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Steven G. Calabresi

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Foreword: In Memory of Justice Antonin Scalia

Cover Page Footnote

Clayton J. and Henry R. Barber Professor, Northwestern University Pritzker School of Law; Visiting Professor of Law, Fall 2013–2016, Yale University; Visiting Professor of Political Theory, Brown University.

FOREWORD: IN MEMORY OF JUSTICE ANTONIN SCALIA

*Steven G. Calabresi**

Justice Antonin Scalia was a father figure to me and is one of the most remarkable human beings I have ever known or expect ever to know. To begin with, the Justice was the ultimate example of a Platonic leader who was both a man of ideas and a man of action. In ancient Greece and Rome combining these traits was a mark of excellence. Justice Scalia combined a love of ideas and a love of action more than anyone else I have ever known.

Justice Scalia was full of ideas, which he wrote about extensively. First, the Justice believed in the Original public meaning of constitutional and statutory texts over the “evolved” meaning of such texts. He wrote up his theory in book form, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997), to which Professors Gordon Wood; Laurence H. Tribe; Mary Ann Glendon; and Ronald Dworkin added responses, with Justice Scalia responding in turn. I am not aware of any other Supreme Court justice in American history who has written such a book full of ideas and then published four responses to his book to which he then responded! This is classic Scalia as a man of action. The Justice further elaborated on his theory of following the original public meaning of written texts in *Originalism: The Lesser Evil*. This remarkable law review article again reveals Justice Scalia as being a man of ideas. In this article, Justice Scalia calls himself a “faint hearted originalist,” saying he would follow longstanding precedents over the original public meaning of the text, but not recent and highly controversial precedents. Justice Scalia’s book and law review article mark him as the leading originalist, along with Justice Clarence Thomas, ever to serve on the U.S. Supreme Court.

*Clayton J. and Henry R. Barber Professor, Northwestern University Pritzker School of Law; Visiting Professor of Law, Fall 2013–2016, Yale University; Visiting Professor of Political Theory, Brown University.

Justice Scalia elaborated on his theory of textual interpretation by writing a treatise on the canons of interpretation. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). This treatise defends and brings back to life the ancient canons of textual interpretation, which the legal realists had sought to bury. No Supreme Court Justice since Justice Joseph Story, who was on the Court from 1812 to 1845, has written a canon of statutory interpretation and no law professor has written one in recent memory. The publication of this massive book together with his work on Originalism mark Justice Scalia as being a true scholar!

To these magnum opuses, we must add Justice Antonin Scalia's seminal law review article, *The Rule of Law as a Law of Rules*, published in the *University of Chicago Law Review* in 1989. In this article, Justice Scalia came out against balancing tests and argued that wherever possible the federal courts ought to follow a rule and should eschew balancing tests. Justice Scalia argued that rules bind judicial discretion in future cases and make the law predictable in a way that balancing tests do not. The Justice argued that wherever possible judges should construe legal language to state a rule rather than a standard. An example of a rule is the Constitution's use of the 35 year-old age limit set for presidents of the United States. An example of a standard, which the Framers thankfully did not use would be a requirement that the president be "a mature individual." As this example shows, rules create certainty while standards do not. A preference of rules over standards in textual interpretation was a hallmark of Justice Scalia's jurisprudence.

These publications mark Justice Scalia as being a first rate legal academic. Any law professor to have published these works would be regarded as an academic superstar! That Justice Scalia found time to write them while serving as a U.S. Supreme Court justice is quite simply extraordinary.

But, as the ancient Greeks and Romans called for, Justice Scalia was not only a man of ideas, but he was also a man of action. He served on the U.S. Court of Appeals for the D.C. Circuit for four years and on the U.S. Supreme Court for more than 29 years. During this time, he made American jurisprudence MUCH more originalist, textualist, and formalist than it had been prior to his appointments in 1982 and in 1986 to his two judicial offices. The triumph of Originalism is most evident in his majority opinion in *District of Columbia v. Heller*, 554

U.S. 570 (2008), which held for the first time that individuals have a right to own guns for their own defense and to hunt, and not merely as an incident to their belonging to their state National Guard unit. This is a landmark opinion, which is entirely originalist in the way it is written and which is responded to with entirely originalist dissents. Justice Scalia took his theory of Originalism and put it into action on the Supreme Court together with Justice Clarence Thomas.

