THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

Volume 18 | Issue 2 Article 5

2017

Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility

J. Lyn Entrikin
University of Arkansas at Little Rock William H. Bowen School of Law, jlentrikin@ualr.edu

DISRESPECTFUL DISSENT: JUSTICE SCALIA'S REGRETTABLE LEGACY OF INCIVILITY

J. Lyn Entrikin*

> *Just as we judge people by . . . the principles they reject as well as the values they affirmatively maintain, so do we look at judges' dissents, as well as their decisions for the court, as we evaluate judicial careers.*[1]

During his nearly thirty years on the Supreme Court, the late Justice Antonin Scalia earned a reputation for writing vitriolic dissents.[2] Meanwhile, the general tone of civic discourse has become at best dismaying and at worst demoralizing.[3] Justice Scalia did not live long enough to witness

---

*Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law. The author gratefully acknowledges the Law School's 2016 summer research stipend in support of this article.

1. William J. Brennan, Jr., *In Defense of Dissents,* 37 HASTINGS L.J. 427, 428 (1986).

2. *E.g.*, ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 323 (2014) (noting that Justice Scalia stood alone for "consistently" writing "with sarcasm"); Brian Christopher Jones, *Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?* 2015 WIS. L. REV. FORWARD 53, 62 (referring to Justice Scalia's "decadent language"); Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2D 215, 215 (2015) (finding "unparalleled" Justice Scalia's "nastiness, particularly directed at other Justices' opinions").

3. *E.g.*, Clarence Thomas, *Civility and Public Discourse*, 31 NEW ENG. L. REV. 515, 515–16 (1997) ("[C]ivility is disappearing from public discourse and public conduct. . . . [U]nless each of us . . . encourage[s] others, by example, to become more civil, we will be contributing to the erosion of the rules that allow our civil society to function."); *see also, e.g.*, Michael R. Wolf et al., *Incivility and Standing Firm: A Second Layer of Partisan Division*, 45 POL. SCI. & POLITICS 428, 428 (2012) (noting widespread concern that decline in tone of political discourse is "worse than ever," threatens the "long-term stability of America's governing institutions" and "damage[es] the ability to resolve complex public problems"); Erica Werner & Mark Sherman, *Gorsuch: Trump's Attacks on Judges "Disheartening," "Demoralizing"*, CHI. TRIBUNE (Mar. 21, 2017), http://www.chicagotribune.com/news/nationworld/politics/ct-gorsuch-supreme-court-hearings-20170321-story.html ("When anyone criticizes the honesty and integrity or the motives of a federal judge, I find that disheartening, I find that demoralizing.").

the 2016 presidential campaign as it played out, nor could he have anticipated how his death would reduce partisan polemics to a new low.[4] The political discourse characterizing the 2016 presidential election represented the modern nadir of civility in the public square.

Largely insulated from such outside political pressures, Supreme Court Justices long hewed to norms of civility, collegiality, and respect, even if not always reaching consensus. With few exceptions, the Justices have disagreed about even controversial legal issues in mutually respectful discourse. They have customarily demonstrated a deep appreciation for the Court's role in our democracy, and an understanding that public respect and confidence in the Court's institutional integrity is essential for its independence.

Not so with Justice Scalia. His dissents frequently reflected uncloaked scorn for the majority.[5] And although he has been celebrated in death as a brilliant judicial giant,[6] his departure from the custom of respectful dissent marked a turning point in the Court's tradition of collegiality and civility.[7]

---

4. *See, e.g.*, Robert Barnes, *Scalia's Death Plunges Court, National Politics into Turmoil,* WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/national/scalias-death-plunges-court-national-politics-into-turmoil/2016/02/13/136c0590-d2a4-11e5-b2bc-988409ee911b_story.html?utm_term=.cc6ba93ac167 (predicting political controversy that became a central feature of the 2016 presidential campaign); Jeffrey Toobin, *In the Balance*, NEW YORKER, Oct. 3, 2016, at 28 ("[T]he death of Antonin Scalia . . . jolted the institution and affirmed . . . a venerable truism, attributed to the late Justice Byron White: 'When you change one Justice, you change the whole Court.'").

5. Despite the disdain Justice Scalia's separate opinions often expressed for the views of his fellow Justices, he and they disavowed any internal conflict as a result. *See, e.g.*, Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010) (sidestepping the question by referring to her friendship with Justice Scalia); Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HISTORY 33, 40–41 (Dec. 1994) (explaining that separate opinions "do not, or at least need not, produce animosity and bitterness among the members of the Court," in which dissents are "normal").

6. *E.g.*, Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia Love Him or Hate Him, Antonin Scalia Demands Attention*, 9 J. LEGAL WRITING INST. 71, 96 (2003) (referring to a quote from a dissent as "Scaliaesque"); Christina Pazzanese, *Death of a Judicial Giant*, HARV. GAZETTE (Feb. 15, 2016), http://news.harvard.edu/gazette/story/2016/02/death-of-a-judicial-giant/ (referring to Justice Scalia as "a legal giant and defender of conservative jurisprudence with a rapier wit and formidable intellect").

7. *See* Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 623 (1994) (emphasizing that dissents are essential for maintaining institutional integrity, but urging civility in expressing strong judicial disagreement).

Given the regrettable and apparently unchecked decline in the civility of public discourse in all branches of our government,[8] we might consider whether Justice Scalia's increasingly vitriolic dissents set a new course for government speech. And if they did, we should consider the implications for his legacy. As one scholar observed, his "dissents have not won over many adherents, and in some areas, despite the force of his protest, he may well be on the wrong side of history."[9] Others have warned that "the nastiness among the Justices contributes to the lack of civility among lawyers."[10] Perhaps the "sting" of Justice Scalia's aggressive rhetoric was "somewhat mitigated by its confinement, by and large, to dissents."[11] Or does a disrespectful dissent by a Supreme Court Justice always set a bad example?[12]

Part I of this article reviews the Supreme Court's history of issuing separate opinions. Part II maps the declining civility of Justice Scalia's dissents during his four years as a circuit judge followed by three decades on the Court. Part III considers the extent to which Justice Scalia's jurisprudence has influenced the law.[13] Part IV assesses whether the increasingly divisive tone of Supreme Court dissents implicates judicial ethics and

---

8. *See, e.g.*, Thomas, *supra* note 3, at 515–16.

9. MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 407 (2015).

10. Gaffney, *supra* note 7, at 624; *see also, e.g.*, Brian Porto, *The Rhetorical Legacy of Antonin Scalia*, 43 VT. B.J. 28, 28 (Summer 2017) (characterizing Justice Scalia's tone as "prone to cross the rhetorical Rubicon between professional critique and personal attack"); Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1077 (1994) (suggesting that Justice Scalia may have "crossed the line between lively language and impermissibly caustic speech"); *but cf.* Thomas, *supra* note 3, at 516 (decrying decline of civility elsewhere but praising the Court, "where civility is . . . not a matter for debate").

11. Porto, *supra* note 10, at 29.

12. *See* Philip Allen Lacovara, *Un-Courtly Manners: Quarrelsome Justices Are No Longer a Model of Civility for Lawyers*, 80 A.B.A. J. 50, 50 (Dec. 1994) (noting that the Supreme Court "is not immune" and "appears disinclined to lead the legal profession back toward more civilized discourse"); *see also, e.g.*, Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 401 (2000) (chiding Justice Scalia for "the tone and rhetoric of his opinions"); Marie A. Failinger, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia*, 34 U. TOL. L. REV. 425, 428 (2003) (addressing Justice Scalia in a public letter that apparently fell on deaf ears); Delgado & Stefancic, *supra* note 10, at 1077.

13. While dissenting opinions "can help to change the law," Justice Scalia conceded that dissents in the federal courts of appeals are more likely to do so than Supreme Court dissents. Scalia, *supra* note 5, at 36–37, 41.

undermines civility among the bench and bar. Finally, Part V discusses whether Justice Scalia's frequent departure from the custom of respectful dissent contributed to the increasingly negative tone of all contemporary government speech. The article concludes by suggesting steps the Court should take to ensure that Justices serve as exemplars of civility and respect in public discourse.

I. OVERVIEW OF THE COURT'S OPINION-ISSUING PRACTICES

> *Supreme Court Justices have not always had the same attitude toward the expression of dissent.*[14]

A. The Early Years

For much of the Court's early history, dissents were issued only rarely,[15] and then often only reluctantly and even apologetically.[16] Most of the earliest reported Supreme Court opinions—issued from 1790 to 1800—were written "by the Court," without attribution by name to the opinion's author.[17] About one fourth were issued *seriatim* following the tradition of English courts, each Justice issuing an individual opinion. Often a *seriatim* opinion was followed by a brief order disposing of the case.[18] History does not make clear why some of the earliest

14. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 137 (1999).

15. UROFSKY, *supra* note 9, at 46–47; Kelsh, *supra* note 14, at 146–48; Scalia, *supra* note 5, at 34.

16. *See, e.g.*, Brown v. Md., 25 U.S. (12 Wheat) 419, 449–50 (1827) (Thompson, J., dissenting) (announcing dissent "with some reluctance, and very considerable diffidence"); United States v. Fisher, 6 U.S. (2 Cranch) 358, 398 (1805) (Washington, J., dissenting) (feeling compelled to dissent to "shew at least that the opinion was not hastily or inconsiderately given"); *see also* Kelsh, *supra* note 14, at 159 & nn. 89, 133 (noting that Marshall Court dissenters routinely expressed respect for fellow Justices).

17. *See* Kelsh, *supra* note 14, at 140; *see, e.g.*, United States v. Peters, 3 U.S. (Dall.) 121, 129 (1795) ("By the Court: We have consulted together on this motion; and, though a difference of sentiment exists, a majority of the Court are clearly of opinion, that the motion ought to be granted.").

18. Kelsh, *supra* note 14, at 140; G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1466 (2006); *see also, e.g.*, Bas v. Tingy, 4 U.S. (Dall.) 37 (1800); Cooper v. Telfair, 4 U.S. (Dall.) 14 (1800); Talbot v. Jansen, 3 U.S. (Dall.) 133 (1795); Penhallow v. Doane's Adm'rs, 3 U.S. (Dall.) 54 (1795); Ga. v. Brailsford, 2 U.S. (Dall.) 402 (1792).

opinions were issued "by the Court" and others *seriatim*, but in the Court's early years its opinions took no set form.

Beginning in 1801, opinions were almost exclusively authored by Chief Justice John Marshall as a means of unifying the Court and establishing its institutional authority.[19] After Justice William Johnson's appointment in 1804, Chief Justice Marshall was persuaded to rotate opinion writing, and Justice Johnson occasionally issued separate opinions.[20] Unanimity of the Court's decisions weakened further later in the Marshall era.

Chief Justice Marshall had his critics, including Thomas Jefferson,[21] but his tight rein over the Court's early opinion-issuing practices has been recognized as entrenching the Supreme Court as a co-equal branch of government.[22]

B. The Beginnings of Respectful Dissent

During Chief Justice Taney's leadership, dissents were so uncommon that Justices often apologized for offering them.[23] Typical are this introduction and conclusion:

---

19. Kelsh, *supra* note 14, at 141–42; UROFSKY, *supra* note 9, at 46–47, 54; Cass Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 786 (2015).

20. *See* UROFSKY, *supra* note 9, at 50, 54.

21. President Jefferson criticized Chief Justice Marshall's approach to issuing opinions. *Id.* at 47–54. In retirement, President Jefferson commended Justice William Johnson—among his appointees to the Court—for his practice of writing separately:

> I rejoice in the example you set of *seriatim* opinions. . . . Some of your brethren will be encouraged to follow it occasionally, and in time, it may be felt by all as a duty, and the sound practice of the primitive court be again restored. Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it is impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority.

Letter from Thomas Jefferson, Pres. of the U.S. (ret.), to William Johnson, J., S. Ct. of the U.S., 2 (June 12, 1823), TEACHING AM. HISTORY, http://teachingamericanhistory.org/library/document/letter-to-justice-william-johnson/; *see also, e.g.*, Oliver Schroeder, Jr., *The Life and Judicial Work of Justice William Johnson, Jr.*, 95 U. PA. L. REV. 164, 168 (1946) (crediting Justice Johnson for altering the Court's practice of issuing a single opinion and asserting that "concurring and dissenting opinions restored an ancient procedure which had been neglected").

22. *E.g.*, UROFSKY, *supra* note 9, at 54–55.

23. Kelsh, *supra* note 14, at 155. Indeed, from 1835 to 1941, fewer than ten percent of all Supreme Court opinions were accompanied by dissents. M. Todd Henderson, *From*

> I dissent from the opinion of the court. The principle upon which the case is decided is so important, and will operate so widely, that I feel it my duty to show the grounds upon which I differ. This will be done as briefly as I can; for my object is to state the principles of law upon which my opinion is formed, rather than to argue them at length.
>
> . . . . .
>
> And believing, as I do, upon the best consideration I am able to give to the subject, that the decision and the principle upon which the opinion of the court founds itself is inapplicable to the case before us, and that if it is carried out to its legitimate results it will deprive the admiralty of power, [which is] useful, and indeed necessary, for the purposes of justice, and conferred on it by the Constitution and laws of the United States, I must respectfully record my dissent.[24]

As the Court gradually took its place as a co-equal branch of government, Justices began writing separately to demonstrate the consistency of their individual views over time rather than to express disagreements on specific issues.[25] Dissents began to underscore the Justices' principles and views as separate individuals rather than as faceless members of the Court's consensus.[26] But even after separate opinions became less apologetic, they almost always used respectful rhetoric.[27] Yet

---

Seriatim to Consensus and Back Again: A Theory of Dissent, 2007 SUP. CT. REV. 283, 321 & tbl. 2 (2007).

