

PROCEEDINGS IN THE SUPREME COURT OF THE
UNITED STATES IN MEMORY OF
JUSTICE SCALIA*

FRIDAY, NOVEMBER 4, 2016

Present: CHIEF JUSTICE ROBERTS, JUSTICE KENNEDY,
JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE BREYER,
JUSTICE ALITO, JUSTICE SOTOMAYOR, and JUSTICE KAGAN.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to Associate Justice Antonin Scalia.

The Court recognizes the Acting Solicitor General of the United States.

Acting Solicitor General Gershengorn addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting of the Bar of this Court, Resolutions memorializing our deep respect and affection for Justice Scalia were adopted unanimously.

RESOLUTIONS

Today the bar of this Court convenes to pay respect to a towering figure in American law—a Justice of conviction, character, and courage; a treasured colleague; an irreplace-

*Justice Scalia died in Shafter, Texas, on February 13, 2016 (577 U. S., p. v).

able mentor; and a man devoted to his country, its Constitution, and this Court. In his nearly 30-year tenure on this Court, Antonin Scalia displayed a forceful intellect, a remarkable wit, and an inimitable writing style. His ideas helped to shape the way we think about law. And for those blessed to know him, his compassion, humanity, and commitment to his family, friends, and faith will remain an inspiration.

On March 11, 1936, five months after this Court heard its first case in this building, Antonin Scalia was born in Trenton, New Jersey. His mother, Catherine Panaro, was the oldest of seven and born to parents who immigrated to the United States from Italy in 1904. His father, Salvatore Eugene Scalia, came to this country from Sicily in 1920 at age 17. Both became teachers—S. Eugene a professor of Romance Languages at Brooklyn College and Catherine an elementary school teacher.

Antonin—Nino to family and friends—was his parents' only child and the only child of his generation on either side of the large family. He grew up in Trenton and later in the diverse Elmhurst neighborhood of Queens in New York City, where his parents made “an education project” out of him. Antonin's curiosity and love of argument surfaced early. One aunt recalled that, “[w]hen [Antonin] wanted to do something” an adult had put off-limits, “you had to give him a very, very good argument about why he could not do it.”¹ Through their example and, one suspects, occasional direction, Scalia's parents fostered his religious faith and character. He also inherited from them a lifelong love of music—especially opera—and the ability to play the piano, which he learned from his father.

After an uncharacteristically subpar showing on an entrance examination for his preferred high school—missing a grammar question of all things—Scalia attended Xavier High School in Manhattan. “One door closes, another door

¹Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* 18, 20 (2009).

opens,” as he would say. Faith was foremost at the Jesuit school at that point and military discipline a close second. Scalia graduated first in his class, collecting an array of awards along the way. He was a stand-out debater—even appearing on local television—and played the French horn for the marching band and starred in several school plays, including the title role in *Macbeth*. From a teacher at Xavier, Scalia learned what he often referred to as the “Shakespeare Principle”: “When you read Shakespeare, Shakespeare’s not on trial. You are.”

Scalia continued the pursuit of a Jesuit education by attending Georgetown University, where he studied history and government and once again graduated first in his class. He and a teammate rose to national prominence in competitive debate, and he continued to perform on stage. Georgetown also made a mark on the Justice’s faith. The “last lesson” he learned in college, imparted by a professor during his oral examinations, was “not to separate your religious life from your intellectual life.” Scalia took that lesson to heart. In his commencement speech, he challenged his classmates to be courageous and to “carry and advance into all sections of our society this distinctively human life, of reason learned and faith believed.” “If we will not lead,” Scalia asked, “who will?”²

After Georgetown, Scalia attended Harvard Law School, where he relished debating cases with professors in the classroom and with classmates through his work as an editor of the *Law Review*. But however rich the academic environment, the signal event of his Harvard years occurred outside the classroom, when he met Maureen McCarthy, an undergraduate student from Radcliffe College, on a blind date. The two had much in common—sharp intellects and quick wits. Perhaps most importantly, Maureen recalled, they had shared convictions on “all the important things,” includ-

² *Id.*, at 25; Jacob Gershman, ‘If We Really Love the Truth’—Excerpts from Scalia’s 1957 Graduation Speech, *Wall St. J.* (Feb. 16, 2016), <http://on.wsj.com/1mFO4mb>.

ing their Catholic faith. In Antonin's telling, Maureen was drawn by the Sheldon Fellowship he had won at Harvard to travel around Europe after graduation. Whatever the proximate cause, the marriage took place in September 1960 and was a blessing and a source of strength to both. Their 55-year union produced nine children and dozens of grandchildren. Antonin joked that the "secret" to their marriage's longevity was that "Maureen made it very clear early on that if we split up, [he] would get the children."³ For her part, Maureen explained that she "would have been bored" with someone "wishy washy."⁴

Upon returning from their European travels, the Scalias moved to Cleveland, Ohio, where Antonin joined Jones, Day, Cockley & Reavis. During his six years there, his work covered a range of fields, from antitrust and real estate to labor law, contracts, and tax. Although Scalia enjoyed the practice of law and was well regarded at the firm, he had long aimed to follow his parents' path by becoming a teacher.

In 1967, Scalia accepted a post at the University of Virginia School of Law, where he taught contracts and comparative law. The focus of his scholarship, if not always his teaching, would become administrative law.⁵ In the classroom he was energetic and engaging, posing inventive and often entertaining hypotheticals. He enjoyed encouraging students to consider legal problems from the standpoint of a layperson, asking classes, "What would Joe Sixpack say

³CNN Transcripts, Piers Morgan Tonight: Interview with Antonin Scalia, CNN.com (transcript of July 18, 2012 cable-television broadcast), <http://www.cnn.com/TRANSCRIPTS/120718/pmt.01.html>.

⁴Lesley Stahl, 60 Minutes: Interview with Antonin Scalia, Part 2, at 5:38-5:48, CBS NEWS (recording of April 27, 2008 interview), <http://www.cbsnews.com/videos/justice-scalia-on-60-minutes-part-2>.

⁵See, e.g., Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases, 68 Mich. L. Rev. 867 (1970); Antonin Scalia & Frank Goodman, Procedural Aspects of the Consumer Product Safety Act, 20 UCLA L. Rev. 899 (1973); Antonin Scalia, Vermont Yankee: The APA, the D. C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345 (1978); Antonin Scalia, The ALJ Fiasco—A Reprise, 47 U. Chi. L. Rev. 57 (1979).

about this?” He often concluded the semester by quoting a line from Robert Bolt’s *A Man for All Seasons*, which to Scalia was a “beautiful expression of the importance of the law.” In the passage, Sir Thomas More boldly declares: “Whoever hunts for me, Roper, God or Devil, will find me hiding in the thickets of the law! And I’ll hide my daughter with me! Not hoist her up to the mainmast of your seagoing principles! They put about too nimbly!”⁶

Several years into teaching, Scalia was appointed to the first of several Executive Branch positions. In 1971, he became the general counsel of the newly created Office of Telecommunications Policy, where he addressed legal and policy issues arising in the still-nascent cable industry. The following year, Scalia was asked to chair the Administrative Conference of the United States, a body composed of officials from various agencies, academics, and other experts in the field to study problems of administrative law and procedure and to recommend solutions to Congress or agencies. Scalia enjoyed the Conference’s work, and was gratified when the Conference was revived in 2010 after a multi-year hiatus.