Justice Scalia also used his “Rule of Law as a Law of Rules” idea to get the Supreme Court to drastically reduce its use of standard-less balancing tests, which gave the judges who applied them too much leeway to make policy and to avoid treating like cases alike, which is the very essence of the rule of law. Justice Scalia followed his formalist, textualist opinions and led a largely successful campaign to get the Supreme Court to greatly reduce its use of legislative history. In this too, the Justice was highly successful, and his ideas had a huge impact on the actions of the Supreme Court.

Justice Scalia was finally a man of action in the vigorous public role he took in extensively questioning litigants before the Supreme Court, and in the exceptionally vocal and active role he took as a Supreme Court Justice to turn himself into one of the nation’s leading public intellectuals. One of Justice Scalia’s favorite speech topics was entitled “The Ayatollahs of the West,” in which he accused his colleagues of behaving like the activist Guardian Council of the Islamic Republic of Iran, which really runs that country by vetoing what the president and parliament of Iran want to do. Justice Scalia publically accused his liberal colleagues on the Supreme Court of behaving like a secular, liberal Guardian Council. There was much truth in these remarks, and they became widely known. Justice Scalia also spoke out: 1) against the use of legislative history; 2) against the Supreme Court’s religion clause jurisprudence, which is too secular; 3) about his Catholicism; and 4) about how evolution in constitutional law is undesirable because societies often “rot” instead of “making progress.”

Justice Scalia was in every sense of the term a man of ideas and a man of action. He used the bully pulpit of the Supreme Court to advance his ideas. Justice Scalia was what the ancient Greeks might have called a philosopher king. He thought deeply, published widely, and used his power as a Supreme Court justice to bring his ideas into action. But, these traits only begin to mark Justice Scalia’s quality as

a moral human being. The Justice was also a paradigm throughout his life of what the Greeks called the four cardinal virtues: Wisdom, Courage, Temperance, and Justice, as well as what St. Thomas Aquinas identified as the three Christian virtues of Faith, Hope, and Love.

First, Justice Scalia embodied wisdom, as all the publications and speeches described above illustrate. He was a deeply learned intellectual with a sense of what ideas were practical obtained from his service as a high government official. Justice Scalia was one of the smartest people I have ever met, and he was widely read and knowledgeable. He travelled all over the world to learn more about countries as diverse as Taiwan and Brazil. Justice Scalia soaked knowledge up from books and articles, but also from the many people he met during his travels literally all over the world. I doubt there has ever been or is currently a person who travelled as extensively both in the U.S. and abroad.

The famous poem *Ulysses* by Alfred Lord Tennyson sums up Justice Scalia's love of travel as a way of acquiring wisdom. Although it is a bit long, I will quote it in full here because it so completely captures Justice Scalia's love of wisdom and of travel from which he gained wisdom:

It little profits that an idle king,
By this still hearth, among these barren crags,
Match'd with an aged wife, I mete and dole
Unequal laws unto a savage race,
That hoard, and sleep, and feed, and know not me.
I cannot rest from travel: I will drink
Life to the lees: All times I have enjoy'd
Greatly, have suffer'd greatly, both with those
That loved me, and alone, on shore, and when
Thro' scudding drifts the rainy Hyades
Vext the dim sea: I am become a name;
For always roaming with a hungry heart
Much have I seen and known; cities of men
And manners, climates, councils, governments,
Myself not least, but honour'd of them all;
And drunk delight of battle with my peers,
Far on the ringing plains of windy Troy.
I am a part of all that I have met;