24. Taylor v. Carryl, 61 U.S. 583, 600–01, 617 (1857) (Taney, C.J., & Wayne, Grier & Clifford, JJ., dissenting). As suggested by the *Taylor* dissent, members of the Taney Court generally confined separate opinions to cases involving constitutional and other questions of far-reaching public concern. Kelsh, *supra* note 14, at 150, 155–56; *see* UROFSKY, *supra* note 9, at 57–58; *e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 493 (1857) (Campbell, J., concurring) ("I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion."), *superseded by* U.S. Const. amends. XIII, XIV.

25. Kelsh, *supra* note 14, at 157 (noting that "by the mid-nineteenth century, "Justices began to state that dissent was acceptable in order to protect or maintain their own records or reputations" and "began to defend dissent less by reference to the issues involved and more by reference to themselves").

26. *See id.* at 157–59 & n.130.

27. *Id.* at 159 ("Marshall Court Justices had gone out of their way to express their respect for the opinions of their brethren.").

there were exceptions. As early as 1854, a concurring Justice pointedly criticized the Court's reasoning:

> [T]he decision . . . seems to me incomprehensible, unless understood as designed to overrule [*Vidal v. Girard's Executors*], and every authority from the English chancery cited and commented upon in its support. For such an assault upon the previous decision of this court, wielding a blow so trenchant and fatal at one great and acknowledged head of equity jurisprudence, the head of trusts, my mind is not prepared.[28]

Illustrative of the Taney Court's norms of internal collegiality and mutual respect is *Dred Scott*,[29] the most divisive decision of the nineteenth century. The Justices' nine separate opinions and the political controversy they engendered foreshadowed the Civil War, the Emancipation Proclamation, and later the adoption and ratification of the post-Civil War amendments to the Bill of Rights.[30]

Justices McLean and Curtis issued dissents, both respectful, cordial, and couched in lofty discourse.[31] Justice McLean objected to anything in the majority opinion beyond its holding that the court below lacked jurisdiction, but he also respectfully addressed the central issue:

> In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. . . . A slave is not a mere chattel. He bears the impress of

28. Fontain v. Ravenel, 58 U.S. (17 How.) 369, 398 (1854) (Daniel, J., concurring) (citing Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127, 183 (1844)).

29. 60 U.S. (19 How.) 393 (1857). Justice Ginsburg recently referred to *Dred Scott* as "the most dreadful decision the Court ever wrote." *A Conversation with Justice Ruth Bader Ginsburg and Professor Aaron Saiger*, 85 FORDHAM L. REV. 1497, 1502 (2017) [hereinafter *Ginsburg Conversation*].

30. While Chief Justice Taney authored the majority opinion, for all practical purposes the case was decided *seriatim* because each Justice issued a separate opinion. *Dred Scott*, 60 U.S. (19 How.) at 399–454 (Taney, C.J.); *id.* at 454–56 (Wayne, J., concurring); 457–69 (Nelson, J., concurring); *id.* at 469 (Grier, J., concurring); *id.* at 469–93 (Daniel, J., concurring); *id.* at 493–518 (Campbell, J., concurring); *id.* at 518–29 (Catron, J., concurring); *id.* at 529–64 (McLean, J., dissenting); *id.* at 564–633 (Curtis, J., dissenting).

31. *See, e.g.*, Roscoe Pound, Cacoethes Dissentiendi*: The Heated Judicial Dissent,* 39 ABA J. 794, 797 (Sept. 1953) (quoting a portion of Justice Curtis's dissent as "a model of temperate, reasoned discussion of a hotly debated legal-political controversy in a time of exceptional political excitement").

> his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.[32]

Justice Curtis wrote more forcefully, but still respectfully:

> If this power [to declare who is a citizen] exists, what persons born within the States may be President or Vice President of the United States, or members of either House of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of Congress.[33]
>
> . . . . .
>
> Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot . . . be recognized in this court, without arrogating to the judicial branch . . . powers not committed to it; and which . . . I do not think it fitted to wield.[34]

And Justice Curtis concluded in an almost apologetic tone, explaining his reasons for writing separately:

> I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass . . . . These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. . . . To have done either more or less, would have been inconsistent with my views of my duty.[35]

During Chief Justice Taney's later years and as the Civil War approached, the tone of separate opinions shifted from the norm of respect to reflect increasing hostility. Justices became

---

32. *Dred Scott*, 60 U.S. (19 How.) at 549–50 (McLean, J., dissenting).

33. *Id.* at 577–78 (Curtis, J., dissenting).

34. *Id.* at 626 (Curtis, J., dissenting).

35. *Id.* at 633 (Curtis, J., dissenting). Even the concurring opinion by Justice Wayne was respectful, and almost apologetic, in commenting on the badly divided decision:

> It would certainly be a subject of regret, that the conclusions of the court have not been assented to by all of its members, if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment, and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.

Id. at 455 (Wayne, J., concurring).

less concerned about the Court's role as an institution and instead focused their attention on their individual reputations.[36]

C. The Separate Opinion in a Time of Socioeconomic Turmoil

After Chief Justice Taney's death in 1864, Supreme Court Justices filed separate opinions in an expanding range of cases, even while continuing to express reluctance in doing so.[37] But some Justices also occasionally issued unapologetic separate opinions expressing disdain for the Court's opinions.[38]

By the late nineteenth century, separate opinions were no longer considered out of the ordinary. In 1892, a brief dissent issued by Justice Brewer[39] expressly relied on the "elaborate discussions" by dissenting Justices in an earlier case, a highly unusual practice at the time.[40] Also during this period, dissents occasionally became law, either by constitutional amendment[41] or by the Court's overruling earlier decisions in favor of dissenting viewpoints.[42] No doubt the political impact of the Court's reversals on the controversial issues of the day offered

---

36. Kelsh, *supra* note 14, at 157–59 & n.130.

37. *Id.* at 160, 161–66.

38. In *Munn v. Illinois*, 94 U.S. 113 (1876), for example, Justice Field wrote that "[t]he principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support." *Id.* at 136 (Field, J., dissenting).

39. Budd v. N.Y., 143 U.S. 517, 548–49 (1892) (Brewer, J., dissenting).

40. Kelsh, *supra* note 14, at 172 (discussing *Munn*).

41. *E.g.*, U.S. CONST. amends. XIII, XIV (overruling *Dred Scott*).

42. *E.g.*, The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) (overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870)). The dissent in *Hepburn*, joined by three Justices, was particularly strident in tone, and was perhaps among the earliest critiques of what is now known as judicial activism:

> [The majority's] whole argument of the injustice of the law, an injustice which if it ever existed will be repeated by now holding it wholly void; and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National legislature.

Hepburn, 75 U.S. at 638 (Miller, J., dissenting).

an irresistible incentive for minority Justices to express dissenting viewpoints.[43]

D. The Anti-Dissent Movement

Beginning in the late nineteenth century, the bar began to express strong opposition to the practice of issuing dissents.[44] The opposition was motivated primarily by two concerns. First, separate opinions weakened the judiciary's institutional authority[45] by undermining the certainty and predictability of the law. Second, they were antithetical to the collective nature of courts and the appropriate role of judges.[46] Yet separate opinions could also reflect the democratic notion that courts, like legislatures, are deliberative bodies. The practice of announcing dissenting viewpoints was said to reflect the transparency and public access valued in the American judicial system.[47]

---

43. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting). Professor Urofsky calls Justice Field's dissent in *The Slaughter-House Cases* the "first modern dissent" because "it not only contradicted the ruling and reasoning of the majority, but also set out the arguments that would ultimately be accepted as correct." Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 PEPPERDINE L. REV. 919, 922–23 (2012).

Yet some Justices of this era circulated proposed dissents primarily to influence the content and reasoning of opinions for the Court. Justice Brandeis, for example, wrote dissents that he later withheld from publication. *Id*. at 929; *see generally* ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK 200 (1957).

44. Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 508–09 (2012) (summarizing the thirty-year debate about publishing dissents in courts of last resort); *see also* C.A. Hereschoff Bartlett, *Dissenting Opinions*, 32 L. MAG. & REV. 54, 55 (Nov. 1906) ("What possible good can result from a dissenting opinion? . . . It simply litters up pages of law reports with divergent views, the dissenting judge frequently posing as the champion of a lost cause.")

45. *See* Smith, *supra* note 44, at 518–19.

46. *See id.* at 540; *see also* Henry Wollman, *Evils of Dissenting Opinions*, 57 ALB. L.J. 74, 74 (1898) ("There never should be a dissenting opinion in a case decided by a court of last resort. No judge, lawyer or layman should be permitted to weaken the force of the court's decision, which all must accept as an unappealable finality.").

47. *See* Emlin McClain, *Dissenting Opinions*, 14 YALE L.J. 191, 192, 195–96 (1905). Some commentators celebrated Supreme Court dissents:

> There is a class of dissenting opinions however which is well worthy of the closest attention on the part of the American bar. They are marked . . . by certain peculiarities which give them permanent value. I refer to the dissenting opinions

Perhaps as a result of the legal uncertainty associated with separate opinions, they became increasingly unpopular with the bar.[48] Legal periodicals and general-interest newspapers alike took positions for and against, and the question was frequently debated at bar meetings.[49] One trigger may have been *Plessy v. Ferguson*,[50] which reaffirmed the "separate but equal" doctrine by upholding a Louisiana statute requiring segregated railway cars.[51] In dissent, Justice Harlan pointedly challenged the Court's reasoning:

> The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.[52]

Soon after *Plessy,* Louisiana amended its constitution to prohibit minority opinions.[53] But by 1921, the opposition movement lost force as judicial dissent came to be viewed as a sign of the

---

delivered by members of the Supreme Court of the United States upon questions of constitutional law.

Hampton L. Carson, *Great Dissenting Opinions*, 50 ALB. L.J. 120, 120 (1894) (conceding nevertheless that "[t]he active practitioner is chiefly concerned with the law as it is declared by the majority of a court, and pays little heed to a shrill or feeble shriek as to what it might or ought to be").

48. *E.g.*, William A. Bowen, *Dissenting Opinions*, 17 GREEN BAG 690, 693 (1905) (calling dissents "judicial mistakes" that injured "public respect for courts"); McClain, *supra* note 47, at 198 (noting that dissents are "in many cases . . . unwise and injudicious").

49. Smith, *supra* note 44, at 511–12.

50. 163 U.S. 537 (1896), *overruled in part*, Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

51. *Id.* at 543, 549–51.

52. *Id.* at 562 (Harlan, J., dissenting). And Justice Harlan had more to say:

> If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

Id.

53. Smith, *supra* note 44, at 513 & n.36 (citing LA. CONST. art. 92 (adopted 1898; rescinded 1921)).

common law's adaptability[54] rather than "a pernicious, private indulgence."[55]

E. The Rise of Consensus and Acquiescence

Chief Justice Taft chaired the commission that drafted the ABA's first code of judicial conduct, issued in 1924.[56] No fan of dissents,[57] he urged restraint by dissenting Justices, promoting the addition of Canon 19 titled "Judicial Opinions."[58] The canon acknowledged that a written opinion "promotes confidence in [the judge's] intellectual integrity and may contribute useful precedent to the growth of the law."[59] But it discouraged courts of last resort from issuing separate opinions, urging judges to exercise "effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision."[60]

---

54. McClain, *supra* note 47, at 193–94 (describing written opinions' essential function as guiding others on force and effect of court rulings on facts presented); Smith, *supra* note 44, at 538.

55. Smith, *supra* note 44, at 538. As early as 1905, some considered dissents "not only proper, but necessary" in some cases and that suppressing dissent would likely "obstruct . . . the harmonious and safe development of the law." McClain, *supra* note 47, at 199. But the potential for abuse was obvious even then: "The writer of the dissent has a decided advantage in that his work is in the main critical and destructive rather than constructive." *Id.*

56. Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUSTICE SYS. J. 271, 273 (2007) (reviewing the history of the ABA Canons of Judicial Ethics).

57. Stephen C. Halpern & Kenneth N. Vines, *Institutional Disunity, the Judges' Bill and the Role of the U.S. Supreme Court*, 30 W. POL. QUARTERLY 471, 481 (1977) (observing that the Court's marked increase in dissenting opinions began while Taft was Chief Justice, "despite his strong antipathy to dissent" and his tradition of discouraging dissents "for the sake of institutional unity").

58. John Alder, *Dissents in Courts of Last Resort: Tragic Choices?* 20 OXFORD J. OF LEG. STUDIES 221, 244 (2000); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1284 & n.55, 1344–45, 1346, 1348, 1356 (2001) (describing Court's involvement in drafting Canon 19 as reflecting norm of consensus in the 1920s and noting that Canon 19 survived until 1972, when the Code was substantially revised). The ABA's *Code*-revision committee considered Canon 19's "detailed discussion of judicial opinions . . . as neither being helpful nor, for the most part, matters of ethical conduct." E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 50 (1973).

59. *ABA Canons of Judicial Ethics*, at Canon 19 (1924), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.authcheckdam.pdf (1924) [hereinafter *1924 Canons*]

60. *Id.*

Perhaps anticipating the Scaliaesque dissent, Canon 19 noted that

> [a] judge should not yield to pride of opinion or value more highly his individual reputation than that of a court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.[61]

Ironically, the *ABA Canons of Judicial Ethics* never applied to federal judges, and Canon 19 has been cited only rarely.[62]

Another major event probably mitigated the influence of Canon 19. The Judiciary Act of 1925 significantly altered the nature of the Supreme Court's docket and generated more time for Justices to write separate opinions.[63] The Court itself had urged Congress to enact the bill "to cope with the growth in its business and to conserve its energies for issues appropriate to the Supreme Bench."[64]

With few exceptions, the Act essentially eliminated cases over which the Court's review was mandatory and granted it authority to control its own docket through writs of certiorari.[65] By this time, dissents were entrenched in the Court's practice,[66] and the statutory changes allowed the Justices sufficient time to prepare, circulate, and deliberate over their dissents, which "entail[ed] as much labor as majority opinions."[67] No longer bound to resolve routine appeals, the Court accepted cases much

---

61. *Id.*

62. One of the few cases to cite Canon 19 was *State* ex rel. *Shea v. Judicial Standards Comm'n*, 643 P.2d 210, 223 (Mont. 1982). The Montana court declined to sanction a judge for using "intemperate" language in a dissent, concluding that "[a]s long as a justice, or a judge . . . does not resort to profane, vulgar or insulting language that offends good morals, it may hardly be considered 'misconduct in office.'" *Id.*

63. Sunstein, *supra* note 19, at 794–95 (describing cases).

64. Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1 (1928); see also *id.* at 4 ("Indeed, the Act was an effort by the Court to cut the coat of jurisdiction according to the cloth of the time and energy of the nine Justices.").