In 1974, Scalia became the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. Then-Deputy Attorney General Laurence Silberman explained that, in choosing a new head of OLC in the aftermath of Watergate, the Ford Administration “wanted a brilliant lawyer with steel nerves.”⁷ Scalia fit the bill. Confirmed just weeks after President Ford took office, Scalia confronted a litany of difficult constitutional and other issues, starting with the legal ownership of President Nixon’s papers. The work entailed long hours. As Maureen recounted, Scalia “slept in the White House, and I don’t mean the Lincoln bedroom.”⁸ But even through those trying and exhilarating professional days, family and faith remained priorities.

⁶ Biskupic, *supra*, n. 1, at 66–67, 76.

⁷ Justice Scalia Memorial Service, at 15:45–15:49, C-SPAN (Mar. 1, 2016), <https://www.c-span.org/video/?405460-1/memorial-service-supreme-court-justice-antonin-scaila&start=939>.

⁸ Biskupic, *supra*, n. 1, at 53.

In 1977, Scalia returned to academia, joining the University of Chicago faculty, where he remained, aside from a visit to Stanford, until 1982. In Chicago, Scalia continued to focus on administrative law and became head of the American Bar Association's Section of Administrative Law in 1981. He was particularly pleased with the amicus brief he wrote for the ABA in *INS v. Chadha*,⁹ the landmark separation-of-powers case striking down a one-house legislative veto.

When President Reagan took office in 1981, he looked for a new Solicitor General, and before long Scalia and Rex Lee emerged as finalists. Scalia was crestfallen when he did not receive the appointment. The President had other ideas, however, nominating him to the U. S. Court of Appeals for the D. C. Circuit in 1982. In his four years on that court, Scalia encountered a range of constitutional and statutory questions. While there, he wrote what he considered one of the best openings in all of his opinions: "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.'" ¹⁰

When Chief Justice Burger announced his retirement in 1986, President Reagan nominated Justice Rehnquist to fill Burger's seat and tapped Scalia to fill Rehnquist's seat. At his confirmation hearing, Scalia was asked to explain the "success of the Constitution." While the Bill of Rights is "very important," he responded, its provisions standing alone "do not do anything." Other countries, even those with authoritarian regimes, have "at least as good guarantees of personal freedom." Instead, Scalia explained, "[w]hat makes it work, what assures that those words are not just hollow promises, is the structure of government that the original Constitution established, the checks and bal-

⁹ 462 U. S. 919 (1983).

¹⁰ *Community Nutrition Inst. v. Block*, 749 F. 2d 50, 51 (D. C. Cir. 1984).

ances among the three branches.”¹¹ When Senator Metzenbaum in jest criticized Scalia’s “bad judgment in whipping” the Senator on the tennis court, Scalia confessed that “[i]t was a case of [his] integrity overcoming [his] judgment.”¹² Scalia was confirmed 98–0 on September 17, 1986, the 199th anniversary of the Constitution’s signing in Philadelphia.

Over the next three decades, Justice Scalia left his mark on the law in numerous ways, too many to recount in full here. His steadfast commitment to the idea that external legal principles rather than internal policy preferences should govern judicial decisionmaking made him deeply respectful of the Constitution’s allocation of powers and vigilant in respecting legal texts. That commitment showed up first, and most often, in his views on statutory interpretation. Justice Scalia pressed the elementary proposition that, when interpreting a statutory text, judges must try to discern and enforce the meaning of words enacted by Congress to express its policies. In his view, courts should never rewrite a discernible statutory text to conform to a law’s unenacted legislative purposes. This position challenged the practice of first divining and then enforcing the “spirit” rather than the “letter” of a law, an approach embodied by the *Holy Trinity* decision.¹³ With characteristic energy, Justice Scalia contested that practice. The legislative process is opaque, path-dependent, and prone to “backroom deals” that do not make their way into the public eye. An awkwardly worded statute that falls short of its apparent policy aspirations thus might not be the product of legislative misstatement, but might instead be “the result of compromise among various interest groups, resulting in a decision to go so far and no farther.”¹⁴ Hence, when judges rewrote

¹¹ Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 32 (1986) (statement of Antonin Scalia).

¹² *Id.*, at 13.

¹³ *Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

¹⁴ *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in judgment).

a clear statute to conform its terms to what they perceived to be the law's underlying purposes, they risked upsetting whatever "legislative compromise [may have] enabled the law to be enacted" in the first place.¹⁵ *Holy Trinity* was never the same after Justice Scalia joined the Court.

During his career, the Court moved a good way (though not as far as he would have liked) toward his rigorous emphasis on the enacted text.¹⁶ The Court's citation of dictionaries has risen to levels previously unseen in the U. S. Reports.¹⁷ After a post-New Deal judicial trend away from the use of semantic canons, they now play a visible, sometimes pivotal, role in the Court's determinations of statutory meaning.¹⁸ And the Court became skeptical of *implied* statutory rights of action.¹⁹ This new textualism²⁰ had an undeniable impact on the way the Court does business.

Perhaps most pronounced has been the Court's embrace of the idea, championed by Justice Scalia, that extrinsic indicia of statutory intention, such as legislative reports or floor statements, may not override a clear statutory text. In an opinion for the Court early in his tenure, Justice Scalia wrote that "[t]he best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."²¹ He added that where such a text is "unambiguous," the Court "do[es] not permit it to be expanded or contracted by the statements of individual legisla-

¹⁵ *Artuz v. Bennett*, 531 U. S. 4, 10 (2000).

¹⁶ See Philip P. Frickey, Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger, 84 *Minn. L. Rev.* 199, 205 (1999).

¹⁷ See, e. g., Jeffrey L. Kirchmeier & Samuel A. Thumma, Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century, 94 *Marq. L. Rev.* 77, 86 (2010).

¹⁸ See, e. g., *McDonnell v. United States*, 579 U. S. 550, 567–569 (2016) (*noscitur a sociis*); *Bruesewitz v. Wyeth LLC*, 562 U. S. 223, 233 (2011) (*expressio unius*).

¹⁹ See, e. g., *Alexander v. Sandoval*, 532 U. S. 275 (2001).

²⁰ See William N. Eskridge, Jr., The New Textualism, 37 *UCLA L. Rev.* 621 (1990).

