



PHOTO COURTESY GEORGETOWN LAW CENTER

**WHY
WE
READ**

**THE
SCALIA
OPINION
FIRST**

BY PAUL D. CLEMENT

VOLUME 101 NUMBER 1 SPRING 2017
JUDICATURE

Published by the Duke Law Center for Judicial Studies.
Reprinted with permission. © 2017 Duke University School
of Law. All rights reserved. www.law.duke.edu/judicature

Writing about Justice Antonin Scalia's writing is a daunting project indeed. The Justice plainly had a gift that is perhaps better savored than analyzed.

As one privileged to be his law clerk for a year, I can attest that the memorable prose that made his opinions such enjoyable reading was all him. Although he did ask his law clerks to provide first drafts, he was routinely handed a stone and returned a sculpture. Indeed, his revision was so transformative, and the final product so distinctly Scaliaesque, that I wondered why he bothered asking for a draft at all. My sneaking suspicion, then and now, is that the Justice did not know how to format a new document on the computer.

Justice Scalia's gift as a wordsmith is something he always had. It is apparent in his opinions for the U.S. Court of Appeals for the D.C. Circuit,¹ and one of his most memorable opinions — his lone dissent in *Morrison v. Olson*² — was penned in just his second year on the Supreme Court. But his unique talents were on display far earlier. In preparing for an argument last term, I came across an article young Associate Professor Scalia wrote on sovereign immunity and nonstatutory review of federal administrative action³ — a potentially dry topic in the wrong hands. But not in his. In making the point that two phenomena, superficially at odds, were actually mutually reinforcing, he evoked “a child's astonishment at watching a tight-rope walker for the first time — how marvelous that he should not only walk along such a narrow wire, but carry and balance a long stick at the same time!”⁴

That passage captures one of the things that made the Justice's writing so distinctive and memorable. The best lines in a Scalia opinion were no mere rhetorical flourishes. They were images — usually far removed from the technical legal questions at hand — that perfectly captured the point the Justice was trying to make. When one thinks of sovereign immunity

and nonstatutory review of federal administrative action — if one thinks of it at all — the image of a tight-rope walker does not immediately come to mind. But once Professor Scalia⁵ set the scene, both the visual image and his legal point stuck. Similarly, the Independent Counsel statute⁶ did not obviously have anything to do with sheep or wolves. But a central point of his *Morrison* dissent was that the Independent Counsel statute was no wolf in sheep's clothing but a frontal assault on the separation of powers: “this wolf comes as a wolf.”⁷

The Justice's writing did more than just entertain the reader, it had serious consequences for the Court and its jurisprudence. It is not clear that the Court's three-part *Lemon* test for evaluating Establishment Clause claims⁸ ever fully recovered from being compared to a “ghoul in a late-night horror movie.”⁹ The image is at once arresting and seemingly out of place in a Supreme Court decision. But the comparison was hardly gratuitous. His point was that there were real costs to the Court's convenient relationship with a test that it sometimes abandoned only to revive it later unexpectedly. Thus, he likened *Lemon* not just to any B-movie ghoulish, but to one “that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,” and he complained that “*Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.”¹⁰

In a similar vein, Justice Scalia was hardly the first Supreme Court justice to write an opinion rejecting a litigant's effort to divine game-changing authority buried in a seemingly obscure statutory provision. But he was the first to proclaim

that Congress does not “hide elephants in mouseholes.”¹¹ Thus, in one particularly felicitous turn of phrase, a canon of construction was born.¹² Litigants not only quote that language to liven up their briefs,¹³ but they use elephants-in-mouseholes as a dismissive shorthand for any effort to attribute outsized consequences to minor provisions,¹⁴ and law professors and commentators write articles about the “elephants-in-mouseholes canon.”¹⁵

But just as the Justice's most memorable lines perfectly captured his doctrinal point, his distinct writing style flowed directly from his approach to the law. As great a writer as Justice Scalia was, it is difficult to conceive of him employing those considerable talents to the enumeration of the half-dozen considerations a lower court should ponder in evaluating the totality of the circumstances. He favored a jurisprudence of bright lines and square corners. And his prose followed his jurisprudence. He used clear and precise language to advocate for clear and precise lines.