65. *Id.* at 1–3; Halpern & Vines, *supra* note 57, at 472. The Judiciary Act of 1925 is generally considered a watershed in the history of Supreme Court jurisprudence, not only because it gave the Court considerable discretion over the nature of the cases it decided, but also because it substantially reduced the Court's caseload. *See* Halpern & Vines, *supra* note 57, at 482–83.

66. Frankfurter & Landis, *supra* note 64, at 15 ("Its practice may well be characterized as one of the settled traditions of the Court.").

67. *Id.* at 15–18 (including tables that show distribution of opinions).

more likely to present challenging issues,[68] especially during and after the New Deal era. The controversial socioeconomic issues raised in these cases understandably prompted more disagreement among Justices.

In 1928, Charles Evans Hughes—then a former Justice of the Supreme Court who would soon be appointed Chief Justice—delivered a series of lectures at Columbia University. They included his famous statement about the dissent's appeal "to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[69] But that lofty, often-quoted passage is almost always taken out of context. While Justice Hughes generally valued minority opinions, at least in "important controversies,"[70] he conceded that dissents "detract from the force of the [majority's] judgment."[71] Read in proper context, his perspective on dissents was more equivocal than has generally been reported.

His published lectures certainly reflect that Justice Hughes valued judicial civility, even in separate opinions. After noting that a court's reputation rests on the "character and independence of its judges," he pointed out that

> [t]his does not mean that a judge should be swift to dissent, or that he should dissent for the sake of self-exploitation or because of a lack of that capacity for cooperation which is of the essence of any group action, whether judicial or otherwise. Independence does not mean cantankerousness and a judge may be a strong judge without being an impossible person. Nothing is more distressing on any bench than the exhibition of a captious, impatient, querulous spirit.[72]

68. *Id.*

69. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS—AN INTERPRETATION 68 (1928).

70. *Id.* at 70; *see also id.* at 64–70 (discussing opinions in general).

71. *Id.* at 67. "Undoubtedly, they do. When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence." *Id.*

72. *Id.* at 67–68.

F. (Mostly) Respectful Dissent on the Roosevelt Court

After 1941, when Harlan Fiske Stone was appointed Chief Justice, the Court's consensus norm ended at a remarkable pace.[73] Chief Justice Stone did not believe he was empowered to discourage Justices from publicly disagreeing with the majority. In fact, he believed dissents were the natural result of thoughtful debate and deliberation on controversial issues.[74]

Chief Justice Stone's internal administrative innovations transformed the inner workings of the Court into nine "separate law offices, with individual Justices elaborating their own views."[75] But his leadership was not the only reason for the decline in consensus. Much of the change is probably attributable to the Court's significant turnover during the Roosevelt years. Between 1937 and 1941 alone, President Roosevelt nominated eight new Justices.[76]

Before 1947, official case reports identified by name only the Justice who authored the Court's opinion or any separate opinion, unless another Justice specifically asked to be identified with a particular opinion. But once the front matter of every opinion identified each Justice's position, silent acquiescence became less frequent and draft opinions began circulating among the Justices. Thus, Justices became personally (and

---

73. Sunstein, *supra* note 19, at 789.

74. *See* Kelsh, *supra* note 14, at 177–79; Sunstein, *supra* note 19, at 789–90. Stone himself dissented more frequently than any previous Chief Justice. Sunstein, *supra* note 19, at 790.

75. Sunstein, *supra* note 19, at 789–90.

76. *Id.* at 775 & n.30. He nominated another in 1943 to replace one of those eight, who resigned after two years to serve in the Roosevelt administration.

President Roosevelt's appointment of academics, including Felix Frankfurter and William O. Douglas, may also have shifted the Court's internal dynamic toward the robust disagreements that sometimes characterize law faculty meetings. *See id.* at 793. Justices Frankfurter and Douglas both had "strong personalities" and "had not been fully socialized into a judicial culture that prized a norm of consensus." *Id*. Justice Frankfurter's judicial brethren also disliked his "pedantic" dissents and "condescending" attitude. One Court scholar concluded,

> As his dream of leading the Court slipped away, Frankfurter grew nastier and his temper shorter. The papers of the [J]ustices who served with him are littered with notes from Frankfurter accusing them of everything from stupidity to the inability to understand the law; what he said behind their backs, and in his diary, usually went much further.

UROFSKY, *supra* note 9, at 232.

perhaps even politically) accountable for their respective positions, which may have prompted more frequent separate opinions.[77] In addition, the jurisprudential shift away from formalism to realism during this period likely influenced the pattern and frequency of minority opinions.[78]

G. The Norm of Consensus and Respect in the Civil Rights Era

By the mid-twentieth century, some dissents had become more strident, and scholars called for more civility and restraint.[79] In 1954, soon after Earl Warren became Chief Justice, the Court unanimously decided *Brown v. Board of Education*.[80] And after 1957, dissenters adopted the customary tone of the "respectful dissent."[81] Under Chief Justice Warren, the Court demonstrated a surprising degree of consensus—and even occasional unanimity—in many of that era's controversial civil rights cases, including not only *Brown* but also *Bates v. City of Little Rock*,[82] *Heart of Atlanta Motel, Inc. v. United States*,[83] *New York Times Co. v. Sullivan*,[84] and *Loving v. Virginia*.[85]

---

77. Sunstein, *supra* note 19, at 797; *see also id.* at 802.

78. *Id.* at 798.

79. *See, e.g.*, Pound, *supra* note 31, at 795–97 (pointedly critiquing dissents of California Supreme Court Justice Jesse W. Carter).

80. 347 U.S. 483 (1954). Scholars have credited the Court's unanimity in *Brown* to Chief Justice Warren's leadership. *See, e.g.*, Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741, 749–50 (2004) (recognizing unanimity as Chief Justice Warren's "signal achievement"); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 34 (1979).

81. Chris Kulawik, Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1317–18 (2011) (crediting Justice Whittaker with using the phrase that has since become the customary language of collegial disagreement); *see also id.* at 1318 & n.87. Yet Chief Justice Taney was apparently the first Justice to adopt the phrase. *See* Thomas v. Osborn, 60 U.S. 22, 56 (1856) (Taney, C.J., dissenting). And other dissenting Justices recited it before the phrase first appeared in a dissent authored by Justice Whittaker. *Compare* Roviaro v. United States, 353 U.S. 53, 71 (1957) (Clark, J., dissenting), *with* City of Detroit v. Murray Corp. of Am., 355 U.S. 489, 511 (1958) (Whittaker, J., dissenting).

82. 361 U.S. 516 (1960) (addressing freedom of association).

83. 379 U.S. 241 (1964) (applying Civil Rights Act to private businesses).

84. 376 U.S. 254 (1964) (reaffirming freedom of the press).

85. 388 U.S. 1 (1967) (striking down statutes banning interracial marriage).

The tradition of respect continued for almost thirty years, even in *Roe v. Wade*,[86] certainly among the most divisive cases of the modern era.[87] Then-Justice Rehnquist, for example, adopted a polite and deferential tone in his *Roe* dissent:

> The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.[88]

But once Justice Scalia arrived in 1986, the tone of Supreme Court discourse would never be the same.[89]

---

86. 410 U.S. 113 (1973).

87. *E.g.*, Bret D. Asbury, *Law as Palimpsest: Conceptualizing Contingency in Judicial Opinions*, 61 ALA. L. REV. 121, 144 (2009) ("*Roe* is one of the most widely read and controversial opinions of the twentieth century").

88. *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting). Justice Rehnquist ended his dissent with the then-customary phrase: "For all of the foregoing reasons, I respectfully dissent." *Id.* at 178. Justice White issued a more strongly worded dissent in *Doe v. Bolton*, 410 U.S. 179 (1973), decided with *Roe*, but he too adopted a nominally respectful tone:

> With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgments. . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.
>
> . . . . .
>
> In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

Id. at 221–22 (White & Rehnquist, JJ., dissenting). Others have reached similar conclusions about the respectful separate opinions in *Roe*. *See, e.g.*, Ronald J. Placone, *The United States Supreme Court and Abortion: A Decline in Civility*, 33 T. JEFFERSON L. REV. 181, 190–91 (2011).

89. Alan B. Morrison, *Remembering Justice Antonin Scalia*, 101 MINN. L. REV. HEADNOTES 12, 12 (2016) (surmising that Justice Scalia was confirmed in part because he had "no record that would suggest how he would vote in controversial cases before the Supreme Court"). "[T]o many who thought they knew Judge Scalia reasonably well when he was appointed, he turned out to be a much different Justice than they had expected." *Id.* at 14. But some of the opinions he wrote as a circuit judge suggested that he could be irascible, impatient, and aggressive. *See, e.g.*, text accompanying notes 137–59, *infra*.

II. JUSTICE SCALIA'S RHETORICAL LEGACY

> *We write what we are, and perhaps, more than others, judges are what they write.*[90]

Were Justice Scalia's separate opinions motivated by a genuine desire to appeal to the "brooding spirit of the law, the intelligence of a future day"? Or was he too "swift to dissent," choosing to "dissent for the sake of self-exploitation" for lack of "capacity for cooperation"? Was he, in the end, just a "cantankerous" and "impossible person" with a "captious, impatient, querulous spirit"?[91]

By the end of his life, Justice Scalia's propensity to dissent was notably greater than might have been expected from his early years on the federal bench. He acknowledged in a 1994 article that "[t]he foremost and undeniable external consequence of a separate dissenting or concurring opinion is to destroy the appearance of unity and solidarity."[92] And he agreed that the unanimity of the Court's "epochal decision" in *Brown* facilitated its acceptance during the highly charged political controversy surrounding school desegregation. He conceded that separate opinions can "obfuscate rather than clarify" the law.[93] And he recognized that they may lead to "a sort of vote-counting approach" in predicting Court decisions on significant issues of law.[94]

---

90. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1415 (1995).

91. HUGHES, *supra* note 69, at 68.

92. Scalia, *supra* note 5, at 35; *see also* Antonin Scalia, *Dissents*, OAH MAG. HISTORY 18 (1998) (restating this conviction in a slightly edited version of 1994 article). Indeed, "if the Court is persistently fragmented, and if the fragmentation occurs along political grounds, some people will lose faith in it—especially if their preferred views are consistently rejected." Sunstein, *supra* note 19, at 816; *but cf.* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1019 (2008) (defending judicial "candor" and "sincerity" but lamenting judicial critiques of one another "in disrespectful terms").

93. Scalia, *supra* note 5, at 38.

94. *Id.* at 39. Justice Scalia's writing also presaged the political reaction to news of his death: "Whenever one of the five Justices in a 5–4 constitutional decision has been replaced there is a chance, astute counsel must think, of getting that decision overruled." *Id.*; *see supra* note 4 and accompanying text; *cf.* Sunstein, *supra* note 19, at 806–07 (arguing that the credibility and legitimacy of a deeply divided decision likely have more to do with public predilections than vote-counting).

On the other hand, Justice Scalia also apparently believed that an opinion for the Court, signed by its author and accompanied by signed dissents, demonstrates that the Court's work is the product of "independent and thoughtful minds," rather than the product of judges who value consensus merely to achieve "some supposed 'good of the institution.'"[95] In concluding that the merits of separate opinions outweigh their disadvantages, Justice Scalia's thoughts mirrored the perspective espoused decades earlier by Chief Justice Hughes. He even acknowledged that concurring opinions issued "only to say the same thing better than the court has done, or worse still, to display the intensity of the concurring judge's feelings on the issue" amount to an abuse that might even counsel against issuing separate opinions.[96]

Yet after serving on the federal bench for less than a decade, Justice Scalia had already earned a reputation for his biting, acerbic dissents.[97] By the end of his judicial career, his separate opinions had been variously described as "harshly worded,"[98] "sarcastic and divisive with a cutting writing style,"[99] "acid,"[100] "corrosive,"[101] belligerent,[102] "hostil[e],"[103]

95. Scalia, *supra* note 5, at 35.

96. *Id.* at 33. Yet Justice Scalia's concurring opinions often appeared to do just that.

97. *See infra* notes 157–225 and accompanying text. Justice Scalia himself once conceded that his tone could be "sharp." But "sharpness is sometimes needed to demonstrate how much of a departure I believe a thing is. Especially in my dissents." Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), nymag.com/news/features/Antonin-scalia-2013f-10/. In one of his last dissents, Justice Scalia attempted to rationalize the use of "extravagances, even silly extravagances, of thought and expression" in concurring or dissenting opinions, while chastising the majority for doing so in "the official opinion of the Court." Obergefell v. Hodges, ___ U.S. ___, 135 S. Ct. 2584, 2630 (2015) (Scalia & Thomas, JJ., dissenting).

98. Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 JUDICATURE 53, 54 (2017).

99. Chemerinsky, *supra* note 12, at 399 ("No justice in Supreme Court history has consistently written with the sarcasm of Justice Scalia. No doubt, this makes his opinions among the most entertaining to read."); Hasen, *supra* note 2, at 215, 224–27 (listing seventy-five sarcastic Scalia opinions); Kapgan, *supra* note 6, at 85 ("Sarcasm is indeed par for Scalia's course." (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia & Thomas, JJ., dissenting)); Adam Liptak, *Scalia Lands at Top of Sarcasm Index of Justices. Shocking*, N.Y. TIMES, at A10 (Jan. 19, 2015), *available at* http://www.nytimes.com/2015/01/20/us/scalia-lands-at-top-of-sarcasm-index-of-justices-shocking.html?_r=0.