²¹ *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U. S. 83, 98 (1991).

tors or committees during the course of the enactment process.”²²

Before 1986, the Court frequently used legislative history in an effort to discern legislative intent. Often, the Court would treat the views of a statute’s sponsor or a drafting committee as if they represented the intentions of Congress as a whole.²³ So strong was the acceptance of legislative history that a Burger Court opinion, in an unguarded moment, declared that because “[t]he legislative history . . . is ambiguous[,] . . . we must look primarily to the statutes themselves to find the legislative intent.”²⁴

Justice Scalia criticized the use of legislative history as a tool of construction every chance he got, all but affixing a badge of shame on it. In vivid prose informed by practical experience in government, he questioned whether rank-and-file legislators necessarily read, much less agreed with, floor statements or even the committee reports that had become a staple of interpretive practice. When the Court interpreted the Civil Rights Attorney’s Fees Award Act by parsing lower court cases that the committee reports had cited, Justice Scalia wrote: “As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction.”²⁵

²² *Id.*, at 98–99.

²³ See, e. g., *North Haven Bd. of Ed. v. Bell*, 456 U. S. 512, 526–527 (1982); *Steadman v. SEC*, 450 U. S. 91, 101 (1981); *J. W. Bateson Co. v. United States ex rel. Bd. of Trustees of Nat. Automatic Sprinkler Industry Pension Fund*, 434 U. S. 586, 591 (1978).

²⁴ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 412, n. 29 (1971).

²⁵ *Blanchard v. Bergeron*, 489 U. S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in judgment).

Ultimately, Justice Scalia's principal concern was less the accuracy of legislative reports than their legitimacy. The Constitution conditions Congress's power to legislate on a bill's passage by two Houses and either the assent of the President or the override of a presidential veto by two-thirds of each house.²⁶ According to Justice Scalia, even if most Members of Congress would want and expect the courts to treat legislative history as an authoritative indication of a statute's intended meaning, "the very first provision of the Constitution" precludes that arrangement by vesting "[a]ll legislative Powers" in *Congress* itself.²⁷ If legislative committees or bill sponsors could make pronouncements that specified the entire body's intended policies, then Members of Congress could make an end-run around the bicameralism and presentment requirements themselves. In Justice Scalia's words: "We are governed by laws, not by the intentions of legislators. . . . 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.'" ²⁸

It is fair to say that the connection between statutory text and judicial interpretations of it has tightened substantially since Justice Scalia joined the Court. The Court has restored the primacy of statutory text and routinely declines to "resort to legislative history to cloud a statutory text that is clear," as Justice Ginsburg wrote for the Court.²⁹ Today, the Court instead "presume[s] that a legislature says in a statute what it means and means in a statute what it says there."³⁰ That is no small legacy.

²⁶ U. S. Const., Art. I, § 7.

²⁷ *Bank One Chicago, N. A. v. Midwest Bank & Trust Co.*, 516 U. S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in judgment) (quoting U. S. Const., Art. I, § 1).

²⁸ *Conroy v. Aniskoff*, 507 U. S. 511, 519 (1993) (Scalia, J., concurring in judgment) (emphasis omitted) (quoting *Aldridge v. Williams*, 3 How. 9, 24 (1844)).

²⁹ *Ratzlaf v. United States*, 510 U. S. 135, 147–148 (1994).

³⁰ *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 253–254 (1992). See also *Alabama v. North Carolina*, 560 U. S. 330, 351–352 (2010).

Just as Justice Scalia believed that courts should do their best to honor a statute's text, he thought the same should be true for the Constitution. And if it was essential to respect the language of the Constitution, it followed that its meaning should be fixed unless and until the People followed the process for ratifying amendments to the charter. As he saw it, the words of the Constitution, like all legal texts and documents, bear the same meaning today as they did when adopted, neither diminished nor augmented—though of course capable of application to new technologies and other features of modern society.³¹

He grounded this principle of interpretation in part in respect for democracy. To recognize constitutional rights that he could not locate in the Constitution, he believed, “prohibit[s] . . . acts of self-governance that ‘We the people’ never, ever, voted to outlaw.”³² “This practice of constitutional revision by an unelected committee of nine,” he argued, “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”³³ He thus voted against recognition of new rights that he believed lacked a foundation in the Constitution's original meaning—in areas ranging from abortion³⁴ and same-sex marriage³⁵ to punitive-damage caps³⁶ and retroactive taxation.³⁷

Any other approach, he worried, placed at risk the guarantees of liberty actually enshrined in the Constitution. Just as he resisted imposing new restrictions on democratic self-

³¹ *Kyllo v. United States*, 533 U. S. 27 (2001).

³² Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 88 (2012).

³³ *Obergefell v. Hodges*, 576 U. S. 644, 714 (2015) (Scalia, J., dissenting).

³⁴ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 979 (1992) (Scalia, J., dissenting).

³⁵ *Obergefell*, 576 U. S., at 713 (Scalia, J., dissenting).

³⁶ *BMW of North America, Inc. v. Gore*, 517 U. S. 559, 598 (1996) (Scalia, J., dissenting).

³⁷ *United States v. Carlton*, 512 U. S. 26, 39 (1994) (Scalia, J., concurring in judgment).

government that the People did not vote to impose, he insisted on unyielding enforcement of those restrictions that the People *did* vote to impose.³⁸ An essential responsibility of the Court, he thought, was “to *preserve* our society’s values” and “to prevent backsliding” from the limits prescribed by the Constitution.³⁹ That approach prompted him to dissent from decisions that he believed cut back on the original meaning of constitutional guarantees such as the Elections Clause,⁴⁰ the Ex Post Facto Clause,⁴¹ the Fourth Amendment,⁴² the Jury Clause,⁴³ and the Seventh Amendment.⁴⁴ His judicial philosophy also led him to recognize constitutional limitations upon the government’s use of new technology where necessary to “assure[] preservation” of the same “degree” of liberty “that existed when the [Bill of Rights] was adopted.”⁴⁵ That imperative prompted his opinions for the Court holding that the Fourth Amendment restricts the government’s power to use thermal scanners to inspect houses,⁴⁶ and that the Confrontation Clause protects a criminal defendant’s right to confront forensic analysts.⁴⁷

Where the constitutional text did not answer the question at hand, history came to the fore, not for its own sake, but to shed light on the original public meaning of the text. It is doubtful that any Justice has done more for the cause of legal history or placed more light on once-obscure legal texts.

³⁸ See *Texas v. Johnson*, 491 U. S. 397 (1989).

³⁹ *United States v. Virginia*, 518 U. S. 515, 568 (1996) (Scalia, J., dissenting).

⁴⁰ *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U. S. 787, 854 (2015) (Scalia, J., dissenting).

⁴¹ *Rogers v. Tennessee*, 532 U. S. 451, 467 (2001) (Scalia, J., dissenting).

⁴² *County of Riverside v. McLaughlin*, 500 U. S. 44, 59 (1991) (Scalia, J., dissenting).

⁴³ *Almendarez-Torres v. United States*, 523 U. S. 224, 248 (1998) (Scalia, J., dissenting).

⁴⁴ *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415, 448 (1996) (Scalia, J., dissenting).

⁴⁵ *Kyllo*, 533 U. S., at 34.

⁴⁶ *Ibid.*

⁴⁷ *Melendez-Diaz v. Massachusetts*, 557 U. S. 305 (2009).