Yet all experience is an arch wherethro'
Gleams that untravell'd world whose margin fades
For ever and forever when I move.
How dull it is to pause, to make an end,
To rust unburnish'd, not to shine in use!
As tho' to breathe were life! Life piled on life
Were all too little, and of one to me
Little remains: but every hour is saved
From that eternal silence, something more,
A bringer of new things; and vile it were
For some three suns to store and hoard myself,
And this gray spirit yearning in desire
To follow knowledge like a sinking star,
Beyond the utmost bound of human thought.
This is my son, mine own Telemachus,
To whom I leave the sceptre and the isle,—
Well-loved of me, discerning to fulfil
This labour, by slow prudence to make mild
A rugged people, and thro' soft degrees
Subdue them to the useful and the good.
Most blameless is he, centered in the sphere
Of common duties, decent not to fail
In offices of tenderness, and pay
Meet adoration to my household gods,
When I am gone. He works his work, I mine.
There lies the port; the vessel puffs her sail:
There gloom the dark, broad seas. My mariners,
Souls that have toil'd, and wrought, and thought with me—
That ever with a frolic welcome took
The thunder and the sunshine, and opposed
Free hearts, free foreheads—you and I are old;
Old age hath yet his honor and his toil;
Death closes all: but something ere the end,
Some work of noble note, may yet be done,
Not unbecoming men that strove with Gods.
The lights begin to twinkle from the rocks:

The long day wanes: the slow moon climbs: the deep
Moans round with many voices. Come, my friends,
'T is not too late to seek a newer world.
Push off, and sitting well in order smite
The sounding furrows; for my purpose holds
To sail beyond the sunset, and the baths
Of all the western stars, until I die.
It may be that the gulfs will wash us down:
It may be we shall touch the Happy Isles,
And see the great Achilles, whom we knew.
Tho' much is taken, much abides; and tho'
We are not now that strength which in old days
Moved earth and heaven, that which we are, we are;
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield.

This poem describes Justice Scalia's quest for wisdom through travel to a tee. It is not surprising that he died travelling, "Made weak by time and fate, but strong in will to strive to seek, to find, and not to yield."

The second of the four classic or cardinal virtues is Courage, and Justice Scalia was an exceptionally brave man. He was in dissent most of the time on the Religion Clause and Substantive Due Process cases that the Supreme Court heard during his time on the bench, but he was brave to a fault in vehemently castigating the majority for its errors. Justice Scalia never ever gave up a cause he cared about. Whether it was being the lone dissenter in *Morrison v. Olson*, 487 U.S. 654 (1988), the case which upheld the constitutionality of the absurdly unconstitutional independent counsel law, or whether it was dissenting in the Affordable Care Act case, *NFIB v. Sebelius*, 567 U.S. 519 (2012), Justice Scalia was a brave and powerful dissenter. He walked into the lion's dens of Harvard and Yale Law Schools and defended his jurisprudence to large crowds of people, not one of whom agreed with him. He was savaged constantly by the press, and he let the criticisms roll off his back because he simply did not care. I have never, ever met a braver man than Justice Scalia.

The third of the four classic or cardinal virtues is Temperance, a virtue Justice Scalia struggled with. He gave up smoking cigarettes,

which is an exceptionally hard thing to do, although he continued to smoke the occasional cigar. He was moderate in his consumption of alcohol and of food, although he was always a little over weight. Most important of all, he exercised vigorously throughout the thirty-four years I knew him, engaging in jogging, playing squash and later tennis, and walking a great deal. He was temperate with people, too, because he did not bear grudges, and, when he was mad at someone—as he occasionally was at me—he let the matter drop after a short period of time. Justice Scalia truly loved all people as he loved himself, and he was thus a model of temperance overall, even if he occasionally got angry about something.