In *Crauford v. Washington*, for example, the Justice wrote an opinion rejecting a more amorphous inquiry into the “reliability” of the government's evidence in favor of a more straightforward test of whether a defendant had the opportunity for “confrontation” mentioned in the Sixth Amendment's text.¹⁶ While Justice Scalia happily conceded that “the Clause's ultimate goal is to ensure reliability of evidence,” he was quick to remind that the Framers embraced a particular means to that end.¹⁷ The Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”¹⁸ He then employed an analogy that left no doubt that he thought the Constitution

provided an answer that was both clear and straightforward. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”¹⁹

Given his preference for bright-line rules, it is no surprise that some of his most memorable prose was used to assail balancing tests. The Justice was a dissenter from much of the Court’s dormant Commerce Clause jurisprudence based on his twin concerns that the doctrine was neither grounded in the constitutional text nor capable of predictable administration.²⁰ He captured the latter concern by likening the Court’s balancing test to one that asked judges to divine “whether a particular line is longer than a particular rock is heavy.”²¹ He had particular disdain for the “shocks the conscience” test sometimes employed in the Court’s substantive due process jurisprudence, which he described with a nod to Cole Porter as “the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity.”²²

One other parallel between Justice Scalia’s writing and jurisprudence merits mention: In both he cared deeply about the meaning of words. Justice Scalia made lasting contributions to the Court’s jurisprudence by reinforcing the primacy of statutory language and championing the interpretation of the Constitution by reference to the original public meaning of the constitutional text. Both modes of interpretation caused Justice Scalia to consult dictionaries, preferably dictionaries contemporaneous with the textual provisions at issue. His opinions, in turn, could send the reader to the dictionary to look up words like “panopticon”²³ and “atavistic,”²⁴ as well as allusions like “Cheops’ Pyramid,”²⁵ and “Marquis of Queensberry rules.”²⁶ He was willing to use an unfamiliar term, and risk losing a lazy reader unwilling to consult the dictionary, because words have meaning. He did not want to dilute his message by using a more familiar but less precise word.

Because of this belief that words have fixed, discernable meanings, he had particular disdain for dictionaries that included not just the accepted meaning of a term,

His opinions are sharper, present the issue more clearly, and employ the language of advocacy, because he had a conception of the opinion’s function as being to persuade, not to pronounce. And when it came to his dissenting opinions, he believed that they needed to be memorable or there was no reason for anyone to read them.

but also common misuses that could actually contradict the established meaning. In his view, such collections were unworthy of the name dictionary. In a case where the Justice confronted a single dictionary suggesting that the word “modify” included changes both transformational and minor, it would have been easy enough to dismiss the former aspect of the definition as an outlier.²⁷ Instead, the Justice mounted a frontal assault on Webster’s Third. He dredged up a few 30-year-old articles noting that when Webster’s Third made its long-awaited debut in 1961, it “was widely criticized as portraying

common error as proper usage.”²⁸ But the Justice’s real concern ran deeper. “When the word ‘modify’ has come to mean *both* ‘to change in some respects’ and ‘to change fundamentally’ it will in fact mean neither of those things. It will simply mean ‘to change.’”²⁹ That draining of specialized meaning from the term was not something the Justice could tolerate. He continued with a flourish: “It might be good English to say that the French Revolution ‘modified’ the status of the French nobility — but only because there is a figure of speech called understatement and a literary device known as sarcasm.”³⁰

The Justice’s opinions stand out from almost all other judicial writing. Part of that is due to the Justice’s unique skills as a writer, but there are other gifted writers on the bench. Something more clearly was at work. The majority opinions, and especially the dissents, include many images that seem out of place in a judicial opinion. They can also be harshly worded, and have been criticized as sarcastic and divisive.³¹ And, whatever else is true, they are not run-of-the-mill judicial prose. What is it that makes a Scalia opinion so distinctive, so Scaliaesque?

The Justice himself provided at least part of the answer in an article he wrote in the *Organization of American Historians Magazine of History*, entitled “Dissents.”³² In that article, the Justice expressed his firm view that judicial opinions are important “for the *reasons* they give, not the *results* they announce; results can be announced in judgment orders without opinions.”³³ In a pithy observation that explains both the number and passion of his dissenting opinions, he stated that “[a]n opinion that gets the reasons wrong gets everything wrong, and that is worth a dissent.”³⁴ The Justice emphasized that a dissenting opinion in particular should “inform the public in general, and the Bar in particular, about the state of the Court’s collective mind.”³⁵ The Justice believed that the public should not be misled that the Court was unanimous when it was in fact divided. And critically, he viewed the process of vigorous dissent as putting “the Court in the forefront of the intellectual development of the law.”³⁶ “In our system,” he wrote, “it is not left to the academi-

cians to stimulate and conduct discussion concerning the validity of the Court's latest ruling. The Court itself is not just the central organ of legal *judgment*; it is the center stage for significant legal *debate*.³⁷

As these passages indicate, the Justice viewed his opinions, especially his dissents, as doing something more than simply announcing a decision or proclaiming a result or legal rule. It is thus no surprise that they have more of the character of a brief for one side in a great debate and less of the solemnity of pronouncing what the law is. His opinions are sharper, present the issue more clearly, and employ the language of advocacy, because he had a conception of the opinion's function as being to persuade, not to pronounce. And when it came to his dissenting opinions, he believed that they needed to be memorable or there was no reason for anyone to read them. As he recognized later in the article, majority opinions will be read whether or not they are well-written, "because what they say is authoritative; it is the law."³⁸ Dissents are different. "They will not be cited, and will not be remembered, unless some quality of thought or of expression commends them to later generations."³⁹