His opinions are replete with references to Coke's Institutes and Blackstone's Commentaries, to Johnson's Dictionary and Publius' Federalist, and to statutes enacted by early Congresses and constitutions adopted by the original States. His lead opinion in *Harmelin v. Michigan*⁴⁸ canvassed everything from Lord Chief Justice Jeffreys' remarks during the Bloody Assizes to Patrick Henry's remarks during the Virginia ratification convention before concluding that disproportionality alone does not render a punishment cruel and unusual under the Eighth Amendment. And in *Hamdi v. Rumsfeld*,⁴⁹ he concluded in dissent that, in the absence of a suspension of the privilege of the writ of habeas corpus, the President lacked power to detain American citizens without charge as enemy combatants—though only after a reconnaissance of the Habeas Corpus Act of 1679, English treason prosecutions, and previous English and American statutes suspending the privilege.

He summed up his approach to text and tradition this way:

“[A] venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle . . . devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest ‘rule,’ or ‘three-part test,’ or ‘balancing test’ devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.”⁵⁰

That meant that in Establishment Clause cases, to use one example, he voted to uphold prayer at public-school gradua-

⁴⁸ 501 U. S. 957 (1991).

⁴⁹ 542 U. S. 507, 554 (2004) (Scalia, J., dissenting).

⁵⁰ *Rutan v. Republican Party of Ill.*, 497 U. S. 62, 95–96 (1990) (Scalia, J., dissenting).

tions,⁵¹ accommodation of religious beliefs,⁵² and public displays of religious monuments⁵³ because they enjoyed the validation of tradition—regardless of whether they comported with judge-devised metrics such as the *Lemon* test.

By the end of Justice Scalia's tenure, a focus on the original public meaning of the Constitution's text had become, if not orthodoxy, a thoroughly respectable and commonplace approach to constitutional interpretation. Two decisions—*District of Columbia v. Heller*⁵⁴ and *Crawford v. Washington*⁵⁵—illustrate the point. In *Heller*, the Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense. Justice Scalia's opinion for the Court showcases his meticulous approach to uncovering how the Constitution was understood by "ordinary citizens in the founding generation"⁵⁶—starting with an analysis of the words of the Second Amendment, continuing with an examination of analogous provisions in early state constitutions, and turning to an analysis of how the Second Amendment was interpreted through the 18th and 19th centuries. This focus on text and history was hardly limited to the Justice's opinion for the Court. Justice Stevens' dissent emphasized the debates surrounding the ratification of the Constitution and the drafting history of the Second Amendment, while Justice Breyer's dissent stressed the prevalence of gun laws in colonial towns.

Crawford is of a piece. His 7–2 decision for the Court interpreted the Sixth Amendment's Confrontation Clause and turned on the public understanding of the guarantee at the time of ratification rather than on the Framers' broader interest in promoting the reliability of evidence in a criminal

⁵¹ *Lee v. Weisman*, 505 U. S. 577, 631 (1992) (Scalia, J., dissenting).

⁵² *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U. S. 687, 732 (1994).

⁵³ *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844, 885 (2005) (Scalia, J., dissenting).

⁵⁴ 554 U. S. 570 (2008).

⁵⁵ 541 U. S. 36 (2004).

⁵⁶ *Id.*, at 576–577.

case. In a series of cases exemplified by *Ohio v. Roberts*,⁵⁷ the Court had employed a balancing test designed to identify reliable evidence. *Crawford* memorably dispatched the *Roberts* balancing test and the elevation of the Framers' broader interest in reliable evidence over the textual guarantee of confrontation. "By replacing categorical constitutional guarantees with open-ended balancing tests," Justice Scalia reasoned, "we do violence to [the Framers'] design."⁵⁸ And while Justice Scalia happily conceded that "the Clause's ultimate goal is reliable evidence," he was quick to remind that the Framers embraced a particular means to that end. 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."⁵⁹ "Dispensing with confrontation because the evidence is obviously reliable," he trenchantly concluded, "is akin to dispensing with jury trial because the defendant is obviously guilty. That is not what the Sixth Amendment prescribes."⁶⁰ He was proud of both decisions.

Justice Scalia may be best known for his views about the proper methodology for statutory and constitutional interpretation. But his first love was an area of substantive law—constitutional structure—which shaped his answers to the underlying questions that appear in every case: Who decides? And how? Even his methods of statutory and constitutional interpretation were informed by these considerations. He eschewed the use of legislative history, for example, because it empowered the Judiciary at the expense of Congress and because committee reports did not comply with the constitutional requirements of bicameralism and presentment. And he criticized judicial amendments of a living Constitution because they aggrandized the power of judges and disregarded the Constitution's explicit means of

⁵⁷ 448 U. S. 56 (1980).

⁵⁸ *Crawford*, 541 U. S., at 67–68.

⁵⁹ *Id.*, at 61.

⁶⁰ *Id.*, at 62.

amendment, all at the expense of the People and their representatives.

Throughout his tenure, Justice Scalia sought to honor the Constitution's structure—its distinct horizontal and vertical lines of power—realizing that they were as essential to the preservation of individual liberty as the provisions of the Bill of Rights. He appreciated that men and women were not “angels,”⁶¹ and that electing (or appointing) them to government posts did not make it otherwise. By assigning three distinct kinds of government power (legislative, executive, and judicial) to three distinct branches of government, he believed, the Constitution prevented the concentration of government power in the same hands—considered by the Founders to be the epitome of tyranny.⁶²

In his iconic dissent in *Morrison v. Olson*,⁶³ written early in his tenure, Justice Scalia put these principles to work. He objected that Congress's attempt to restrict the President's ability to remove an independent counsel—an officer who exercised executive power—violated Article II, which vests the executive power in the President and obligates him to take care that the laws be faithfully executed. As he saw it, the Constitution vested all—not some—of the executive power in the President. For Justice Scalia, this made *Morrison* an easy case: “Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”⁶⁴

Justice Scalia was no less vigilant in preventing legislative incursions on the judicial power, exemplified by his opinion for the Court in *Plaut v. Spendthrift Farm, Inc.*,⁶⁵ rejecting

⁶¹ The Federalist No. 51 (James Madison).

⁶² See The Federalist No. 47 (James Madison).

⁶³ 487 U. S. 654 (1988).

⁶⁴ *Id.*, at 699 (Scalia, J., dissenting).

⁶⁵ 514 U. S. 211 (1995).

an attempt by Congress to reopen final judgments of Article III courts. As Scalia explained, the Article III judicial power gave federal courts the power to decide cases with finality, and the statute in question trespassed on that assignment. “The Framers of the Constitution,” he reasoned, built separation of powers into the structure because they had “lived among the ruins of a system of intermingled legislative and judicial powers,” and they established “high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of inter-branch conflict.”⁶⁶

At the same time Justice Scalia thought it essential that the Court stand sentinel over efforts by one branch to assume power allocated to another branch, he was insistent that the Judiciary not use its final say over the meaning of federal law to aggrandize power the Constitution never gave it. Throughout his career, he rejected attempts to expand the judicial power beyond the limits embedded in Article III. Witness *Lujan v. Defenders of Wildlife*,⁶⁷ where Justice Scalia wrote that “the Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.” The requirement of standing, he explained, helped to identify those disputes properly—and improperly—resolved through the judicial process. Absent a claim that alleged a particularized, imminent injury of the kind redressable by courts, Justice Scalia concluded that the federal courts had no warrant to referee the dispute.