Justice Scalia also exhibited the fourth classic or cardinal virtue, which was a passionate commitment to Justice. He passionately lived up to the Supreme Court's Oath of Office, which reads: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as an Associate Justice of the Supreme Court under the Constitution and laws of the United States." Justice Scalia cared deeply about "administering justice without respect to persons" and doing "equal right to the poor and the to rich." This is why he hated the Critical Legal Studies movement, which argued that only women justices could do justice to women or that only African American justices could do equal justice under their constituencies. Justice Scalia hated this idea, and he passionately believed not only in equal justice for all persons, but also that he was fully capable of delivering equal justice unto all persons. Scalia cared about doing justice in deciding cases as much as anyone who has ever served on the Supreme Court during the history of our country.

In addition to exhibiting the four classical or cardinal virtues of wisdom, courage, temperance, and justice, Scalia also exhibited the three Christian virtues, identified by St. Thomas Aquinas: 1) Faith; 2) Hope; and 3) Love. Justice Scalia was a devout Christian who spoke often and publically about the importance of his Catholic faith to himself and to his work. He attended mass regularly and brought me to a mass when I was clerking with him even though as an Episcopalian I could not take the Eucharist. Justice Scalia's Christian faith was baked deeply into him in every way. From his nine children to his more than thirty grandchildren he lived out his faith in a very

public way. One of his children went on to become a Catholic priest! There can be no argument that Justice Scalia was a man of great faith. He defended his faith in a highly intolerant secular legal profession with the greatest vigor and strength.

Second, with respect to these Christian virtues, Justice Scalia was a man of Hope. He never gave up trying through his published opinions and his countless speeches to reach out to people and bring them around to his way of thinking about law, religion, and the world. Most famous and powerful men and women become cynical and self-centered, but this never happened with Justice Scalia during his 29 years of service on the U.S. Supreme Court. He always hoped that he could persuade people with the force of his formidable intellect. He also hoped that constitutional law could be reformed, and he made giant progress in the effort to do so. Justice Scalia was absolutely a man of hope.

Finally, Justice Scalia was the very paragon of the Christian virtue of Love. He loved his wife, his children, and his grandchildren. He loved his law clerks and secretaries. He loved his colleagues, even when some of them were quite difficult toward him. He loved the audiences of people he spoke to and his former faculty colleagues at the University of Chicago School of Law and the University of Virginia. He had a huge amount of energy and it came pouring out of him as love for the world and for all the people in it. Justice Scalia truly loved the Lord his God, and he loved his neighbors as much as himself. He was a paragon of the Christian virtue of love. It is worth recalling here the famous verse from 1 CORINTHIANS 13, which Justice Scalia always lived up to:

If I speak in the tongues of men or of angels, but do not have love, I am only a resounding gong or a clanging cymbal. If I have the gift of prophecy and can fathom all mysteries and all knowledge, and if I have a faith that can move mountains, but do not have love, I am nothing. If I give all I possess to the poor and give over my body to hardship that I may boast, but do not have love, I gain nothing.

Love is patient, love is kind. It does not envy, it does not boast, it is not proud. It does not dishonor others, it is not self-seeking, it is not easily angered, it keeps no record of wrongs. Love does not delight in evil but rejoices with the

truth. It always protects, always trusts, always hopes, always perseveres.

Love never fails. But where there are prophecies, they will cease; where there are tongues, they will be stilled; where there is knowledge, it will pass away. For we know in part and we prophesy in part, but when completeness comes, what is in part disappears. When I was a child, I talked like a child, I thought like a child, I reasoned like a child. When I became a man, I put the ways of childhood behind me. For now we see only a reflection as in a mirror; then we shall see face to face. Now I know in part; then I shall know fully, even as I am fully known.

And now these three remain: faith, hope and love. But the greatest of these is love.

Justice Scalia lived an exemplary and wonderful life. He was a philosopher king who loved equally the world of ideas and the world of action. He exhibited all four of the classical virtues of wisdom, courage, temperance, and justice and all three of the Christian virtues of faith, hope, and love. It was a great privilege for me to have known and worked for Justice Scalia, and I will always remember the many lessons I learned from knowing him.

