers to both White and Kennedy as his mentors, although neither justice could be considered an originalist. When Justice Gorsuch hears his first case on gay rights—as on so many other topics—we will be watching to see if he breaks the mold.

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21 *See* http://volokh.com/2013/10/07/new-york-magazine-interview-justice-scalia-write-forceful-dissents/.

22 *See* https://www.whitehouse.gov/the-press-office/2017/04/10/remarks-president-trump-and-justice-gorsuch-swearing-justice-gorsuch.

23 Lawrence v. Texas, 539 U.S. 558 (2003).

24 Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015).