Justice Scalia likewise regarded the Constitution’s vertical separation of powers—federalism—as a core feature of the Constitution’s structure that needed to be preserved. He honored the States’ “residuary and inviolable sovereignty”⁶⁸ under the Constitution by joining the Court’s decisions rec-

⁶⁶ *Id.*, at 219, 239.

⁶⁷ 504 U. S. 555, 559–560 (1992).

⁶⁸ *Printz v. United States*, 521 U. S. 898, 918–919 (quoting *The Federalist* No. 39 (James Madison)).

ognizing limits on Congress's power to regulate interstate commerce⁶⁹ and upholding the States' sovereign immunity from suit.⁷⁰ Perhaps his most notable federalism opinion came in *Printz v. United States*,⁷¹ in which the Court held that the Constitution prohibited Congress from commanding state executive officials to enforce federal law. Permitting Congress to impress state executive officers into federal service, he reasoned, would threaten the States' separate sphere of constitutional authority by "immeasurably" augmenting the power of the federal government at the expense of the States and eventually individual liberty.⁷² "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch," he explained, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."⁷³

In view of Justice Scalia's appreciation of separation-of-powers principles and his scholarship as a professor, it should come as no surprise that the Court's administrative-law docket engaged him. His opinions touched many areas of administrative law, including the scope and limitations of *Chevron* deference.⁷⁴ He was a tireless defender of the proposition that judicial deference to agency interpretations should not depend on a case-by-case determination of whether Congress would want the Court to defer based on multiple unranked and unweighted factors.⁷⁵ At the same time, he made clear that *Chevron* does not permit courts

⁶⁹ See *United States v. Morrison*, 529 U. S. 598 (2000); *United States v. Lopez*, 514 U. S. 549 (1995).

⁷⁰ See *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996).

⁷¹ 521 U. S. 898 (1997).

⁷² *Printz*, 521 U. S., at 922.

⁷³ *Id.*, at 921 (quoting *Gregory v. Ashcroft*, 501 U. S. 452, 458 (1991)).

⁷⁴ *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

⁷⁵ *United States v. Mead Corp.*, 533 U. S. 218, 241 (2001) (Scalia, J., dissenting).

reflexively to credit whatever reading of a statute an agency tenders and thus does not permit courts to abdicate their *Marbury* function to interpret the law.⁷⁶ His decisions underscore that, if an agency's interpretation is inconsistent with Congress's clear direction, courts need not—indeed cannot—disregard Congress's commands.⁷⁷ As he acknowledged early in his tenure, his commitment to giving primacy to the statutory text necessarily meant that *Chevron* deference will matter less often, and will affect fewer case outcomes, than if he “permit[ted] the apparent meaning of the statute to be impeached by legislative history” or other sources outside the text Congress enacted.⁷⁸ *Chevron*, he explained, does not compel courts to defer merely because a statute contains some ambiguity; the mere “presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation” the agency advances.⁷⁹ “It does not matter,” Justice Scalia memorably observed, “whether the word ‘yellow’ is ambiguous when the agency has interpreted it to mean ‘purple.’”⁸⁰

One other area of substantive law deserves mention. When people think of transformative criminal law opinions, *Mapp v. Ohio*,⁸¹ *Miranda v. Arizona*,⁸² and decisions restricting capital punishment come to mind. But to Justice Scalia, many of those Warren Court landmarks transformed the pre-existing law precisely because they had no basis in the Consti-

⁷⁶ *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

⁷⁷ See, e. g., *Michigan v. EPA*, 576 U. S. 743, 747–760 (2015); *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 307–334 (2014); *Cuomo v. Clearing House Assn., L. L. C.*, 557 U. S. 519, 525 (2009); *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 481–486 (2001).

⁷⁸ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 *Duke L. J.* 511, 521 (1989).

⁷⁹ *Clearing House*, 557 U. S., at 525.

⁸⁰ *United States v. Home Concrete & Supply, LLC*, 566 U. S. 478, 493, n. 1 (2012) (Scalia, J., concurring in part and concurring in judgment).

⁸¹ 367 U. S. 643 (1961).

⁸² 384 U. S. 436 (1966).

tution. He thus led the charge to limit the reach of *Mapp*⁸³ and critiqued *Miranda*⁸⁴ and many death-penalty decisions.⁸⁵

That is not to say he resisted the rights of criminal defendants. He just preferred to enforce a different set of rights—those protections that, in his view, were properly grounded in the Constitution’s text and history. He became an uncompromising defender of those rights. Take the breathtaking impact of his commitment to the Sixth Amendment’s trial by jury. When Justice Scalia dissented in *Almendarez-Torres v. United States*⁸⁶ to point out that laws that create new statutory maximum sentences on the basis of judicial factual findings violate the jury guarantee, he launched a wholesale shift in the Court’s view of sentencing laws. A majority of the Court ultimately came around to his viewpoint through three system-changing decisions, one of which (*Blakely*) he wrote, all of which he joined.⁸⁷ Sentencing laws in the state and federal courts have shifted markedly ever since.

Justice Scalia led a similar transformation of the Sixth Amendment’s Confrontation Clause.⁸⁸ That shift also began with a vigorous dissent (joined by Justices Brennan, Marshall, and Stevens), in which he maintained that the Court had “subordinat[ed]” the Constitution’s textual demand that the defendant had a right “to be confronted with the witnesses

⁸³ See, e.g., *Hudson v. Michigan*, 547 U. S. 586 (2006) (limiting the reach of the exclusionary rule).

⁸⁴ See, e.g., *Dickerson v. United States*, 530 U. S. 428, 448 (2000) (Scalia, J., dissenting) (arguing that “*Miranda* was objectionable for innumerable reasons”).

⁸⁵ See, e.g., *Atkins v. Virginia*, 536 U. S. 304, 337–338 (2002) (Scalia, J., dissenting) (criticizing “death-is-different jurisprudence” that “find[s] no support in the text or history of the Eighth Amendment”); *Glossip v. Gross*, 576 U. S. 863, 894 (2015) (Scalia, J., concurring) (responding to the suggestion that the Eighth Amendment might preclude the death penalty, and arguing that “[i]t is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*”).

⁸⁶ 523 U. S. 224, 248 (1998) (Scalia, J., dissenting).

⁸⁷ See *Apprendi v. New Jersey*, 530 U. S. 466 (2000); *Blakely v. Washington*, 542 U. S. 296 (2004); *United States v. Booker*, 543 U. S. 220 (2005).