100. Liptak, *supra* note 99.

101. Michael O'Donnell, *What's the Point of a Supreme Court Dissent?* NATION, https://www.thenation.com/article/whats-the-point-of-a-supreme-court-dissent/ (Jan. 21, 2016)

"caustic,"[104] "invective,"[105] "degrading,"[106] "brutal,"[107] "outside the boundaries of judicial discourse,"[108] "strident and contentious,"[109] "bold vitriol,"[110] a "torrent of outrage,"[111] "prone to stylish stabs,"[112] "vituperative,"[113] and even "nasty."[114] They were perhaps written as much to garner attention[115] and entertain[116] as to enlighten readers.[117] Justice

("[C]orrosive rhetoric like Scalia's does more than fray relationships on the Court; it convinces the public that the justices are political stooges.").

102. David A. Yalof et al., *Collegiality Among U.S. Supreme Court Justices?* 95 JUDICATURE 12, 13 (July–Aug. 2011) ("During his nearly two decades on the Rehnquist Court, Scalia cemented his reputation as a stubborn and recalcitrant character, relentlessly attacking those who might disagree with his ideology or judging philosophy." (footnote omitted)).

103. Edward L. Rubin, *Question Regarding* D.C. v. Heller*: As a Justice, Antonin Scalia Is (a) Great, (b) Acceptable, (c) Injudicious*, 54 WAYNE L. REV. 1105, 1111 (2008) (noting several instances of "hostility" in *Heller* dissent)). Professor Rubin acknowledged Justice Scalia's "energetically articulated opinions," *id.* at 1110, while noting the different rhetorical styles used in his dissents and his opinions for the Court. Rubin's answer to the question posed in his title was "injudicious." *Id.*at 1130.

104. Wald, *supra* note 90, at 1416.

105. Thomas Przybylowski, Note, *A Man of Genius Makes No Mistakes: Judicial Civility and the Ethics of the Opinion*, 29 GEO. J. LEGAL ETHICS 1257, 1261 (2016).

106. David Kravitz, *Why We Should Ignore Justice Scalia's Nasty Zingers,* WASH. POST (July 31, 2015), https://www.washingtonpost.com/opinions/justice-scalias-appalling-zingers/2015/07/31/0f5db50c-36f5-11e5-b673-1df005a0fb28_story.html?utm_term=.f5ae0ff93ec0.

107. Michael J. Gerhardt, *Justice Scalia's Legacies*, 15 FIRST AMEND. L. REV. 221, 229 (2017).

108. Rubin, *supra* note 103, at 1129 n.144.

109. *Id.* at 1130.

110. Jones, *supra* note 2, at 62 (referring specifically to Justice Scalia's June 2015 dissents in *King* and *Obergefell*).

111. David Auerbach, *R-E-S-P-E-C-T, Find Out What It Means to Scalia*, LEX.I.CON VALLEY: A BLOG ABOUT LANGUAGE (June 26, 2015), http://www.slate.com/blogs/lexicon_valley/2015/06/26/the_surprising_history_of_the_respectful_dissent_at_the_supreme_court.html; *see also* Kapgan, *supra* note 6, at 86 ("'[A]t times [Justice Scalia's rejection of abortion rights] has swelled over banks and turned into a torrent of abuse submerging the ordinarily depersonalized language of opinions.'" (quoting RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 277 (1997)).

112. Wald, *supra* note 90, at 1383.

113. Porto, *supra* note 10, at 30.

114. Kravitz, *supra* note 106; O'Donnell, *supra* note 101; *see also* Hasen, *supra* note 2, at 215 ("[Justice Scalia's] ability (and willingness) to engage in nastiness, particularly directed at other Justices' opinions, is unparalleled."); Yalof et al., *supra* note 102, at 13 (quoting Tony Mauro, *Supreme Court Justices Need to Regain Civility*, USA TODAY, May 14, 1991, at 7A)).

115. Hasen, *supra* note 2, at 216 (opining that Justice Scalia's sarcasm "gain[s] attention for his ideas"); Kapgan, *supra* note 6, at 74 (describing Justice Scalia's prose as

Scalia once surmised that law students might no longer need to read academic writings about legal controversies because "[t]hose controversies appear in the opposing opinions of the Supreme Court itself, and can be studied from that text."[118] His self-professed motive for writing dissents was his desire to keep the Court "at the forefront of the intellectual development of the law," even if it meant ceding influence to the legal academy, albeit sometimes only dismissively.[119]

Justice Scalia's early writings shed no light on the reasons for the decline in civility his separate opinions exhibited over the years. Occasionally, his dissents reflected what might be considered merely acerbic wit, as when he referred to the Court's statutory interpretation as "sheer applesauce."[120] By

---

"compelling—demanding of attention"); *see also* O'Donnell, *supra* note 101 ("Justices have become so accustomed to having their say that they rarely put the Court's prestige above their own reputations.").

116. Kravitz, *supra* note 106 ("Scalia's zingers add nothing of substance to his opinions; they are there to entertain, not to explain or enlighten."); *see also* Clement, *supra* note 98, at 53 (noting that while Justice Scalia's writing was entertaining, "it had serious consequences for the Court and its jurisprudence"). At times Justice Scalia injected humor into his opinions, which occasionally defused some of his intemperance. Of his textualist jurisprudence, for example, he once wrote that "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

117. Perhaps he wrote separately for his own amusement. Justice Scalia found professional satisfaction in issuing separate opinions: "To be able to write an opinion solely for oneself, without the need to accommodate the views of one's colleagues; . . . to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure." Scalia, *supra* note 5, at 42; *see also* WILLIAM O. DOUGLAS, AMERICA CHALLENGED 4 (1960) ("[T]he right to dissent is the only thing that makes life tolerable for a judge of an appellate court."). Justice Scalia confessed that the pleasure of writing separate opinions was "the most important of all." Scalia, *supra* note 5, at 42.

118. Scalia, *supra* note 5, at 39; *see also* Clement, *supra* note 98, at 55 ("Scalia, ever the law professor, had a great feel for that audience. . . . [S]tudents confess that they always read the Scalia opinion first—even students who almost always disagreed with the Justice. And who could blame them? Not only would the Scalia opinion lay the question bare and articulate one side of the legal debate clearly and cogently, it would be a fun read.")

119. Justice Scalia, himself a former law professor, exhibited disdain for academics on more than one occasion. In one dissent he derisively declared that it was "indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles . . . ." Nat'l Cable & Telecomm'n Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting); *see also* Zivotofsky *ex rel.* Zivotofsky v. Kerry, ___ U.S. ___, 135 S. Ct. 2076, 2121 (2015).

120. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 113 (2007) (Scalia, Thomas & Souter, JJ., & Roberts, C.J., dissenting) ("The sheer applesauce of this statutory

2015, however, his increasingly frequent dissents[121] had long reflected a harsh, vitriolic tone. The well-reasoned, temperate, and concise separate opinions he sometimes wrote in his early years as a judge became the exception. Some of his last dissents reflected disrespectful judicial rhetoric at its worst. But although his unusually biting rhetoric drew repeated criticism from Court observers[122] with some urging him to change his ways,[123] Justice Scalia neither listened nor seemed to care.[124]

This Part traces the evolution of Justice Scalia's rhetorical style as expressed in his separate opinions beginning in 1982 when he joined the D.C. Circuit. While a complete chronology of Justice Scalia's dissents is beyond the scope of this article, the next three subsections illustrate the change in rhetorical style of his dissents over the years.

---

interpretation should be obvious."); *see also* King v. Burwell, ___ U.S. ___, 135 S. Ct. 2480, 2501 (2015) (Scalia, Thomas & Alito, JJ., dissenting) (referring to Court's reasoning as "pure applesauce"). Justice Scalia did not confine his witticisms to his dissents. Writing for the Court, he once observed that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

121. In the last of his twenty-nine full terms, Justice Scalia issued thirteen dissents.

122. *E.g.*, Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783 (2017) (book review); Noel J. Francisco, A Law Clerk's Reflections on Justice Scalia (Aug. 4, 2016), *available at* https://www.heritage.org/courts/report/law-clerks-reflections-justice-scalia; Gerhardt, *supra* note 107; Robert G. Gibson, *In Memory of Justice Antonin Scalia*, 28 DCBA BRIEF 16 (May 2016); Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y.L. SCH. L. REV. 907 (2006); Porto, *supra* note 10; Jeffrey M. Shaman, *Justice Scalia and the Art of Rhetoric*, 28 CONST. COMMENT. 287 (2012).

123. E.g., Chemerinsky, *supra* note 12, at 399–400 (citing examples and concluding that "this [rhetoric] sends exactly the wrong message to law students and attorneys about what type of discourse is appropriate in a formal legal setting and how it is acceptable to speak to one another."); Failinger, *supra* note 12 (chronicling some of Justice Scalia's "memorable" comments); Newman, *supra* note 122, at 908.

124. *See* Senior, *supra* note 97, and accompanying text. One might wonder whether Justice Scalia just pretended not to care. He apparently cared early in his Supreme Court career. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989) (anticipating that some of his dissents would eventually prevail).

A. Dissenting Discourse as Circuit Judge: 1982–1986

Judge Scalia spent four years on the D.C. Circuit,[125] issuing relatively few separate opinions. He occasionally issued a biting dissent, but his typical practice as a circuit judge did not reflect the reputation he would earn as a Supreme Court Justice for writing sarcastic, blistering, and sometimes even bombastic dissents.

A few weeks after joining the bench, Judge Scalia issued his first dissent—to an unpublished *per curiam* opinion.[126] His aggressive approach hinted at his future dissenting rhetoric. The plaintiffs lacked standing, he reasoned, and the majority's grant of injunctive relief was not only misguided but also implicated the separation of powers.[127] Long-winded and pointedly critical of the majority's reasoning and conclusion,[128] Judge Scalia's dissent reflected an acerbic wit.[129]

In his first full year as a circuit judge, Judge Scalia wrote seven separate opinions—six dissents[130] and an opinion

125. President Reagan reportedly first offered the young Scalia a seat on the Seventh Circuit, but he turned it down, hoping for an appointment to the more prestigious and influential D.C. Circuit. JOAN BISKUPIC, AMERICAN ORIGINAL, THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 80 (2009).

126. Covelo Indian Cmty. v. Watt, Nos. 82-2377, 82-2417, 1982 U.S. App. LEXIS 23138, *37 (Dec. 21, 1982) (Scalia, J., dissenting). Why the opinion was not designated for publication is not entirely clear; it appears only on LEXIS.

127. *Id.* at *51–*53.

128. Even when he concurred in the Court's judgment, Justice Scalia's minority opinions were long. *E.g.*, Walton v. Ariz., 497 U.S. 639, 656–74 (1990) (Scalia, J., concurring in part and concurring in the judgment, taking eighteen printed pages to critique the Court's death-penalty jurisprudence along the way).

129. The last sentence was perhaps his most biting: "There is no justification in law or in practicality for this court to ride to the assistance of an allegedly uninformed and impotent Congress which will otherwise not be able, as it wishes, to help these plaintiffs." *Covelo*, 1982 U.S. App. LEXIS 23138, at *53 (Scalia, J., dissenting).

130. Chaney v. Heckler, 718 F.2d 1174, 1192–1200 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 470 U.S. 821 (1985); Ensign-Bickford Co. v. Occ. Safety & Health Rev. Comm'n, 717 F.2d 1419, 1423–24 (D.C. Cir. 1983) (Scalia, J., dissenting); Steger v. Def. Investigative Serv., 717 F.2d 1402, 1407–09 (D.C. Cir. 1983) (Scalia, J., dissenting); Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); United States v. Richardson, 702 F.2d 1079, 1086–94 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 468 U.S. 317 (1984); KCST-TV, Inc. v. F.C.C., 699 F.2d 1185, 1195–1201 (D.C. Cir. 1983) (Scalia, J., dissenting).

concurring in part and dissenting in part.[131] While typically verbose, they were for the most part temperate in tone and well-reasoned. Some reflected snippets of the Scalia wit,[132] but few reflected the vitriolic tone that would become the defining characteristic of his opinions on the Supreme Court. And several even included self-effacing clauses such as "it seems to me" and "in my view,"[133] acknowledging that his perspective might not be the only correct one.

But perhaps Judge Scalia was emboldened when three of his early dissents, each reflecting a spark of his later aggressive tone, prompted Supreme Court reversals.[134] In the first case, the majority opinion granted double-jeopardy relief in an interlocutory appeal. Judge Scalia dissented, warning that the panel's opinion "will bring the criminal law process into greater public disrepute than the exclusionary rule, while at the same time doing criminal defendants an evident injustice."[135] The Supreme Court reversed, agreeing with him on jurisdiction but resolving the case on other grounds.[136]

In the second—a challenge to the use of execution drugs that the FDA had not yet approved—Judge Scalia's tone was more strident.[137] The plaintiff inmates had unsuccessfully petitioned the lower court to compel agency enforcement, and the circuit panel granted relief.[138] Judge Scalia's dissent

131. Cmty. Nutrition Inst. v. Block, 698 F.2d 1239, 1255–59 (D.C. Cir. 1983) (Scalia, J. concurring in part and dissenting in part), *rev'd*, 467 U.S. 340 (1984).

132. *See, e.g.*, *Steger*, 717 F.2d at 1407 (Scalia, J., dissenting) ("I dissent because I believe the majority has applied a microscope to an inquiry which Congress meant to be conducted with the naked eye.").

