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JUSTICE CLARENCE THOMAS

A Tribute to Justice Antonin Scalia

I was blessed to have had Antonin Scalia as a colleague and as a dear friend. I did not know Nino when I joined the Court in 1991, and we certainly made an unlikely pair: a northerner from a house of educators, and a southerner from a house of almost no formal education. “Friendship,” however, “is born at the moment when one man says to another ‘What! You too? I thought that no one but myself’”¹ Despite our different backgrounds, Nino and I experienced that moment often. We shared our Catholic faith, love of country, and reverence for the Constitution and the rule of law. And so, over the course of nearly twenty-five years, Nino and I developed an improbable yet unbreakable bond of trust and friendship. I cannot overstate how much I treasure that bond.

It is equally difficult to overstate Justice Scalia’s contributions to the law. So difficult, in fact, that finding the right words to capture his legacy seems all but impossible. Suffice it to say, he transformed the law, winning many converts (including me²) with his persuasive and colorful opinions. I cannot help but laugh when I imagine what would have been Nino’s beaming grin had he lived to read a recent D.C. Circuit opinion, declaring the “nearly universal consensus” that he “had been right” in his lone dissent in *Morrison v. Olson*³ “to view the independent counsel system as an unconstitutional departure from historical practice and a serious threat to individual liberty.”⁴ I am sure Nino would have treated me to a dramatic reading of the D.C. Circuit’s opinion, much like

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1. C. S. LEWIS, *THE FOUR LOVES* 113 (1st Am. ed. 1960).
2. Compare *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting), with *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Thomas, J., concurring) (admitting my error in *Almendarez-Torres*).
3. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
4. *PHH Corp. v. CFPB*, 839 F.3d 1, 20 (D.C. Cir. 2016).

those performances he would proudly deliver in chambers after completing a writing with which he was particularly pleased. There were many such dramatic readings over the years—and deservedly so. His opinions captivated even the most skeptical reader.

I will leave a full accounting of Justice Scalia’s tremendous legal legacy to the many others who have said so much to honor that legacy since he passed away. I instead want to focus on one of Nino’s perhaps underappreciated virtues. For all his confidence as a legal thinker, Justice Scalia was remarkably humble about his role as a judge. He knew that his duty to declare the law was hardly “a separate, free-standing role,” but merely an “incidenta[l]” one, appropriate only when necessary to resolve a case or controversy.⁵ And when it came to answering the controversial moral questions of the day, he put more faith in “nine people picked at random from the Kansas City telephone directory” than in “the nine Justices of this Court.”⁶ Nino reminded us that government officials have little incentive “to place restraints upon [their] own freedom of action.”⁷ And he also reminded us that the Court, in particular, “seems incapable of admitting that some matters—*any* matters—are none of its business.”⁸ But he had the humility to resist these temptations and to respect the text of our laws and our Constitution, including when they assign decision-making authority to the other branches of the government or leave it to the people themselves.

Nino was always careful to judge according to law, not personal preference. As he put it, “the judge who always likes the results he reaches is a bad judge.”⁹ On more than one occasion I watched him initially struggle with a case.¹⁰ He would admit that, could he rule without constraint, he would be strongly inclined to favor one position over another. Perhaps he was frustrated that the government was overreaching or horrified by the acts of a criminal defendant. But Justice Scalia said time and again that judging is subject to constitutional constraints.¹¹ Faced with text, tradition, and reasoned argument, Justice Scalia

5. *United States v. Windsor*, 133 S. Ct. 2675, 5699 (2013) (Scalia, J., dissenting).

6. *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

7. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting).

8. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

9. See Saikrishna Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 29 (2016) (quoting Justice Scalia).

10. “Avoiding th[e] error [of mistaking personal preferences for the law] is the hardest part of being a conscientious judge.” Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

11. See, e.g., *Board of Comm’rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting) (“[The Constitution] is a prescribed structure, a framework, for the conduct of

decided the case at hand, without regard for his initial reaction or preference. Complain he might, but Justice Scalia followed the law—even if Nino might have preferred a different result. If the devil’s “cause b[e] good, the devil should have his right.”¹²

Nino’s awareness of his predispositions made him particularly vigilant and sensitive to them, including those that came from his urban, northeastern roots. Perhaps as a result, he especially cherished his experiences with his many friends living in “the vast expanse in-between.”¹³ He always kept in mind that the Constitution is the mechanism by which the people—not the unelected members of the bench—rule.

Justice Scalia also retained a remarkable degree of humility regarding his ability to reach the right result. He was keenly aware “that it is often exceedingly difficult to plumb the original understanding of an ancient text.”¹⁴ He treasured vigorous disagreement as a means of reaching the truth. And he recognized that people acting in good faith could, and would, reach different results on the same set of facts. He was thus careful to “attack ideas, not people.” Nino thrived when his ideas were being tested—at argument, in the back-and-forth with his colleagues, and with his beloved law clerks.

