A Man of Honor: Antonin Scalia (1936-2016), Justice of the Supreme Court of the United States

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Whether you loved him or hated him, you couldn’t ignore Antonin Scalia. He was larger-than-life, both on the Supreme Court and in the broader world of legal discourse. He was a brilliant stylist. You might not like what he said, but it was always exhilarating to read. To make the point that the government cannot discriminate between speaker viewpoints, he said that the government has no authority “to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.” To express his displeasure with the Court’s same-sex marriage decision, he said the Court had descended “to the mystical aphorisms of the fortune cookie.” See SCALIA, Page A19
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Mark Twain said “[t]he difference between the right word and the almost right word is the difference between lightning and a lightning bug.” Thanks to Scalia’s prodigious vocabulary, he had the perfect word for every occasion, which he launched with the precision of a laser-guided missile. Another justice’s reasoning was “legalistic gargle-barge,” or, worse yet, “interpretive jiggery-pokery.” Lawyers knew these characterizations were unflattering. They had to run to their dictionaries to find out how much.

Scalia also had an irreplaceable joie de vivre. He had a cracking wit and a snug smile to match. He could be a card, a clown or a mischievous child. He described his and his wife’s birth control method as “Vatican Roulette.” (It’s no surprise that they had nine children.) “In a big family,” he would joke, “the first child is kind of like the first pancake. If it’s not perfect, that’s okay, there are lot more coming along.”

All of this sounds fun and endearing, and by all accounts, it accurately captures the man. But there was also a darker side to Scalia. His passion for his own beliefs caused him to write scathingly of those who disagreed with him. He said one colleague’s opinion was “as pretentious as its content is egoistic,” another’s was “pure applesauce,” and a third’s “cannot be taken seriously.”

That’s not the way to build trust with colleagues whose votes might be critical in the future. Indeed, Scalia’s “my-way-or-the-highway” approach seems to have limited his effectiveness as a justice. Both Chief Justice Rehnquist and Chief Justice Roberts were reluctant to assign Scalia major cases out of fear that his unwillingness to compromise would cause justices to defect to the other side. Not surprisingly, Scalia is best known for his blistering dissents where he was under no obligation to please anyone but himself.

But the darkest part of Scalia’s jurisprudence was not his occasional tongue-lashing of fellow jurists, who undoubtedly could slough it off. It was instead the remarkable insensitivity he sometimes showed toward the people whose rights and freedoms were at the mercy of the justices’ discretion.

When the court held that gays and lesbians could not be criminally punished for engaging in private, consensual sex, Scalia wrote an angry dissent that described the majority’s opinion as “the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.” It was as if Scalia thought the case was about nothing more than a special interest group seeking preferential treatment, rather than individuals yearning to live their lives without being labeled as criminals.

During the oral argument in Shelby County v. Holder, the case in which the court’s conservative majority largely gutted the Voting Rights Act, Scalia referred to the Act as a “racial entitlement.” Yet when did voting free from discrimination become a mere “entitlement” and not a fundamental right?

Scalia could excuse the harmful consequences of his actions by saying he was an “originalist” who was bound to follow the Constitution’s original meaning. According to Scalia, “[t]he only good Constitution is a dead Constitution.” If the Constitution is alive, justices are at liberty to decide how it grows, and that “robs the People of the most important liberty they... won in the Revolution of 1776: the freedom to govern themselves.”

That sounds good if taken with a boatload of salt. If people have the freedom to govern themselves, why didn’t Scalia think they had the power to regulate corporate campaign financing? Why didn’t he think they had the power to require individuals to buy health insurance, so that those who do buy insurance wouldn’t have to keep subsidizing those who don’t? And why didn’t he think the people’s elected representatives in Congress could reauthorize the Voting Rights Act, as they did in overwhelming numbers, without the Court’s blessings? Why aren’t all of these examples of the Court declaring the Second Amendment guarantee an individual this right regardless of what the majority thinks? Is it for the people to decide whether someone can have a handgun at home, or does the Second Amendment guarantee an individual this right?

The simple fact is that justices have wide discretion in interpreting the Constitution. They couldn’t do their jobs if they didn’t. Constitutional law is all about figuring out which issues should be left to the people to decide through the political process and which issues should be immunized from popular control by the Constitution. Is it for the people to decide whether someone can have a handgun at home, or does the Second Amendment guarantee an individual this right regardless of what the majority thinks? Is it for the people to decide whether a same-sex couple can get married, or does the Fourteenth Amendment, which speaks of “liberty” and “equal protection,” ensure that the couple can make this decision without public approval?

Like it or not, all Supreme Court justices use extensive discretion in interpreting the Constitution. The notion that some “stay true” to the Constitution while others impose their viewpoint on society is a myth. The only way to evaluate an Antonin Scalia or a Ruth Bader Ginsburg is to look at how each one has used his or her discretion. Figure out which use of judicial power seems appropriate to you. And make sure to keep that in mind when you enter the voting booth in November to elect a new president.

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