133. *E.g.*, *Cmty. Nutrition Inst.*, 698 F.2d at 1255 (Scalia, J., dissenting) ("I dissent from the Court's action in reversing the district court's dismissal of the individual consumers, who *in my view* were correctly found to lack standing." (emphasis added)); *see also id.* at 1258 ("I prefer, therefore, to rest my disposition of this aspect of the case upon *what seems to me* surer ground . . . ." (emphasis added)); *Richardson*, 702 F.2d at 1094 (Scalia, MacKinnon & Bork, JJ., dissenting) ("In sum, the position adopted by the majority—that a double jeopardy right ultimately exists, but a double jeopardy claim may not now be asserted—*seems to me* wrong on both counts." (emphasis added)).

134. *Chaney*, 718 F.2d at 1192–1200 (Scalia, J., dissenting); *Watt*, 703 F.2d at 622–27 (Scalia, J., dissenting); *Richardson*, 702 F.2d at 1086–94 (Scalia, MacKinnon & Bork, JJ., dissenting).

135. *Richardson*, 702 F.2d at 1086, 1094 (Scalia, MacKinnon & Bork, JJ., dissenting).

136. Richardson v. United States, 468 U.S. 317 (1984).

137. *See Chaney*, 718 F.2d at 1192–1200 (Scalia, J., dissenting).

138. *Id.* at 1192.

foreshadowed the sarcastic tone of his later Supreme Court opinions: "[T]he sound which the majority heard was not an anachronistic ring at all," he wrote, "but the stifled cry of smothered stare decisis, or perhaps the far-off shattering of well-established barriers separating the proper business of the executive and judicial branches."[139] The Supreme Court later reversed, holding that the agency's failure to act on the inmates' request was not judicially reviewable.[140]

The third case involved a permit for a days-long demonstration held on National Park Service property where camping was prohibited.[141] The *en banc* court held that the protestors engaged in expressive conduct by sleeping there in makeshift tents to underscore the plight of the homeless, and the agency's regulation violated their First Amendment rights.[142] Judge Scalia, joined by two other judges,[143] took the position that sleeping can never qualify as expressive conduct.[144] He declared that "to extend . . . protection [to] actions . . . conducted for the purpose of 'making a point' is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate."[145] The Supreme Court later reversed, holding that the regulation was a reasonable time, place, or manner restriction on the demonstrators' "symbolic conduct," assuming (without deciding) that sleeping can be a form of protected expression.[146]

In one early opinion, Judge Scalia revealed his capacity for aggressive dissenting rhetoric. In *Ramirez de Arellano v. Weinberger*,[147] his cutting rhetoric first appeared in a majority opinion written over a dissent. The plaintiffs, Honduras property owners, sought to enjoin the United States from using their

139. *Id.* at 1198 (Scalia, J., dissenting).

140. Heckler v. Chaney, 470 U.S. 821, 837–38 (1985).

141. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

142. *Watt*, 703 F.2d at 599 (Mikva, J., writing for the majority).

143. *Id.* at 622–27 (Scalia, MacKinnon & Bork, JJ., dissenting).

144. "That this should seem a bold assertion," he wrote, "is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." *Id.* at 622.

145. *Id.*

146. *Clark*, 468 U.S. at 294–95.

147. 724 F.2d 143 (D.C. Cir. 1983), *vacated on reh'g*, 745 F.2d 1500 (D.C. Cir. 1984), *cert. granted*, *judgment vacated on other grounds*, 471 U.S. 1113 (1985).

property for military purposes. Judge Scalia, mocking the dissent, wrote that they failed to state a claim:

> The dissent invokes "the great tradition of judicial protection of individual rights against unconstitutional governmental activities." . . . But that tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong[148] by thrusting the sharpest of our judicial lances heedlessly and in perilous directions. It acknowledges the need to craft judicial protection in such fashion as to preserve the proper functions of government.[149]

On rehearing, the en banc court vacated the panel opinion Judge Scalia had written, and he could not resist attacking that decision in dissent. "Even if it *were* the function of the federal courts to create a system of shareholder rights for Fifth Amendment purposes," he wrote, "the system the majority has produced is either a practical disaster or an analytic monstrosity."[150] And then he took one last jab, characterizing the majority as having "an inflated notion of the function of this court, which produces stirring rhetoric but poor constitutional law."[151] Based on later legislative developments, the Supreme Court vacated the en banc decision.[152]

With these few exceptions, the opinions Judge Scalia wrote in his first year on the bench were well-reasoned, temperate, and judicial in tone.[153] And the few separate opinions he issued over the next three years generally reflected moderation, although some were pointedly critical of the majority's reasoning,[154] and

---

148. *See* JOE DARION & MITCH LEE, *The Impossible Dream*, on MAN OF LA MANCHA (Decca 1965) (including the lyric "[t]o right the unrightable wrong").

149. *Ramirez de Arellano*, 724 F.2d at 156 (Scalia, J., writing for the majority).

150. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1558 (D.C. Cir. 1984) (*en banc*) (Scalia, Bork & Starr, JJ., dissenting) (emphasis in original), *vacated*, 471 U.S. 1113 (1985).

151. *Id.* at 1565–66 (Scalia, Bork & Starr, JJ., dissenting).

152. *See* Weinberger v. Ramirez de Arellano, 471 U.S. 1113, 1113 (1985) (mem.). None of the biting Scalia rhetoric had any effect on the outcome.

153. *See Ensign-Bickford Co.*, 717 F.2d at 1423–24 (Scalia, J., dissenting); *Steger*, 717 F.2d at 1407–09 (Scalia, J., dissenting); *Watt*, 703 F.2d at 622–27 (Scalia, J., dissenting); *KCST-TV, Inc.*, 699 F.2d at 1195–201 (Scalia, J., dissenting); *Cmty. Nutrition Inst.*, 698 F.2d at 1255–59 (Scalia, J. concurring in part and dissenting in part).

154. *See, e.g.*, *Carter*, 727 F.2d at 1246 (Scalia, J., dissenting) ("Assuming . . . that by "discriminatory intent" the majority means an intent to discriminate on the basis of race,

one criticized the result sought by the plaintiffs as "far too speculative to justify the exercise of judicial power."[155]

But one 1984 case reflected Judge Scalia's penchant for acrimonious rhetoric. Survivors of those killed in an Antarctica airplane crash sued the United States for wrongful death. Whether they stated a claim under the Federal Tort Claims Act turned on whether Antarctica was a "foreign country." The panel held that it was not, allowing the claim.[156]

Judge Scalia's twenty-five-page dissent began in an exasperated tone. He attacked the majority for creating "venue and choice-of-law solutions out of whole cloth" by rewriting the statute instead of interpreting it.[157] He also excoriated the majority for relying on "the ever-congenial banquet of legislative history (in the case of the FTCA, a banquet with separate sittings in a number of years before it was finally adopted in 1946)."[158] And finally, he offered this biting and sarcastic off-the-point aside:

> I suppose it must be regarded as fortunate that the majority's decision to replace the choice-of-law rule of the statute with those of the *Restatement (Second) of Conflict of Laws* . . . led to the District of Columbia in the present case. But one must fear that the circumstances of the next Antarctica case (or perhaps a revision of the *Restatement*) will lead next time to the substantive law of the Soviet

---

this is the most demonstrable illogic."); *see also Ill. Commerce Comm'n*, 749 F.2d at 887 (Scalia, J., dissenting) ([The majority's] notion of total preemption and cede-back has no basis in reality."); *id.* at 890 ("The majority has it precisely backwards . . . when . . . it in effect applies a *standard* . . . to reach a *conclusion* regarding the meaning of the statutory text." (emphasis in original)); *id.* at 893 ("Legislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored.").

155. *Ctr. for Auto Safety*, 793 F.2d at 1345 (Scalia, J., dissenting). That opinion, however, did not criticize the majority's reasoning, or even the plaintiff's motives—only the result: "What we achieve today is not judicial vindication of private rights, but judicial infringement upon the people's prerogative to have their elected representatives determine how [to apply] laws that do not bear upon private rights." *Id.* at 1342.

156. Beattie v. United States, 756 F.2d 91, 105–06 (D.C. Cir. 1984).

157. *Id.* at 112 (Scalia, J., dissenting).

158. *Id.* at 115. In mocking language, Judge Scalia commended "the wisdom of the English courts in refusing to attend these [legislative history] feasts." *Id.* It would not be long, however, before the English courts decided to partake of the very "feast" of which Judge Scalia spoke so disparagingly. *See* Pepper v. Hart [1992] AC 593 (noting that Parliament's clear statements of purpose when enacting legislation may be consulted to guide judicial interpretation).

> Union. If that happens, one wonders whether the consequence will be to convert Antarctica (for purposes of that case) into a "foreign country" (since foreign law would then be applicable) with the result that the suit will be dismissed; or rather to set the court off in search of another nonjurisdiction to replace *Restatement (Second)*, which will perhaps once again lead to the United States substantive law. I am tempted to confess that a decision which produces such endlessly interesting ramifications cannot be all bad.[159]

After this long-winded, sarcastic dissent, Judge Scalia's separate opinions were shorter, more temperate, and generally more self-effacing. It was almost as if someone had whispered in his ear that if he ever hoped to be elevated to the Supreme Court, he should consider toning down his discourse to reflect a more judicial temperament.

B. Dissenting Discourse as Supreme Court Justice: 1986–1995

At his Supreme Court confirmation hearings, Judge Scalia was praised for his skill "in the arcane art of cogently drafting judicial opinions."[160] One senator quoted an unnamed judge who reported that Judge Scalia had a "combination of commitment with vigor and an incisive, often wittily sarcastic, . . . style that will rally the troops even if it never commands a majority of the court."[161]

One Senator, noting the frequency with which Supreme Court Justices had been issuing separate opinions, expressed "concern about the effect of these increasingly sharp public disagreements on the collegiality of the Court." Asked whether separate opinions on the Supreme Court had "impeded the

---

159. *Beattie*, 756 F.2d at 130 (Scalia, J., dissenting).

160. *Hearing on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong., 2d Sess. 29 (Aug. 5–6, 1986), *available at* https://www.loc.gov/law/find/nominations/scalia/hearing.pdf [hereinafter *Confirmation Hearings*] (Statement of Senator McConnell).

161. *Id.* at 23 (prepared Statement of Senator Denton (ellipsis in original)). Senator Denton reported that Judge Scalia was "genuinely liked by his colleagues on the Court, whether of liberal or conservative bent, and is very effective at forging coalitions between those on all sides of the issue." *Id.* Judge Scalia also received the American Bar Association's highest rating of "Well Qualified." *Id.* at 113–17 (reproducing ABA letter of August 5, 1986).

ability of either lawyers or judges to glean the reasoning to support a particular decision,"[162] Judge Scalia agreed that they had. Then, acknowledging that he had not issued a "notable" number of separate opinions as a circuit judge, he expressed "hope" that he could exercise the self-restraint necessary to keep from doing so if confirmed to the Supreme Court.[163]

Just eight years later, however, Justice Scalia's separate opinions had already earned him a reputation for his "quick tongue and acerbic wit," in some cases having "crossed the line between lively language and impermissibly caustic speech."[164] But not all his early dissents fit this description. His first was generally respectful in tone—perhaps because two other Justices joined it.[165] In the most pointed passage, he called it "fanciful" for the Court to hold that a Connecticut primary statute implicated the right of association as between Republican Party members and independent voters.[166] But otherwise the opinion was well-reasoned, temperate, and brief. His second dissent, joined only by Justice White, was twice as long as the first,[167] but it too was generally temperate and well reasoned.

His third dissent, this time in an affirmative-action case, was strikingly different.[168] Justice Scalia ratcheted up the rhetoric, reaching a degree of snarkiness that foreshadowed the tone of many later opinions. He declared two passages in the majority opinion "patently false,"[169] used language about women's career aspirations that many would find demeaning,[170]

---

162. *Confirmation Hearings*, *supra* note 160, at 46–47.

163. *Id.* at 47.

164. Delgado & Stefancic, *supra* note 10, at 1077.

165. Tashjian v. Repub. Party of Conn., 479 U.S. 208, 234–37 (1986) (Scalia, J., Rehnquist, C.J., & O'Connor, J., dissenting). In the same case, Justice Scalia also joined a separate dissent authored by Justice Stevens. *See id.* at 230 (Stevens & Scalia, JJ., dissenting).

166. *Id.* at 235 (Scalia, J., Rehnquist, C.J., & O'Connor, J., dissenting). The word "fanciful" appears regularly in Scalia dissents.

167. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 607–14 (1987) (Scalia & White, JJ, dissenting).

168. Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 657–77 (1987) (Scalia, J., Rehnquist, C.J., & White, J, dissenting.).

169. *Id*. at 668 (Scalia, J., Rehnquist, C.J., & White, J., dissenting); *see also id.* at 671 (same).

170. *Id.* at 668 (Scalia, J., Rehnquist, C.J., & White, J., dissenting) (noting that "[t]here are, of course, those who believe that the social attitudes which cause women themselves to

denigrated Court precedent,[171] denounced an earlier case and declared that it should be overruled,[172] and ended on a dark note of foreboding that warned of the injustices likely to flow from the Court's decision.[173] All were characteristic of the disdainful, exaggerated tone that would soon become his trademark.

The eleven dissents Justice Scalia authored during his first term ranged from respectful and generally brief[174] to vitriolic and lengthy.[175] In between were sharply—even harshly—worded dissents that focused on critiquing the Court's reasoning rather than attacking other Justices or undermining precedent.[176] His last first-term dissent, however, was full of vituperative rhetoric, accusing the Court of distorting the record and the precedents, lacking any basis for its holding, engaging in misguided reasoning, "boggl[ing] the mind," making "sweeping" assertions that were "contrary to reason and experience," and finally, reaching an "absurd" result.[177] Perhaps most alarming, this most disrespectful dissent was joined by three other Justices whose opinions were typically temperate and judicial in tone, as if Justice Scalia's disrespectful rhetoric were beginning to infect the rest of the Court.

