

# ISSUES IN PERSPECTIVE

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## ***Remembering Justice Antonin Scalia***

On Saturday, 13 February 2016, Supreme Court Justice Antonin Gregory Scalia died. Scalia was 79 years old and had been married to Maureen McCarthy Scalia for 55 years. Together they raised nine children (5 sons and 4 daughters) and had more than two dozen grandchildren. He had been a Supreme Court justice for nearly 30 years. Nicknamed the “Leader of the Opposition,” Scalia was indisputably the voice of conservative jurisprudence on the Court and for the larger culture. Arguably one of the most brilliant justices on the Court, Scalia will be sorely missed.

What was at the heart of Scalia’s conservatism? The term rather consistently used of Scalia was “originalist,” which means that which honors and adheres to the “constitutional and statutory text.” [He preferred to call his approach to interpreting the Constitution “textualism.”] Because, in his opinion, it was contrary to democratic accountability and rule of law, Scalia treated with disdain the Court’s arrogance in departing from the original intent of the Constitution. He consistently argued that the Constitution made clear that the major issues facing America are to be decided by the democratic process, not through the “nine unelected lawyers” (one of his phrases for the Court). Scalia believed that the Constitution established a republic that recognized the ultimate authority of the people, not an elite group of unelected judges, to establish laws. In his dissent on the 2015 *Obergefell* case, which legalized same-sex marriage, Scalia wrote: “This is a naked judicial claim to legislative—indeed *super*-legislative power; a claim fundamentally at odds with our system of government. A system of government that makes the people subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.”

In an essay in 1997, Scalia explained his commitment to “textualism”: “The American people have been converted to believe in the Living Constitution, a ‘morphing’ document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of electing and confirming federal judges, at all levels, on the basis of their views concerning a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs to be done from age to age, we shall have caused it to do nothing at all.” Thus in 2009, Scalia succinctly described his perception of the role of a justice: “We don’t sit here to make the law, to decide who ought to win. We decide who wins under the law that the people have adopted. And very often, if you’re a good judge, you don’t like the result you’re reaching.” Finally, columnist George Will further summarizes Scalia’s approach: “A justice’s job is to construe the text of the Constitution

or of statutes by discerning and accepting the original meaning the words had to those who ratified or wrote them. These principles of judicial modesty were embraced by a generation of conservatives who recoiled from what they considered the unprincipled creation of results-oriented Supreme Court justices and other jurists pursuing their own preferred policy outcomes.”

Scalia’s approach to the role of the judiciary stood in juxtaposition to “progressives” or judicial activists who regard the Constitution as a “living” text that can be interpreted in any manner and with any meaning modern jurists and legal theorists deem appropriate. To Scalia, “judges h[ave] grown accustomed to remaking the world in their own image, abandoning constitutional government.” Theologian Albert Mohler demonstrates that “The moral revolution now reshaping Western societies could not have occurred without a cadre of judges and justices eager to advance that revolution by the assertion of radical ideas of personal liberty, autonomy, identity, and self-expression that the framers of the Constitution would never have recognized.” So, it is doubtful that President Obama or any other president in the near future will appoint another brilliant judicial mind such as Antonin Scalia. As with so many things in our culture, appointments to the Court have become politicized and partisan; no president would dare appoint another Antonin Scalia. He would never be approved by the Senate.

A final thought on Justice Scalia, specifically a word about his personal faith. Scalia was a devout, traditional Catholic. For example, as Thomas Berg, Law professor at St. Thomas School of Law, observes, “At a 1996 prayer breakfast he exhorted attendees to wear the label ‘fools for Christ’ in the face of scorn from the ‘worldly wise.’” Scalia resolutely defended the idea that religious ideas and believers could fully participate in the public square. He upheld equal access for student religious groups to public school classrooms, equal access for religious schools and their students to tuition vouchers and other forms of educational aid, and the power of government to conduct prayers at public events such as graduation ceremonies or city council meetings. He believed strongly in the free exercise of religion in the public square. Berg declares quite forcefully that “Justice Scalia was a prophet, like many of the great dissenters in the Court’s history (he will rank with Oliver Wendell Holmes among the greatest). And prophecy involves ringing tones and stark terms; it is hard to combine those with qualifiers that charitably give the other side every benefit of the doubt. Justice Scalia lost many battles on the Court, and some of his positions will become even less popular over time. But many of his words will ring with prophetic power for generations to come.”

We will miss the power of his brilliant mind; we will miss his cogent defense of limited judicial power; we will miss his biting critique of an expanded, loose interpretation of the Constitution; and we will miss his humor, his sound judgment and his defense of human liberty as enshrined in the Constitution, not in the mind of a Progressive judicial activism that redefines rights and liberty as autonomy and libertinism.

See George Will in the *Washington Post* (15 February 2016); Editorial in the *Washington Post* (15 February 2106); [www.albertmohler.com](http://www.albertmohler.com) (15 February 2016); and Thomas Berg, “Antonin Scalia: Devout Christian, Worldly Judge,” in [www.christianitytoday.com](http://www.christianitytoday.com) (18 February 2016).