⁸⁸ U. S. Const., Amdt. 6.

against him” to “currently favored public policy” when it allowed a child witness to testify by one-way closed circuit television.⁸⁹ In *Crawford*, the Justice persuaded six colleagues to join his opinion for the Court insisting that out-of-court testimonial statements by witnesses are barred unless the defendant had a prior opportunity to examine the witness and the witness is currently unavailable.⁹⁰ This, too, led to a sea change in the handling of criminal cases.

Justice Scalia also was a stalwart defender of the Constitution’s prohibition against vague criminal laws.⁹¹ Consider his treatment of the residual clause of the Armed Career Criminal Act, which triggers higher penalties for those who commit violent felonies. The clause raised vexing questions about what crimes were included in its scope, prompting Justice Scalia to urge the Court to invalidate the clause as vague: “We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution.”⁹² While he initially raised these concerns in dissent, here too he persuaded a majority to see his point of view. In *Johnson v. United States*,⁹³ he wrote the opinion striking down the clause as unconstitutionally vague. The rule of law is indeed a law of rules,⁹⁴ as thousands of criminal defendants have come to appreciate.⁹⁵

Justice Scalia not only took seriously the Constitution’s many criminal procedure protections. He also respected

⁸⁹ *Maryland v. Craig*, 497 U. S., 836, 860–861 (1990) (Scalia, J., dissenting).

⁹⁰ *Crawford*, 541 U. S., at 53–54.

⁹¹ See, e. g., *Skilling v. United States*, 561 U. S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in judgment).

⁹² *Sykes v. United States*, 564 U. S. 1, 35 (2011) (Scalia, J., dissenting).

⁹³ 576 U. S. 591 (2015).

⁹⁴ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

⁹⁵ *Welch v. United States*, 578 U. S. 120 (2016) (making *Johnson* retroactive).

venerable canons of statutory construction that protected liberty. Exhibit A is the rule of lenity, which had no greater advocate on the Court than Justice Scalia.⁹⁶ That Justice Scalia, whose first stint in public service came in a Republican administration promising law-and-order judges, ended up where he did on so many matters of criminal law shows that he worked to follow his principles where they led him.

No account of Justice Scalia's contribution to this Court would be complete without mentioning his remarkably clear and vivid writing—qualities praised in the last three Justices to occupy his seat: Justices Jackson, Harlan, and Rehnquist. Scalia's writing stands out for its lucidity, poignant wit, and succinctness—and the inventive, memorable images sprinkled throughout.

The images were memorable precisely because they captured the substance of the legal point the Justice was making. Surely there was a separation-of-powers problem with the creation of “a sort of junior-varsity Congress,”⁹⁷ or a deep flaw in a dormant Commerce Clause test that asked judges to divine “whether a particular line is longer than a particular rock is heavy.”⁹⁸ By the same token, who could argue with his observation that Congress “does not . . . hide elephants in mouseholes,”⁹⁹ or his injunction that no government has the “authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules”?¹⁰⁰ The Justice could cut to the heart of a matter and

⁹⁶ See, e. g., *Burrage v. United States*, 571 U. S. 204 (2014); *United States v. Santos*, 553 U. S. 507 (2008); *Holloway v. United States*, 526 U. S. 1, 20 (1999) (Scalia, J., dissenting); *United States v. O'Hagan*, 521 U. S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part); *Smith v. United States*, 508 U. S. 223, 246–247 (1993) (Scalia, J., dissenting); *United States v. R. L. C.*, 503 U. S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in judgment).

⁹⁷ *Mistretta v. United States*, 488 U. S. 361, 427 (1989) (Scalia, J., dissenting).

⁹⁸ *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment).

⁹⁹ *Whitman*, 531 U. S., at 468.

¹⁰⁰ *R. A. V. v. St. Paul*, 505 U. S. 377, 391 (1992).

signal that a colorful opinion was coming just by reframing the question presented: “It ha[s] been rendered the solemn duty of the Supreme Court of the United States . . . to decide What Is Golf.”¹⁰¹ Other opinions would send the reader scurrying to the dictionary, though not to Webster’s Third.¹⁰² Think of his criticism of large-scale state-run DNA databases: “Perhaps the construction of such a genetic panopticon is wise”—he wanted you to look it up—but he “doubt[ed] that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”¹⁰³

In other cases, his sometimes playful language was aimed at the serious business of moving the Court’s jurisprudence in his preferred direction. Has the *Lemon* test every fully recovered from Justice Scalia’s critique in *Lamb’s Chapel v. Center Moriches Union Free School Dist.*?

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart . . . , and a sixth has joined an opinion doing so.

The secret of the *Lemon* test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes,

¹⁰¹ *PGA TOUR, Inc. v. Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

¹⁰² *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225–228 (1994).

¹⁰³ *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

we take a middle course, calling its three prongs “no more than helpful signposts.” Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.¹⁰⁴

The lively wit, off-the-beaten-path imagery, and rigorous analysis that mark his opinions are all the more impressive given their quantity. By any measure, including the *Harvard Law Review’s* opinion count, his output was prodigious. Over 30 years, Justice Scalia authored 870 opinions, including 281 majority (or plurality) opinions. Many of Justice Scalia’s most memorable contributions appear in separate writings. While a number of his 274 dissents are well and widely known, concurring opinions occupied an even larger share of his work. Over three decades, Justice Scalia authored 315 concurrences—the second most of any Justice who joined the Court since the *Harvard Law Review* began tabulating opinions by author in 1949.

Justice Scalia appreciated that vibrant debate today can lay the foundation for persuading readers tomorrow—himself included. More than once he acknowledged that new and better arguments had persuaded him to alter views he had expressed in prior cases.¹⁰⁵ And when an oversight in an earlier case was called to his attention, he confessed error, borrowing a page from Justice Jackson to explain: “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.”¹⁰⁶ The North Star to Justice

¹⁰⁴ 508 U. S. 384, 398–399 (1993) (Scalia, J., dissenting) (citations omitted).

¹⁰⁵ See *Ring v. Arizona*, 536 U. S. 584, 611 (2002) (Scalia, J., concurring) (explaining that, since *Walton v. Arizona*, 497 U. S. 639 (1990), he had “acquired new wisdom . . . or, to put it more critically, ha[d] discarded old ignorance”); *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U. S. 50, 67–68 (2011) (Scalia, J., concurring) (acknowledging his prior acceptance of *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), including in his opinion for the Court in *Auer v. Robbins*, 519 U. S. 452 (1997), but expressing serious doubts about its validity).

¹⁰⁶ See *Dart Cherokee Basin Operating Co. v. Owens*, 574 U. S. 81, 102 (2014) (Scalia, J., dissenting) (quoting *Massachusetts v. United States*, 333 U. S. 611, 639–640 (1948) (Jackson, J., dissenting)).

Scalia was getting the reasoning right—an admonition he never ceased to urge on others and never desisted to accept for himself.