It is thus no surprise that Justice Scalia and I disagreed from time to time. (Good friends usually do.) And when we did, Nino pulled no punches. Take *McIntyre v. Ohio Elections Commission*,¹⁵ where we disagreed over whether the First Amendment protects anonymous distribution of political leaflets. I thought the anonymous speech was protected, based on Founding-era evidence.¹⁶ Nino disagreed, accusing me (and the Court) of “discover[ing] a hith-

government. In designing that structure the Framers *themselves* considered how much commingling [of the branches] was acceptable, and set forth their conclusions in the document.”); see also *The FEDERALIST NO. 51* (James Madison) (“If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

12. WILLIAM ROPER, *THE LIFE OF SIR THOMAS MORE* (1556).

13. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting). Despite his urban roots, Nino famously loved to hunt. For all his persuasive powers on the bench, however, he never could convince me to join him. I would not-so-subtly remind him that I spent much of my life trying to avoid the woods, and had no intention of voluntarily going back for recreation. He would respond with uproarious laughter.

14. Antonin Scalia, *Assoc. Justice, Supreme Court of the U.S., William Howard Taft Constitutional Law Lecture at the University of Cincinnati* 856 (Sept. 16, 1988).

15. 514 U.S. 334 (1995).

16. *Id.* at 358 (Thomas, J., concurring in the judgment).

erto unknown right-to-be-unknown while engaging in electoral politics.”¹⁷ That charge was tame, however, compared to Nino’s more recent dissents. In *Navarette v. California*,¹⁸ for example, Nino and I debated whether a search of a driver could be constitutional if that search was predicated solely on an anonymous tip that the driver was intoxicated. I wrote for the majority of the Court, holding that the search was constitutional. Nino rejoined, “The Court’s opinion serves up a freedom-destroying cocktail.”¹⁹ And the following Term we split again in *Zivotofsky v. Kerry*,²⁰ this time over the President’s power to regulate passports. I concluded that the regulation of passports fell within the President’s residual foreign-affairs power; Nino thought it was within Congress’s control.²¹ He accordingly declared—with classic Nino flare—that my reading of the Constitution “produces a presidency more reminiscent of George III than George Washington.”²² Nino’s pen spared no one, and I would have had it no other way.

Even Justice Scalia’s own opinions were not beyond his criticism. He had no trouble admitting previous mistakes. He candidly acknowledged in *Ring v. Arizona*,²³ for example, that he had “acquired new wisdom . . . or, to put it more critically, ha[d] discarded old ignorance.”²⁴ And a few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins*²⁵ was one of the Court’s “worst decisions ever.” Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled.²⁶ Indeed, his most recent criticism of *Auer* in *Perez v. Mort-*

17. *Id.* at 371 (Scalia, J., dissenting).

18. 134 S. Ct. 1683 (2014).

19. *Id.* at 1697 (Scalia, J., dissenting).

20. 135 S. Ct. 2076 (2015).

21. Compare *id.* at 2096 (Thomas, J., concurring in the judgment in part and dissenting in part), with *id.* at 2116 (Scalia, J., dissenting).

22. *Id.* at 2126 (Scalia, J., dissenting).

23. 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

24. *Id.* at 611.

25. 519 U.S. 452 (1997).

26. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring); *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part) (calling for the Court to overrule *Auer*); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring) (doubting *Auer*’s validity).

gage *Bankers Ass'n*²⁷ suggested that he had concerns about *Chevron* deference, which Nino had vigorously defended for years.²⁸

To Nino, no idea was beyond criticism or review. Not even the theology of the great St. Thomas Aquinas escaped his reexamination: About a month before Nino's untimely death, he spoke to a group of Dominicans on the occasion of the 800th jubilee of their order. He took the opportunity to—of all things—criticize Aquinas's thoughts on the role of the judge set out in his *Summa Theologica*. Despite professing fidelity to the written law, Aquinas expressed the view that judges may sometimes disregard poorly drafted laws contrary to natural rights in the name of “the equity which the lawgiver had in view.”²⁹ Aghast at this disregard for judicial restraint, Justice Scalia invited the assembled faithful to question everyone, even the Angelic Doctor.

Justice Scalia was not a man who cared much for talk of his own legacy. He famously disliked eulogies at funerals. And to our continued praise of his contribution to law, he would respond simply, in the words of St. Thomas More: “What part soever you take upon you, play that as well as you can and make the best of it.” Justice Scalia lived this advice—not just as a humble judge, but as a devoted husband, loving father, steadfast friend, and faithful Catholic. We each have a vocation, and we discharge the duties of that calling as best we can. Nino answered his call as a good and faithful servant to our country. Each day, in his ceaseless effort to do what was required of him, he examined and reexamined his own ideas and those of others. What resulted was nothing short of spectacular. His influence on the law will endure far beyond our days, and ours will be a better Nation for it. But that was not Nino's aim. He merely answered the call.

27. 135 S. Ct. at 1211-12 (Scalia, J., concurring) (arguing that deference to agency legal interpretations flouts the text of the Administrative Procedure Act).

28. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013); *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

29. 2 THOMAS AQUINAS, *SUMMA THEOLOGICA*, q. 60, art.5.