---

avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination," asserting that "there is assuredly no consensus on the point").

171. *Id.* at 670–71 (Scalia, J., Rehnquist, C.J., & White, J., dissenting).

172. *Id.* at 672–73 (Scalia, J., Rehnquist, C.J., & White, J., dissenting).

173. *Id.* at 675–77 (Scalia, J., Rehnquist, C.J., & White, J., dissenting).

174. Booth v. Md., 482 U.S. 496, 519–21 (1987) (Scalia, J., Rehnquist, C.J., White & O'Connor, JJ., dissenting); United States v. Mendoza-Lopez, 481 U.S. 828, 846–50 (1987) (Scalia, J. dissenting); Gray v. Miss., 481 U.S. 648, 672–80 (1987) (Scalia, J., Rehnquist, C.J., White & O'Connor, J.J., dissenting); *Cal. Coastal*, 480 U.S. at 607–14 (Scalia & White, JJ., dissenting); *Tashjian*, 479 U.S. at 234–37 (Scalia, J., Rehnquist, C.J., & O'Connor, J., dissenting).

175. Rankin v. McPherson, 483 U.S. 378, 394–401 (1987) (Scalia, J., Rehnquist, C.J., White & O'Connor, JJ., dissenting); Tyler Pipe Indus., Inc. v. Wash. State Dep't of Rev., 483 U.S. 232, 254–65 (1987) (Scalia, J., concurring in part and dissenting in part); Edwards v. Aguillard, 482 U.S. 578, 610–40 (1987) (Scalia, J., & Rehnquist, C.J., dissenting); *Johnson*, 480 U.S. at 657–77 (1987) (Scalia, J., & Rehnquist, C.J., dissenting, & White, J., dissenting in part).

176. Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 303–06 (1987) (Scalia, J., & Rehnquist, C.J., dissenting); United States v. Johnson, 481 U.S. 681, 692–703 (1987) (Scalia, Brennan, Marshall & Stevens, JJ., dissenting); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 235–38 (1987) (Scalia, J., & Rehnquist, C.J., dissenting).

177. *Rankin*, 483 U.S. at 394–401 (Scalia, J., Rehnquist, C.J., White & O'Connor, JJ., dissenting).

The dissents Justice Scalia issued during his first term were characteristic of those he would author during his next three decades on the Supreme Court, except that he wrote solo dissents more frequently over the years.[178] And generally speaking, his rhetoric became more biting. Many of his dissents were well-reasoned, if long-winded, but Justice Scalia often could not resist adding vitriol.

One 1988 dissent, for example, ended this way:

> Today's decision is a potential cornucopia of waste. Since its reasoning cannot possibly be followed where it leads, the jurisdiction of the Claims Court has been thrown into chaos. On the other hand, perhaps this is the opinion's greatest strength. Since it cannot possibly be followed where it leads, the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single type of suit before us.[179]

Another was a thirty-seven-page dissent to an otherwise unanimous opinion upholding a statute that authorized appointment of an independent counsel to investigate criminal allegations against government officials.[180] Perhaps its most memorable paragraph was about the allocation of power:

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts . . . . 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

178. While he wrote only one solo dissent in his first term, Justice Scalia wrote alone more often as the years went on. In his second term, he authored three solo dissents; in his third, two; in his fourth, one; and in his fifth, five. In many later terms, it was not unusual for five of Justice Scalia's dissents to be issued solely on his own behalf. In a typical term, he wrote an average of ten dissents, although that number declined significantly between 1993 and 1995. One reason for the decline in those years might have been Justice Thomas's 1991 appointment, replacing Justice Marshall. The Court's majority then shifted to a more conservative perspective.

179. Bowen v. Mass., 487 U.S. 879, 930 (1988) (Scalia, J., Rehnquist, C.J., & Kennedy, J., dissenting).

180. Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting). Justice Kennedy took no part in this seven-to-one decision.

> be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[181]

Then he lectured his colleagues, accusing them of departing from the Constitutional text, announcing the decision without analysis, and abandoning "the government of laws that the Constitution established," instituting in its place a scheme that "is not a government of laws at all."[182] He ended with melodrama, criticizing the majority's "ad hoc approach" to constitutional adjudication that "is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law."[183] He preferred to "rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound."[184]

Justice Scalia occasionally wrote with startling fervor. In a case striking down a statute exempting religious periodicals from a state tax, he began his dissent with this jarring rhetoric:

> As a judicial demolition project, today's decision is impressive. The machinery employed by the opinions of Justice Brennan and Justice Blackmun is no more substantial than the antinomy that accommodation of religion may be required but not permitted, and the bold but unsupportable assertion . . . that government may not "convey a message of endorsement of religion." With this frail equipment, the Court topples an exemption for religious publications of a sort that expressly appears in the laws of at least 15 of the 45 States that have sales and use taxes . . . . I dissent because I find no basis in the text of the Constitution, the decisions of this Court, or the traditions of

---

181. *Id.* at 699 (Scalia, J., dissenting) (citation omitted). Justice Scalia later referred to his *Morrison* opinion as "my lonesome dissent." Scalia, *supra* note 124, at 851. He also called it the "most wrenching" case he had ever decided:

> [I]t was wrenching not only because it came out wrong—I was the sole dissenter—but because the opinion was written by Rehnquist, who had been head of the Office of Legal Counsel, before me, and who I thought would realize the importance of that power of the president to prosecute. And he not only wrote the opinion; he wrote it in a manner that was more extreme than I think Bill Brennan would have written it. That was wrenching.

Senior, *supra* note 97 (quoting Justice Scalia).

182. *Morrison*, 487 U.S. at 711–12 (Scalia, J., dissenting).

183. *Id.* at 734 (Scalia, J., dissenting); *see also* Kapgan, *supra* note 6, at 79 (noting that Scalia was "ever the one for drama").

184. *Id*.

> our people for disapproving this longstanding and widespread practice.[185]

And he ended with this equally jarring rhetoric:

> It is not right—it is not constitutionally healthy—that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law. I dissent.[186]

Justice Scalia even attacked Justices who wrote separate concurring opinions. Consider, for example, his lengthy and otherwise respectful dissent in *McKoy v. North Carolina*,[187] in which Justices Rehnquist and O'Connor joined.[188] The vitriolic footnotes in the dissent were pointedly directed at Justice Blackmun and his concurring opinion, the last of them perhaps the most strident:

> Justice Blackmun believes that [the Court's] grotesque distortion of normal jury deliberations cannot be blamed upon the rule the Court today announces, but is rather North Carolina's own fault, because the scheme it has adopted represents "an extraordinary departure from the way in which juries customarily operate." . . . Typically, he points out, juries "are . . . called upon to render unanimous verdicts on the ultimate issues of a given case," with "no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." . . . This is the sort of argument that causes state legislators to pull their hair. A general verdict is of course the usual practice. *But it is this Court that has pushed the States to special verdicts in the capital sentencing field.* We have intimated that requiring "the sentencing authority . . . to specify the factors it relied upon in reaching its decision" may be necessary to ensure . . . "that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia,* 428 U.S. 153, 195 (1976) . . . . Disparaging a practice we have at least encouraged, if not indeed coerced, gives new substance to the charge that we have been

185. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 29–30, 33 (1989) (Scalia, J., Rehnquist, C.J., & Kennedy, J., dissenting).

186. *Id.* at 45 (Scalia, J., Rehnquist, C.J., & Kennedy, J., dissenting).

187. 494 U.S. 433 (1990).

188. *Id.* at 457–71 (Scalia, J., Rehnquist, C.J., & O'Connor, J., dissenting).

> administering a "bait and switch" capital sentencing jurisprudence.[189]

And near the end of an otherwise temperate dissent in *Grady v. Corbin*,[190] Justice Scalia dropped these sarcastic comments—all aimed at his colleagues—into a nearly two-page paragraph:

> There are many questions here, and the answers to all of them are ridiculous.
>
> This delicious role reversal, discovered to have been mandated by the Double Jeopardy Clause lo these 200 years, makes for high comedy but inferior justice.
>
> If the judge initially decides that the previously prosecuted offense "will not be proved" (whatever that means) he will have to decide at the conclusion of the trial whether it "has been proved" (whatever that means).
>
> Even if we had no constitutional text and no prior case law to rely upon, rejection of today's opinion is adequately supported by the modest desire to protect our criminal legal system from ridicule.
>
> [P]rosecutors confronted with the inscrutability of today's opinion will be well advised to proceed on the assumption that the "same transaction" theory has already been adopted. It is hard to tell what else has.[191]

Toward the end of his time on the Court, Justice Scalia did much the same thing in *Zivotofsky* ex rel. *Zivotofsky v. Kerry*.[192] After writing a generally well-reasoned dissent, he suddenly

---

189. *Id.* at 470 n.5 (Scalia, J., Rehnquist, C.J., & O'Connor, J., dissenting).

190. 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

191. *Id.* at 542–43 (Scalia & Kennedy, JJ., & Rehnquist, C.J., dissenting). Similar passages appear in other Scalia dissents. *See, e.g.*, Regions Hospital v. Shalala, 522 U.S. 448, 469 (1998) (Scalia, O'Connor & Thomas, JJ., dissenting) (referring to "*ex post facto* legislative psychoanalysis"); Simmons v. S.C., 512 U.S. 154, 185 (1994) (Scalia & Thomas, JJ., dissenting) (referring to "a whole new chapter in the 'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing" and the "Federal Rules of Death Penalty Evidence, so to speak, which this Court will presumably craft (at great expense to the swiftness and predictability of justice) year by year"); Chisom v. Roemer, 501 U.S. 380, 405, 419 (1991) (Scalia, J., Rehnquist, C.J., & Kennedy, J., dissenting) (characterizing Court's approach as "backwards," its method as one that "psychoanalyzes Congress rather than reads its laws," and its holding as "poison[ing] the well of future legislation"); Minnick v. Miss., 498 U.S. 146, 166 (1990) (Scalia, J. & Rehnquist, C.J., dissenting) (referring to "a veritable fairyland castle of imagined constitutional restriction").

192. ___ U.S. ___, 135 S. Ct. 2076 (2015).

switched tone as he accused the Court of "announc[ing] a rule that is blatantly gerrymandered to the facts," dismissed one of the Court's conclusions as "[n]onsense," criticized a step in the Court's analysis as "a leap worthy of the Mad Hatter," asserted that the Court "may as well jump from power over issuing declaratory judgments to a monopoly on writing law-review articles," likened the foreign policy facilitated by the Court's decision to "that of a monarchy," and predicted that the decision would "erode the structure of separated powers that the People established for the protection of their liberty."[193]

In other dissents, Justice Scalia used melodramatic language to ridicule the Court's conclusion that a system of political patronage could infringe on First Amendment rights,[194] to contest its approval of closed-circuit testimony by child victims of alleged abuse,[195] to belittle the Court's concerns about unconstitutional racial discrimination in prosecutors' peremptory strikes,[196] to criticize the Court's conclusions in a search-and-seizure case,[197] and to warn about the "destruction of predictability" stemming from the Court's interpretation of a lien provision in the Bankruptcy Code.[198]

Justice Scalia was prone to exaggeration as well as melodramatic vitriol. In one case he accused the Court of

193. *Id.* at 2121, 2123 (Scalia, J., Roberts, C.J., & Alito, J., dissenting).

194. Rutan v. Republican Party of Ill., 497 U.S. 62, 94 (1990) (Scalia & Kennedy, JJ., & Rehnquist, C.J., dissenting) (accusing the Court of making "its constitutional civil service reform absolute").

195. Md. v. Craig, 497 U.S. 836, 861 (1990) (Scalia, Brennan, Marshall & Stevens, JJ., dissenting) (expressing worry about "subordination of explicit constitutional text to currently favored public policy").

196. Powers v. Ohio, 499 U.S. 400, 426–31 (1991) (Scalia, J., & Rehnquist, C.J., dissenting); *see also* Morgan v. Ill., 504 U.S. 719, 748–49, 752 (1992) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting) (criticizing Court's reasoning in a jury-selection case as failing to pass "the most gullible scrutiny" and as making "a great leap over an unbridgeable chasm of logic," concluding that its holding was "grossly" offensive to the Constitution).

197. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) ("Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made.").

198. Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting) (accusing Court of "disregarding well-established and oft-repeated principles" and rendering them "less secure and the certainty they are designed to achieve less attainable").

creating "a vast uncertainty in the law," bound to yield a future in which "the lawfulness and finality of no conviction or sentence can be assured."[199] In a second, he challenged the Court's "revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests."[200] In another he predicted "years of litigation-driven confusion and destabilization" and "judicially ordained turmoil" caused by the Court's "inscrutable" reasoning.[201]

A particularly striking example of Justice Scalia's disrespect for his judicial colleagues appeared in *Lee v. Weisman*,[202] an Establishment Clause case involving clergy members invited to offer nonsectarian prayers at a public-school graduation.[203] Excerpts from his fifteen-page dissent are packed with examples of his most inappropriate rhetoric:

> In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court . . . lays waste a tradition that is as old as public-school graduation ceremonies themselves . . . . As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion . . . . Today's opinion shows . . . why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court . . . .
>
> . . . . .
>
> The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays . . . has come to

199. Lankford v. Idaho, 500 U.S. 110, 133 (1991) (Scalia, White & Souter, JJ., & Rehnquist, C.J., dissenting).

200. Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 209 (2000) (Scalia & Thomas, JJ., dissenting).

201. United States v. Fordice, 505 U.S. 717, 749, 751 (1992) (Scalia, J., concurring and dissenting).

202. 505 U.S. 577 (1992).

203. *Id.* at 586 (Kennedy, J., writing for the Court).