Nor was there much doubt which audience the Justice was trying to persuade. While dissents may begin as an effort to alter the majority opinion, the most effective of those efforts either become majority opinions or never see the light of the day. At the point it is clear that a dissenting opinion will be published as such, it has

failed to persuade judicial colleagues, and the intended audience must lie elsewhere. For the Justice, that audience was law students, present and future. On this too, he was explicit. "In our law schools, it is not necessary to assign students the writings of prominent academics" so that students can understand "the principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself."⁴⁰

Justice Scalia, ever the law professor, had a great feel for that audience. In my own teaching, I have had countless students confess that they always read the Scalia opinion first — even students who almost always disagreed with the Justice. And who could blame them? Not only would the Scalia opinion lay the issue bare and articulate one side of the legal debate clearly and cogently, it would be a fun read. What law student would rather read about some dry, three-pronged doctrinal test, than about 60,000 naked Hoosiers⁴¹ or even just nine people selected at random from the Kansas City phone book.⁴² As always, that colorful prose was not gratuitous, but flowed from his jurisprudential beliefs and captured vividly the substantive point he was trying to make. The Justice believed that longstanding prohibitions against public nudity were not justified exclusively by the protection of nonconsenting third parties, and so he evoked the image of a stadium full of half-naked Hoosiers without "an offended innocent in

the crowd;"⁴³ he believed the Constitution gave the nine justices no special role in deciding right-to-die issues, and thus they had no more authority or expertise than nine people selected at random from the city phone book.⁴⁴

The Justice did not seek to pronounce the law, but to persuade the reader to side with him in a great legal debate. And he believed his separate opinions would be remembered only if they were well written and meticulously reasoned. In this regard, the Justice was plainly playing a long game. While others might be willing to trim their rhetorical sails or fuzz up a bright-line rule to pick up a fifth vote, Justice Scalia believed that "[a]n opinion that gets the reasons wrong gets everything wrong,"⁴⁵ and preferred opinions that both got the reasons right and commended themselves "to later generations."⁴⁶ My guess is that all law students will be reading and enjoying his opinions, and some will find themselves persuaded, for generations to come.



PAUL D. CLEMENT

is a former Solicitor General of the United States. He is now a partner with Kirkland & Ellis LLP and a Distinguished Lecturer in Law at the Georgetown University Law Center. He has argued 85 cases before the Supreme Court.

¹ See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1551 n.1 (D.C. Cir. 1984) (en banc) (Scalia, J., with Bork & Starr, JJ., dissenting) ("Even the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief."), *majority op. vacated*, 471 U.S. 1113 (1985); *Cnty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984) ("This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that 'No man should see how laws or sausages are made.'")

² *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

³ Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusion from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970).

⁴ *Id.* at 879–80.

⁵ Justice Scalia joined the faculty of the University of Virginia Law School in 1967.

⁶ Congress enacted the Independent Counsel statute as Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1867 (1978), and Congress twice reenacted the law, with amendments, Pub. L. No. 97-409, 96 Stat. 2039 (1983); Pub. L. 100-191, 101 Stat. 1293 (1987).

⁷ *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

⁸ "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations and quotation marks omitted).

⁹ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., with Thomas, J., concurring in the judgment).

¹⁰ *Id.*

¹¹ *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). The full sentence reads: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."

¹² In his years on the Court, Justice Scalia repeated the phrase only once. But the phrase obtained canonical status through usage from nearly every other justice on the Court. See, e.g., *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016) (Thomas, J., majority opinion); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Ginsburg, J., dissenting); *Chambers of Commerce of U.S. v. Whiting*, 563 U.S. 582, 641 (2011) (Sotomayor, J., dissenting); *Bilski v. Kappos*, 561 U.S. 593, 645 (2010) (Stevens, J., concurring in the judgment); *Coeur Ala., Inc. v. Se. Ala. Governance Council*, 557 U.S. 261, 303 (2009) (Ginsburg, J.,