While Justice Scalia's writing frequently leapt off the page, advocates before the Court often confronted his tenacity and wit long before he unsheathed his pen. Before 1986, oral argument in the Court was more disquisition than dialogue. Counsel could lead the Court on a leisurely stroll through the facts, the procedural history, and the argument—interrupted by questions only a handful of times. During then-Assistant Attorney General Scalia's only argument before the Supreme Court, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,¹⁰⁷ he faced a total of 12 questions from two Justices; the other seven Justices said not a word. Scalia won the case. But he took a different approach to the Court's argument sessions once he arrived on the other side of the bench. He peppered lawyers with questions, sometimes posing 30 or 40 in a single argument. If he found an answer unsatisfactory, he pursued the point through short, often flinty-minded, follow-up inquiries. While his approach to oral argument was unique when he joined the Court, that is no longer so. Most Members of the Court have embraced an engaged style of questioning, and the advocates appreciate it (most of the time).

Even after Justice Scalia left the academy to start his judicial career, he maintained his connection with the law schools—nearly all of them—by accepting scores of invitations over the years to speak with students and professors. In one sense, he never left teaching; his classroom just got bigger. He often thought of the audience of his opinions as today's and tomorrow's law students, and relished opportunities to talk to students about his theories of judging and about the many useful ways to use a law degree.

Justice Scalia's productivity and many contributions to the law could leave the misimpression that he left little time for anything else—that he was all work and no play. Only someone who did not know him could make that mistake. This son

¹⁰⁷ 425 U. S. 682 (1976).

of Trenton and Queens became an avid hunter and fisherman, both of which allowed him to see and experience the Nation's breadth and diversity. He and Maureen looked forward to their annual visits to the Fifth Circuit, where he was the Circuit Justice, each year giving the "duck call award" to district court judges reversed by the Fifth Circuit only to be vindicated by the Supreme Court. He relished meals with friends, colleagues, and law clerks, often at the late but much-beloved A.V. Ristorante, replete with anchovy pizza and an occasional glass of red wine. He was an ever-present mentor to his many law clerks, often traveling to their cities to speak at local events, always taking time to give career advice. He found a way despite his many other commitments to write several books.¹⁰⁸ He took time to indulge his love of music, even appearing with one of his "best buddies," Justice Ginsburg, in a local opera production.¹⁰⁹ And of course he was deeply devoted to his large and remarkably close family. Stories about family trips were a staple of chambers conversations, including descriptions of summer trips to "Nag's End," the North Carolina beach house that Maureen named in honor of her own years of indefatigable advocacy. He loved to tell the story of his grandson, who, when told at a young age that his grandfather worked at the Supreme Court, exclaimed proudly, "Pop-Pop is the Court Jester." Through it all, the Justice did everything in his brim-filled life with unstinting vigor, curiosity, engagement, and a twinkle in his eye.

As Justice Scalia once observed, "[w]hen participating in programs such as this, consisting of brief memorial tributes, one sometimes fears that he will paint a portrait of his departed friend that others will not recognize—that perhaps he saw or thought he saw colorations of character or personality

¹⁰⁸ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008); Scalia & Garner, *Reading Law*, *supra*, n. 32.

¹⁰⁹ Statement of Justice Ruth Bader Ginsburg, Supreme Court of the United States (Feb. 15, 2016), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-14-16; see also Piers Morgan, *supra*, n. 3.

that others did not; rose where they saw pink, or violet where they saw purple.” As was true of the colleague Justice Scalia was honoring then, “[t]hat is not a problem when one stands up to talk about” Antonin Scalia: “His colors were bright, and they neither changed nor were ever dissembled.”¹¹⁰ Carrying on our tradition dating to the days of Chief Justice Marshall,¹¹¹ it is accordingly:

RESOLVED that we, the members of the Bar of the Supreme Court of the United States, express our deepest respect for the late Justice Antonin Scalia; our loss at his passing from this life; our admiration for his commitment to the Nation, its charter, and this Court; and our enduring gratitude for the example he set in his life both within and beyond the law; and we have further

RESOLVED that the Acting Solicitor General be asked to present these resolutions to the Court, and that the Attorney General be asked to move that they be inscribed upon the permanent records of the Court.

THE CHIEF JUSTICE said:

Thank you, General Gershengorn. The Court recognizes the Attorney General of the United States.

Attorney General Lynch addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of the Court met today to honor the memory of Antonin G. Scalia, Associate Justice of the Supreme Court from 1986 to 2016.

The passing of Justice Scalia has left an enormous void in this courtroom and in the life of the law throughout the United States. With his razor-sharp brilliance and unmatched eloquence, Justice Scalia transformed the way the

¹¹⁰ Antonin Scalia, *Tribute to Emerson G. Spies*, 77 Va. L. Rev. 427, 427 (1991).

¹¹¹ 10 Pet., at vii, viii (1836).

jurists and lawyers approach the law. He strode like a colossus through some of the most important opinions, concurrences, and dissents of our time, and he had a singular presence both in the courtroom and on the page. His penetrating questions at oral argument did not merely seek to clarify minor nuances; they cut to the heart of a position's flaws. And his writing did not merely state the law, it captivated all who treasure memorable and radiant prose. And even those who disagreed with Justice Scalia could appreciate his inspired wordsmithing, like his assertion that Congress does not hide elephants in mouseholes or his contention that the rule of law requires a law of rules.

Justice Scalia's life was a quintessentially American story. His father was a Sicilian immigrant who came through Ellis Island as a teenager, earned a doctorate from Columbia, and became a professor. His mother was an elementary schoolteacher, herself the daughter of Italian immigrants. By all accounts, Justice Scalia's talent was obvious from a young age: from Xavier High School in Manhattan to Georgetown, where he graduated first in his class, to Harvard Law School, where he edited the Harvard Law Review. He was a charismatic student who loved to debate. That charisma and his love of the clash of ideas would come to define him.

With these gifts, he could have gone anywhere and done anything. He could have conquered the worlds of commerce or found a home within the business of the law. But rather than pursue material wealth in the private sector, he chose the wealth of ideas to be found in academia. And instead of seeking public acclaim, he turned to public service. Law students at the University of Virginia, as well as the University of Chicago, Georgetown, and Stanford, benefited from his rigorous intellectualism and love of the law.

And we at the Department of Justice also benefited from his dedication to public service. From 1974 to 1977, he served as the head of the Office of Legal Counsel at the Department of Justice. The traits that would come to define Justice Scalia's judicial presence were apparent in that role as he provided written opinions that showcased his intellec-

tual rigor, his sharp pen, and his independent mind. He was also known for his fierce support of the independence of the Office of Legal Counsel and of the Department, traditions we are proud to uphold.

Justice Scalia's contributions to the Supreme Court cannot be overstated. Countless pages have been written about the textualist approach to statutory interpretation he championed. In his three decades on the bench, he succeeded in changing the very way that lawyers and judges determine the meaning of congressional enactments, and he fundamentally transformed legal argument. As Justice Kagan noted in her Scalia lecture at Harvard Law School, we're all textualists now.