> "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary." . . . But interior decorating is a rock-hard science compared to psychology practiced by amateurs. . . . [T]he Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.
>
> . . . . .
>
> The Court . . . does not say . . . that students are psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.)
>
> . . . . .
>
> I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.
>
> . . . . .
>
> The Court relies on our "school prayer" cases. . . . But whatever the merit of those cases, they do not support, much less compel, the Court's psycho-journey.
>
> . . . . .
>
> Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test . . . . Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.
>
> . . . . .
>
> Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some

> purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been.[204]

Beyond their disrespectful rhetoric, exaggeration, and melodrama, Scalia's separate opinions were characteristically verbose. He once added a twelve-page dissent in a case that even he admitted was unimportant.[205] Nevertheless, he took it upon himself to lecture the majority for its errant methodology, bluntly declaring it "an act of willpower rather than of judgment."[206] He declared each part of the Court's two-step interpretive analysis "patently false";[207] criticized the majority for failing to consult one of his favored dictionaries to interpret a term's "ordinary meaning," instead relying on "fictitious" dictionary support;[208] and scolded it for "equat[ing] parole and supervised release."[209] Then he moved on to a jurisprudence lesson:

> [A]n institution that is careless in small things is more likely to be careless in large ones; and an institution that is willful in small things is almost certain to be willful in large ones. The fact that nothing but the Court's views of policy and "congressional purpose" supports today's judgment is a matter of great concern, if only because of what it tells district and circuit judges. The overwhelming majority of the Courts of Appeals . . . reached the result unambiguously demanded by the statutory text. . . . Today's decision invites them to return to headier days of not-too-yore, when laws meant what judges knew they ought to mean.[210]

---

204. *Id.* at 632–45 (Scalia, J., Rehnquist, C.J., White & Thomas, JJ., dissenting (emphasis in original)).

205. *Johnson*, 529 U.S. at 727 (Scalia, J., dissenting) ("This is not an important case, since it deals with the interpretation of a statute that has been amended to eliminate, for the future, the issue we today resolve.").

206. *Id.* at 715 (Scalia, J., dissenting); *see also id.* at 722 (Scalia, J., dissenting) ("I do not contend that the result the Court reaches is any way remarkable, only that it is not the result called for by the statute.").

207. *Id.* at 716 (Scalia, J., dissenting).

208. *Id.* at 717, 719 (Scalia, J., dissenting).

209. *Id.* at 725 (Scalia, J., dissenting).

210. *Id.* at 727 (Scalia, J., dissenting). Even on the rare occasions when Justice Scalia wrote a concise dissent, he used negative rhetoric. *See, e.g.*, Richmond v. Lewis, 506 U.S. 40, 54 (1992) (Scalia, J., dissenting) (scolding Court for using a "recently invented

Although the single dissent he authored in 1993 was respectful, clear, and concise,[211] Justice Scalia reverted to form in 1994, writing an extraordinarily sarcastic dissent in a paternity case challenging the use of peremptory strikes to remove women from the jury:

> Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display—a modest price, surely—is that most of the opinion is quite irrelevant to the case at hand. . . . [T]he Court treats itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot).
>
> . . . . .
>
> Perhaps, however . . ., only the stereotyping of groups entitled to heightened or strict scrutiny constitutes "the very stereotype the law condemns"—so that other stereotyping (e.g., wide-eyed blondes and football players are dumb) remains OK.
>
> . . . . .
>
> In order . . . to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.[212]

Justice Scalia's dissent in a 1994 Establishment Clause case challenging New York school district boundaries is remarkable

---

requirement" that yielded "a propensity to error that make a scandal and a mockery of the capital sentencing process").

211. Smith v. United States, 508 U.S. 223, 241–47 (1993) (Scalia, Stevens & Souter, JJ., dissenting). In addition to the *Smith* dissent, Justice Scalia wrote a 1993 opinion concurring in part and dissenting in part in *Withrow v. Williams*, 507 U.S. 680, 714–24 (1993) (Scalia & Thomas, JJ., concurring in part and dissenting in part). He also joined dissenting and concurring opinions by other Justices.

212. J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 156–57, 161, 163 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

not only for its extreme sarcasm, but also for its insulting attacks on fellow Justices and their separately expressed points of view, repeatedly singling them out by name. The first paragraph is instantly off-putting:

> The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an "establishment" of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause . . . has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.[213]

Justice Scalia then characterized the Court's opinion and reasoning as "misdescrib[ing]" precedent,[214] "mislead[ing],"[215] "astounding,"[216] "astonishing[]" and "breathtaking,"[217] "*disfavoring* of religion,"[218] and "steamrolling . . . the difference between civil authority held by a church and civil authority held by members of a church."[219] He declared that the Court's analysis "could scarcely be weaker"[220] and failed to "give the

213. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 732 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting) (citation omitted) (emphasis in original).

214. *Id.* at 734 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

215. *Id.* at 751 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

216. *Id.*at 752 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

217. *Id.* at 735 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

218. *Id.* at 736 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting) (emphasis in original).

219. *Id.* at 735 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

220. *Id.* at 738 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

New York Legislature the benefit of the doubt."[221] He thought the opinion was "preposterous,"[222] pernicious,"[223] "not a rational argument,"[224] and based on "the flimsiest of evidence."[225] This was aggressive rhetoric, but Justice Scalia's watershed year on the Court was yet to come.

C. Dissenting Discourse as Supreme Court Justice: 1996–2016

Nearly all of Justice Scalia's twelve 1996 dissents bore the angry tone of someone who had expected to prevail, but was unable to muster the votes to write for the majority.[226] This pattern continued through the next two decades of his dissenting rhetoric,[227] as might be best illustrated by the saga that began in 1996 and concluded with *Obergefell v. Hodges*[228] in 2015.

The story begins with *Romer v. Evans*,[229] in which the Court struck down a Colorado constitutional amendment preempting state or local laws protecting homosexuals against

---

221. *Id.* at 740 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

222. *Id.* at 735 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

223. *Id.* at 737 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

224. *Id.* at 741 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

225. *Id.* at 752 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting). He went on to criticize Justice Stevens for writing "less a legal analysis than a manifesto of secularism" that "announces a positive hostility to religion," *id.* at 749; Justice Kennedy for using analysis that "founder[s] on its own terms," *id.*; and Justice O'Connor for proposing no replacement for the *Lemon* test so the Court would "no longer feel the need to even pretend that our haphazard course of Establishment Clause decisions is governed by any principle," *id.* at 751 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).

226. Ironically, the only respectful dissent that Justice Scalia filed in 1996 was one that he wrote only for himself. *See* Ornelas v. United States, 517 U.S. 690, 700–05 (1996) (Scalia, J., dissenting).

227. It is only fair to point out that Justice Scalia occasionally issued respectful dissents, even in this period. *E.g.*, Kingsley v. Hendrickson, ___ U.S. ___, 135 S. Ct. 2466, 2479 (2015) (Scalia, J., Roberts, C.J. & Thomas, J., dissenting). The *Kingsley* majority held that a pretrial detainee could support an excessive-force claim by showing that "objectively unreasonable" force had been used. *Id.* at 2473 (Breyer, J.). While Justice Scalia's dissent suggested that this conclusion rested on an "illogical" premise, it was otherwise respectful and temperate. *Id.* at 2478 (Scalia, J., Roberts, C.J. & Thomas, J., dissenting). But Scalia dissents of this type became increasingly rare beginning in 1996.

228. ___ U.S. ___, 135 S. Ct. 2584 (2015). Many other Scalia dissents would illustrate the disturbing decline of this brilliant jurist's discourse and his increasingly frequent outbursts of frustration with the Court. But the *Romer*-to-*Obergefell* series makes the point.

229. 517 U.S. 620 (1996).

discrimination.[230] Justice Scalia's excoriating dissent began this way: "The Court has mistaken a Kulturkampf for a fit of spite."[231] With characteristic prescience, he noted the apparent conflict between *Romer* and *Bowers v. Hardwick*,[232] decided a decade earlier, which had upheld the constitutionality of a state statute criminalizing sodomy.[233] He accused the *Romer* majority of placing the Court's prestige behind the proposition that opposing homosexuality was "as reprehensible as racial or religious bias."[234] And he proclaimed that the Court had "no business" imposing the elite values of its members—including the belief that "animosity" toward homosexuals is "evil"—on all Americans.[235]

Justice Scalia continued with spleen-venting outrage, claiming that "[t]he Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled 'gay-bashing'" was "so false as to be comical."[236] He called the holding that the Colorado amendment violated the federal Constitution "a facially absurd proposition" that "frustrate[d] Colorado's reasonable effort to preserve traditional American moral values."[237] And he accused the Court of inventing "a novel and extravagant constitutional doctrine to take the victory away from traditional forces" and of "verbally disparag[ing] as bigotry adherence to traditional attitudes,"[238] which was "nothing short of insulting."[239] Finally, he called the decision an act "not of judicial judgment, but of political will."[240]

As Justice Scalia predicted, the Court overruled *Bowers* seven years later in *Lawrence v. Texas*,[241] a challenge to an anti-sodomy statute. Justice Scalia opened by feigning surprise that

230. *Id.* at 624 (quoting 1992 amendment to Colorado Constitution).

231. *Id.* at 636 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

232. 478 U.S. 186 (1986) (five-to-four decision), *overruled by* Lawrence v. Tex., 539 U.S. 558 (2003).

233. *Id.* at 196.

234. *Romer,* 517 U.S. at 636 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

235. *Id.*

236. *Id.* at 645 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

237. *Id.* at 647, 651 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

238. *Id.* at 652 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

239. *Id.*

240. *Id.* at 653 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

241. 539 U.S. 558 (2003).

the Court had overruled *Bowers*, "rendered a mere 17 years ago."[242] His first few paragraphs chastised the Court for invoking *stare decisis* a decade earlier[243] when refusing to overrule *Roe v. Wade*[244] and its "preservation of judicially invented abortion rights,"[245] while appearing to have no compunction about overruling *Bowers*.[246] Justice Scalia devoted five pages to defending *Bowers* while chiding the majority for selectively disregarding *stare decisis*.[247] With characteristic slippery-slope exaggeration, he claimed that overruling *Bowers* would effect a social catastrophe.

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . . What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.[248]

But then Justice Scalia conceded that he was not at all surprised by the Court's reasoning.[249] He pointed out that the Court had sidestepped the question whether homosexual sodomy was a fundamental right, and had effectively conceded it was not by applying the rational basis test.[250] Next, he challenged the majority's reasoning that consensual homosexual relations qualify as a constitutionally protected liberty interest based on an "emerging awareness" of a right to privacy with respect to adult sexual activity.[251] Then he refuted the majority's reasoning

---

242. *Id.* at 586 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

243. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).

244. 410 U.S. 113 (1973); *see Casey*, 539 U.S. at 853–60 (explaining considerations against overruling *Roe*).

245. *Lawrence,* 539 U.S. at 587 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

246. *Id.* at 586–87 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

247. *See id.* at 586–92 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

248. *Id.* at 590–91 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

249. *Id.* at 592 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting) ("[I]t does not surprise me . . . that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey*'s extraordinary deference to precedent for the result-oriented expedient that it is.").

250. *See id.* at 593–94 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

251. *Id.* at 597–98 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

that Texas had no rational basis for singling out sodomy for criminal penalties.[252] "This proposition," he wrote, "is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion," and he went on to explain the consequences of the Court's error:

> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," . . . the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. . . . This effectively decrees the end of all morals legislation.[253]

He accused the Court of signing on to "the so-called homosexual agenda,"[254] and then warned of the coming apocalypse:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, . . . and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? . . . This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.[255]

It would be a decade before Justice Scalia's predicted apocalypse threatened again in *United States v. Windsor*,[256]

252. *Id.* at 599 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

253. *Id.*

254. *Id.* at 602 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

255. *Id.* at 604–05 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

256. 570 U.S. 744 (2013).

which challenged the Defense of Marriage Act.[257] After the Obama Administration's Department of Justice declined to defend the statute's constitutionality, a group representing Congress was permitted to intervene as an interested party.[258] The Court held DOMA unconstitutional because its primary purpose and effect were to treat a subset of state-sanctioned marriages unequally.[259]

Justice Scalia dissented, his first paragraph setting the derisive tone for the rest of his opinion:

> This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.[260]

Then, before reaching the merits, he characterized the Court's taking the case as "an assertion of judicial supremacy" that "envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role."[261] He called the case "a contrivance,"[262] while deriding as "incomprehensible" the Court's conclusion that adversarial aspects of Article III standing are "prudential" rather than mandatory.[263]

But he did not stop there. He mocked the Court's reasoning as "wryly amusing," and sarcastically asserted that "[r]elegating a jurisdictional requirement to 'prudential' status is a wondrous

257. 1 U.S.C. § 7 (2012) (defining "marriage" as "only a legal union between one man and one woman as husband and wife," and "spouse" as "only . . . a person of the opposite sex who is a husband or a wife").

258. *Windsor*, 570 U.S. at 754 (noting that the trial court, without opposition, had granted permissive intervention to the House Bipartisan Legal Advisory Group).

259. *Id.* at 769–75.

260. *Id.* at 778 (Scalia & Thomas, JJ., & Roberts, C.J., dissenting).

261. *Id.* at 779 (Scalia & Thomas, JJ., & Roberts, C.J., dissenting).

262. *Id.* at 782 (Scalia & Thomas, JJ., & Roberts, C.J., dissenting).