- dissenting); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 239 (2009) (Stevens, J., dissenting); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116 (2008) (Breyer, J., majority opinion); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 243 (2008) (Breyer, J., dissenting); *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (Kennedy, J., majority opinion).
- ¹³ Since 2001, “elephants in mouseholes” has appeared nearly 200 times in Supreme Court briefs alone.
- ¹⁴ There is, in fact, an entire article devoted to tracing the use of “elephants in mouseholes” in legal writing. Robert B. Hoffman, *A Stampede of Elephants*, PA. LAWYER Jan./Feb. 2005, at 24.
- ¹⁵ See, e.g., William K. Tom & Gregory F. Wells, *Elephants in Mouseholes: Lessons for Joint Ventures from the Intellectual Property World*, ANTITRUST, Sum. 2016, at 32; Joseph Hood, *Before There Were Mouseholes: Resurrecting the Non-Delegation Doctrine*, 30 BYU J. PUB. L. 123 (2015); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010); Harold H. Bruff, *On Hunting Elephants in Mouseholes*, 62 VAND. L. REV. EN BANC 127 (2009).
- ¹⁶ *Crauford v. Washington*, 541 U.S. 36 (2004).
- ¹⁷ *Id.* at 61.
- ¹⁸ *Id.*
- ¹⁹ *Id.* at 62.
- ²⁰ See, e.g., *Intl Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78 (1993) (Scalia, J., concurring in part and concurring in the judgment) (criticizing “the vague and open-ended tests that are the current content of our negative Commerce Clause jurisprudence, such as the four-factor test set forth in [one case] or the ‘balancing’ approach of [another case]”); *Am. Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 200, 202 (1990) (Scalia, J., concurring in the judgment) (describing “my view (by no means mine alone) that this jurisprudence is a quagmire . . . and that it has only worsened with age” (quotations marks omitted)); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., with Rehnquist, C.J., concurring in part and dissenting in part) (“The standard for discrimination adopted by the Court . . . has no basis in the Constitution.”).
- ²¹ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).
- ²² *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 862 (1998) (Scalia, J., with Thomas, J., concurring in the judgment) (call number omitted). In a footnote, Justice Scalia explained: “For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter’s ‘You’re the Top,’ copyright 1934.”
- ²³ *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., with Ginsburg, Sotomayor, & Kagan, JJ., dissenting) (“Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”).
- ²⁴ *Lewis*, 523 U.S. at 861 (Scalia, J., with Thomas, J., concurring in the judgment).
- ²⁵ *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., with Thomas, J., dissenting) (“Today’s judgment converts Miranda from a milestone of judicial overreaching into the very Cheops’ Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance.”).
- ²⁶ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992) (“St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”).
- ²⁷ *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–26 (1994).
- ²⁸ *Id.* at 228. n.3.
- ²⁹ *Id.* at 227.
- ³⁰ *Id.* at 228.
- ³¹ See, e.g., Adam Liptak, *Scalia Lands at Top of Sarcasm Index of Justices*, *Sbocking*, N.Y. TIMES, Jan. 19, 2015, http://www.nytimes.com/2015/01/20/us/scalia-lands-at-top-of-sarcasm-index-of-justices-shocking.html?_r=0 (“Justice Antonin Scalia has a sharp tongue and a cutting writing style. His signature mode is sarcasm.”).
- ³² Antonin Scalia, *Dissents*, OAH MAGAZINE OF HISTORY, Fall 1998, at 18.
- ³³ *Id.* at 18.
- ³⁴ *Id.*
- ³⁵ *Id.* at 20.
- ³⁶ *Id.* at 21.
- ³⁷ *Id.*
- ³⁸ *Id.* at 23.
- ³⁹ *Id.*
- ⁴⁰ *Id.* at 21.
- ⁴¹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).
- ⁴² *Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).
- ⁴³ After criticizing the dissent’s “Thoreauvian ‘you may do as you like as long as it does not injure someone else’ beau ideal,” the Justice continued that, “[t]he purpose of Indiana’s nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.” *Barnes*, 501 U.S. at 575 (Scalia, J., concurring in the judgment). Justice’s Scalia colorful prose forced the dissent to engage with the argument on Justice Scalia’s own terms: “We agree with Justice SCALIA that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosier Dome.” *Id.* at 596 (White, J., with Marshall, Blackmun, & Stevens, JJ., dissenting).
- ⁴⁴ “[T]he point at which life becomes ‘worthless,’ and the point at which the means necessary to preserve it become ‘extraordinary’ or ‘inappropriate,’ are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.” *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).
- ⁴⁵ Scalia, *supra* note 33, at 18.
- ⁴⁶ *Id.* at 23.

Osborn Maledon is pleased to sponsor
Judicature,
the scholarly
journal for
judges.

OSBORN
MALEDON

Osborn Maledon is a law firm in Phoenix, Arizona, that provides litigation, business, and general counsel solutions for its clients. We provide many services to our clients, from strategic advice for our business and litigation clients, to written and oral presentations we make to judges, juries, and arbitrators. We are proud to support Judicature as part of our commitment to serving our community and our profession.

(602) 640-9000 • OMLAW.COM
2929 N CENTRAL AVE, 21ST FL.
PHOENIX, AZ 85012