Justice Scalia will also be remembered for his robust interpretations of the protections that the Constitution affords those who come in contact with the criminal justice system. His Fourth Amendment and Sixth Amendment decisions regarding searches, the right to a jury trial, and the Confrontation Clause fundamentally shaped the way law enforcement officers investigate potential wrongdoing, and the way prosecutors put on their cases. The opinions are noteworthy for their reliance on Justice Scalia's originalist approach to interpreting the Constitution, a philosophy that looks backwards in order to look forward. It looks back to the founding of this great Nation in an effort to understand the protections reserved in the Constitution, and it looks forward to demand that we uphold these protections despite changing times.

But Justice Scalia's greatest legacy may be that he brought unmatched conviction and enthusiasm to his jurisprudence. In doing so, he elevated our national legal discourse for all Americans. He challenged even those who agreed with him, and he earned the respect of those who did not. Lawyers who appeared before Justice Scalia found themselves compelled to clarify their positions and to sharpen their arguments. Readers of Justice Scalia's opinions could not disregard the strength of his reasoning and were forced to re-examine their own convictions.

Justice Scalia knew that this was the point of debate, and he also knew that debate was the essence of democracy. For decades, he had an outsized role in the debates over the meaning of our most fundamental principles: principles of liberty, justice, and equality. And because of the brilliance, the eloquence, and the unique passion he brought to that debate, he guaranteed that he will continue to shape it for decades to come.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation, and in particular, the members of this Court's Bar, I respectfully request that the resolutions presented to you in honor of Antonin Scalia be accepted by the Court and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, General Lynch. Your request that the Bar resolutions be made part of the permanent record of the Court is granted,

The Court extends to the members of the Resolutions Committee, to the members of the Arrangements Committee, and to the Chairman of today's meeting of the Bar our appreciation for the resolutions adopted today.

Antonin Scalia was nominated to the U. S. Court of Appeals for the D. C. Circuit by President Reagan on July 15, 1982. He joined that court on August 17 that same year. And just four years later, President Reagan nominated him to be our 103rd Supreme Court Justice.

At the time of the White House announcement, he was not well-known to the public. The press had to ask Justice Scalia how to pronounce both his first and last names. Antonin Scalia was confirmed on Constitution Day in 1986 by a vote of 98-0. He took the oath of office as an Associate Justice of this Court on September 26, 1986. Today, every lawyer and journalist in this country, and most other citizens as well know how to pronounce Justice Antonin Scalia.

In nearly three decades on this Court, Justice Scalia wrote, by our count, 282 opinions for the Court, beginning with *O'Connor v. United States*, which he announced exactly 30 years ago today, and ending with *Kansas v. Carr*, which he announced on January 20 of this year. He was also known to write separately from time to time—authoring more than 300 concurrences and nearly as many dissents. He served with 17 other Justices during his long tenure on this Court.

You have already heard of Justice Scalia's extraordinary legacy. On matters of constitutional interpretation, he championed the judicial philosophy of originalism, a view that the Constitution means today what it meant when it was adopted. He espoused this approach in opinions, both for the Court and in dissent, that are now a central feature of every law school's constitutional curriculum.

His opinions explaining our Constitution's structural constraints on governmental power are among the most important intellectual contributions to the study of liberty since *The Federalist Papers*. Justice Scalia defended the President's power to appoint and remove executive officials, not to aggrandize presidential power, but to maintain the equilibrium between co-equal branches of government. He insisted that Congress perform the duties within its Constitutional charge and leave other matters alone, not to manage the legislative process, but to promote individual freedom through electoral accountability.

He approached the Judicial Branch with the same rigor. Justice Scalia demanded that federal courts stay within their constitutionally prescribed role of deciding only concrete cases and controversies. He did so not to avoid difficult issues, but to ensure that judges who are insulated from the political process resolve only those matters within Article III's grant of judicial power.

Justice Scalia applied originalist scrutiny to interpreting the Bill of Rights. His views were especially influential with respect to the First Amendment's religion clauses, the Second Amendment's right to bear arms, and the Sixth

Amendment's Confrontation Clause. He persuasively explained how the guarantees set forth 225 years ago continue to provide vital protections in our own age. Writing for the Court in cases involving the Fourth Amendment, he demonstrated how the centuries-old protections against unreasonable searches and seizures reach contemporary police investigatory tools, ranging from thermal imaging to electronic tracking devices to drug-sniffing dogs. He once commented that his opinions on the scope of criminal law safeguards in the Bill of Rights should make him the favorite Justice among criminal defendants across the country. Now, whether he wrote for the Court or in dissent, Justice Scalia's incisive analysis and unforgettable prose compelled jurists, lawyers, and citizens alike to think deeply about the meaning of the compact that binds us.

Justice Scalia left an equally enduring mark on statutory construction. His insistence on the primacy of a statute's text has enforced greater discipline on the task of construction. As he explained, reliance on the statutory text restrains judicial discretion and thereby promotes democracy.

Although Justice Scalia was a keen legal theorist, he was deeply concerned about the practical workings of government, and that intense focus is reflected in his contributions to administrative law. He made enduring contributions to that field as a teacher, scholar, and Chairman of the Administrative Conference of the United States, even before he became a judge. Whatever the discipline, whatever the role, Justice Scalia was committed to finding the right answer. And once he had settled upon what was right, he let the chips fall where they may, and cared not a whit what others thought about it.

Justice Scalia's voice is perhaps most deeply missed in this very chamber. From his first day on the bench, he was a vigorous participant in oral argument. His insightful inquiries enlivened debate and brought out the best in his colleagues and the attorneys who appeared before him, on many occasions also confirming that their best was not good enough.

Now, it would be a stretch to say that there was never a dull moment in this chamber—but often, just when things were getting a bit soporific, counsel would make some assertion that would trigger a reaction from Justice Scalia, ranging from explosive to subtle, and the game would be on. His comments in this room also included priceless sotto voce insights shared only with those fortunate enough to sit beside him on the bench.

Justice Scalia was not restrained in stating his views clearly and forcefully, but he never ceased being our dear friend and valued colleague. He wrestled with ideas, not people, and he knew the difference. He made our days warmer, livelier, and happier. He sang loudest and best at our traditional birthday celebrations. He raised his glass highest to toast others' happy occasions, and his rich laughter filled our halls and our hearts.

Justice Scalia's life reached far beyond the law. He would never have said that the law was what was most important to him. He was steadfast in his Roman Catholic faith, and he was devoted beyond measure to his beloved wife, Maureen, and the nine children they raised.

On occasions such as this, speakers often employ so many laudatory adjectives that the effect can be to sow doubt rather than admiration. But no one who knew Justice Scalia, however they viewed his work, would dispute for a moment that he was patriotic, principled, loyal, courageous, engaging, and brilliant.

Those of us on the Court will miss Nino, but we will continue to feel his presence throughout this building. Our ears will hear his voice in this courtroom when advocates invoke his words searching for powerful authority. Our minds will move to the measure of his reason in our chambers when we study his opinions. And our hearts will smile, even as our eyes glisten, when we walk the halls and recall how happy we were whenever we saw him rounding the corner.