263. *Id.* at 784 (Scalia & Thomas, JJ., & Roberts, C.J., dissenting).

device, enabling courts to ignore the requirement whenever they believe it 'prudent'—which is to say, a good idea." And he denigrated the Court's cited authorities as falling "miles short of supporting the counterintuitive notion that an Article III 'controversy' can exist without disagreement between the parties."[264]

Justice Scalia was so incensed and exasperated about the jurisdictional implications that he was ready to incite a constitutional showdown by which Congress might compel the Executive Branch to comply with its will by defending DOMA:

> [I]f Congress cannot invoke our authority . . . then its only recourse is to confront the President directly. Unimaginable evil this is not. Our system is *designed* for confrontation. . . . If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding. (Nothing says "enforce the Act" quite like ". . . or you will have money for little else.") But the condition is crucial; Congress must care enough to act against the President itself, not merely enough to instruct its lawyers to ask *us* to do so. Placing the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership does not do the system a favor. And by the way, if the President loses the lawsuit but does not faithfully implement the Court's decree, just as he did not faithfully implement Congress's statute, what then? Only Congress can bring him to heel by . . . what do you think? Yes: a direct confrontation with the President.[265]

Justice Scalia's tone was no less biting when he turned to the merits.[266] He called the Court's justification for its holding "rootless and shifting,"[267] accusing the majority of invoking the "dread words 'substantive due process'" as the basis for its decision without expressly saying so.[268] And then he criticized the Court for making "only passing mention" of the arguments

264. *Id*. at 785 (Scalia & Thomas, JJ., & Roberts, C.J., dissenting).

265. *Id.* at 790–91 (Scalia & Thomas, JJ., & Roberts, C.J., dissenting).

266. *Id.* at 791 (Scalia & Thomas, JJ., dissenting).

267. *Id.*

268. *Id.* at 794 (Scalia & Thomas, JJ., dissenting).

advanced by DOMA's defenders, perhaps, he imagined, "because it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them."[269]

Justice Scalia enumerated the Court's specific words used to describe the perceived motives of DOMA's supporters, and he declared (without further explanation) that he was "sure these accusations [were] quite untrue."[270] He asserted that to defend "traditional marriage" is not to demean those "who would prefer other arrangements."[271] And then, in an abundance of irony considering the habitual tone of his own separate opinions, he let loose this remarkably hostile statement:

> To hurl such accusations so casually demeans *this institution*. In the majority's judgment, any resistance to its holding is beyond the pale of reasoned disagreement. To question its high-handed invalidation of a presumptively valid statute is to act (the majority is sure) with *the purpose* to "disparage," "injure," "degrade," "demean," and "humiliate" our fellow human beings, our fellow citizens, who are homosexual. All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.[272]

But he was not quite done. He warned readers not to be fooled by the majority's "naked declaration" confining its holding to same-sex couples who were already lawfully married under state law. "It takes real cheek," he wrote,

> for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here—when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I

269. *Id.* at 796 (Scalia & Thomas, JJ., dissenting) (emphasis in original).

270. *Id.* at 797 (Scalia & Thomas, JJ., dissenting).

271. *Id.*

272. *Id.* at 797–98 (Scalia & Thomas, JJ., dissenting) (emphasis in original).

> promise you this: The only thing that will "confine" the Court's holding is its sense of what it can get away with.[273]

Justice Scalia then issued his own string of insults to describe the Court's opinion: He claimed it was based on "scatter-shot rationales . . . (federalism noises among them)," complete with "disappearing trail[s] of . . . legalistic argle-bargle."[274] He thought it "inevitable" that the Court would soon apply its holding to invalidate state laws prohibiting same-sex marriage, and even offered edited paragraphs of the majority's opinion (complete with striketype and italics) to demonstrate how easily the Court could do just that.[275] He speculated that the Court had written these and many more passages to be "deliberately transposable" to an opinion that would strike down state statutes precluding recognition of same-sex marriages.[276] "By formally declaring anyone opposed to same-sex marriage an enemy of human decency," he claimed, "the majority arms well every challenger to a state law restricting marriage to its traditional definition."[277] And he predicted that "[t]he result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy 'help' only to a member of this institution."[278] In the end, he conceded that the issue was contentious, implicating complicated social and political views on a "fundamental" matter, but he believed the Court's opinion "cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat."[279]

Finally came *Obergefell*. This time the issue of whether states could constitutionally refuse to recognize same-sex marriages was squarely before the Court, as Justice Scalia had been predicting since 2003. Justice Kennedy, who had written the majority opinions in *Lawrence* and *Windsor*, once again

273. *Id.* at 798 (Scalia & Thomas, JJ., dissenting).
274. *Id.* at 799 (Scalia & Thomas, JJ., dissenting).
275. *Id*. at 799–800 (Scalia & Thomas, JJ., dissenting).
276. *Id.* at 800 (Scalia & Thomas, JJ., dissenting).
277. *Id.*
278. *Id.* at 800-01 (Scalia & Thomas, JJ., dissenting).
279. *Id.* at 802 (Scalia & Thomas, JJ., dissenting).

wrote for the Court, holding that states were constitutionally barred from refusing to recognize same-sex marriages.[280]

Chief Justice Roberts wrote the principal dissent, but Justices Scalia, Thomas, and Alito each dissented separately.[281] Justice Scalia's "blistering dissent"[282] reflected his I-told-you-so mood,[283] declaring the Court's decision "a threat to American democracy."[284] As far as he was concerned, the answer to the question before the Court was easy from the perspective of his originalist constitutional jurisprudence.[285] But Justice Scalia did not stop after setting out this simple approach. Instead, he mocked the Court's suggestion that the freedom to marry protects other freedoms as well, including those of intimacy, expression, and spirituality. He expressed astonishment at "the hubris reflected in today's judicial Putsch."[286] Then, demonstrating his outright disgust with the majority's reasoning, he quoted from the Court's opinion. He even injected meta-thinking parentheticals into his dissent—as if they were bubble thoughts in a comic strip:

---

280. *Obergefell*, 135 S. Ct. at 2604–05.

281. The four dissents span thirty-two pages. *See Obergefell*, 135 S. Ct. at 2611–43. Ironically, Chief Justice Roberts has repeatedly expressed his belief that the Court should avoid splintered decisions. *See, e.g.*, Debra Cassens Weiss, *Chief Justice Says He Backs Consensus, Even If It Means Putting Off Issues for A Later Day*, ABA J. DAILY NEWS (May 26, 2016), http://www.abajournal.com/news/article/chief_justice_says_he_backs_consensus_even_if_it_means_putting_off_issues_f; Jeffrey Rosen, *Roberts's Rules*, ATL. (Jan.–Feb. 2007), https://www.the atlantic.com/magazine/archive/2007/01/robertss-rules/305559/.

282. *Cf.* Jeff Bleich & Kelly Klaus, *Ready for Prime Time—Group Dynamics, Dissent and Intrigue: A Look at the Supreme Court, 1999–2000*, 60 OR. ST. B. BULL. 15, 19 (Aug./Sept. 2000) (referring to Scalia's earlier "blistering dissent (does he write any other kind?)" in Dickerson v. United States, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting)). Justice Scalia's *Obergefell* dissent was certainly blistering in tone. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting) ("The [majority] opinion is couched in a style that is as pretentious as its content is egotistic.").

283. Justice Scalia himself used this phrase in his dissent in *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000), in which the Court struck down a Nebraska statute banning an abortion procedure. *Id.* at 955 (Scalia, J., dissenting).

284. *Obergefell*, 135 S. Ct. at 2626 (Scalia & Thomas, JJ., dissenting).

285. *Id.* at 2628 (Scalia & Thomas, JJ., dissenting) (noting that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman," and asserting that the Court had "no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text").

286. *Id.* at 2629 (Scalia & Thomas, JJ., dissenting).

> It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, "[i]n any particular case," either the Equal Protection or Due Process Clause "may be thought to capture the essence of [a] right in a more accurate and comprehensive way," than the other, "even as the two Clauses may converge in the identification and definition of the right." (What say? What possible "essence" does substantive due process "capture" in an "accurate and comprehensive way"? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses "converge in the identification and definition of [a] right," that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.[287]

---

287. *Id.* at 2630 (Scalia & Thomas, JJ., dissenting) (footnotes omitted; parentheses,

To many, this was perhaps the most offensive passage in Justice Scalia's extraordinarily offensive dissent.[288]

But Justice Scalia did not stop there. In a footnote, he leveled an unusually pointed, sarcastic attack on the Court's reasoning:

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.[289]

And in characteristic fashion, Justice Scalia felt compelled to leave the reader with a ringing, memorable, and quotable phrase:

> With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.[290]

Of course, Justice Scalia could not have known that his *Obergefell* dissent would be among the last of his injudicious dissents. But we know that now. Regrettably, his many descendants will someday look through the *United States Reports* and read the intemperate words written by their ancestor.[291] What will they think of his legacy?

III. ASSESSING THE IMPACT OF JUSTICE SCALIA'S DISSENTS

> *The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of*

---

ellipses, brackets, and emphasis in original).

288. *See, e.g.*, Eric Levitz, *Five Unexpected Arguments in Scalia's Same-Sex Marriage Dissent*, MSNBC.COM (June 26, 2015 5:00 PM EDT), http://www.msnbc.com/msnbc/five-unexpected-arguments-scalias-dissent (describing dissent as "brimming with vitriolic snark" and responding to its analysis).

289. *Obergefell*, 135 S. Ct. at 2630 n.22 (Scalia & Thomas, JJ., dissenting).

290. *Id.* at 2631 (Scalia & Thomas, JJ., dissenting).

291. Justice Scalia had nine children and often joked in interviews that he had lost track of how many grandchildren he had.

> *the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.*[292]

A. The Law Without Justice Scalia

The extent of Justice Scalia's influence will not be known for generations,[293] although some already predict that "the enduring form" of his written opinions offers "the potential to shape doctrines and decisions in the near and distant future."[294] The Justice himself once confessed his hope that "at least some" of his dissents would someday become majority opinions.[295] Yet years later, he professed to care little about his legacy.[296]

Justice Ginsburg recently observed that the Supreme Court has changed since Justice Scalia's death, reporting that "the Court is a paler place without our lively Justice Scalia."[297] Even Justice Stevens, who often disagreed with Justice Scalia on constitutional issues, remembered him for his friendship and spontaneous sense of humor.[298] Others found him engaging and personable,[299] sometimes even "charming and . . . riotously

---

292. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 36 (1931).

293. *E.g.*, SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS 19 (Keven A. Ring ed., 2016).

294. *Id.* (internal quotation marks and citation omitted).

295. Scalia, *supra* note 124, at 864.

296. Senior, *supra* note 97 ("But I have never been custodian of my legacy. When I'm dead and gone, I'll either be sublimely happy or terribly unhappy."). Asked which of his decisions he thought posterity would view as "heroic," Justice Scalia responded, "Oh, my goodness. I have no idea. You know, for all I know, 50 years from now I may be the Justice Sutherland of the late-twentieth and early-21st century, who's regarded as: 'He was on the losing side of everything, an old fogey, the old view.' And I don't care." *Id.*

297. *Ginsburg Conversation*, *supra* note 29, at 1499.

298. John Paul Stevens, J., Sup. Ct. of the U.S. (ret.), Some Thoughts About a Former Colleague at 2–3 (Apr. 25, 2016), *available at* https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech%20Washington%20University%20in%20St%20Louis%20School%20of%20Law_04-25-2016.pdf. Justice Stevens noted then that "Nino's friendship with his colleagues, including both those who disagreed with his views and those who more regularly shared his views, is legendary." *Id.* at 3.

299. *E.g.*, John G. Browning, *The Justice Scalia I Knew*, 79 TEX. B.J. 294, 294 (2016). (characterizing the private Scalia as "a witty, engaging person with the courtly manners of an Old World gentleman and a singular devotion to his large family").

funny."[300] But how have his separate opinions influenced and shaped the law?[301]

While Justice Scalia's dissents were frequently cited for their colorful rhetoric, especially in the popular press,[302] the very fact that they were dissents demonstrates that he often fell short of persuading his colleagues to accept his reasoning.[303] During his lifetime, a majority of the Court would embrace only a handful of the hundreds of dissenting opinions the Justice personally authored.[304] And while Justice Scalia claimed to write his dissents for "law students,"[305] that begs the question of their lasting value as instruments of persuasion.

---

300. Dahlia Lithwick, *Justice Grover Versus Justice Oscar: Scalia and Breyer Sell Very Different Constitutional Worldviews*, SLATE (Dec. 6, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/justice_grover_versus_justice_oscar.html. Lithwick analogized Justice Breyer to a "jurisprudential Grover—sweet and optimistic and eager-to-please— . . . confident he'll sell us on his constitutional theory, one lawyer at a time. And Antonin Scalia's constitutional Oscar the Grouch—frustrated and misunderstood, yet somehow more lovable for it—doesn't even try to close the deal. He doesn't need us to vindicate him. He's confident history will do that." *Id.*

301. The following analysis uses the categorization of Scalia opinions by Cornell's Legal Information Institute. *See Writings by Justice Scalia Grouped by Type*, LII.COM, https://www.law.cornell.edu/supct/justices/scalia.dec.html (reporting 338 majority and plurality opinions, 385 concurring opinions, 270 dissents, and forty-eight opinions concurring in part and dissenting in part, for a total of 1,041).

302. *E.g.*, Michael S. Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 863 (1997) (referring to "flamboyant judicial rhetoric and colorful writing" that "make headlines" and terming Scalia "the master of the eminently quotable turn-of-phrase, the arresting quip, the provocatively expressed legal argument").

303. Kapgan, *supra* note 6, at 97.

304. The author's independent analysis reveals that only six of the many dissents Justice Scalia personally authored eventually commanded a majority during his lifetime. *See* Sykes v. United States, 564 U.S. 1 (2011), *overruled by* Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551 (2015) (Scalia, J.); James v. United States, 550 U.S. 192 (2007), *overruled by Johnson*, 135 S. Ct. 2551; Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993) (Scalia, J.); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); S.C. v. Gathers, 490 U.S. 805 (1989), *overruled by* Payne v. Tenn., 501 U.S. 808 (1991); Booth v. Md., 482 U.S. 496 (1987), *overruled by Payne*, 501 U.S. 808. In none of the six overruled cases was Justice Scalia the lone dissenter. And four were overruled in the same two opinions, reducing the *issues* on which his dissenting opinions have yet prevailed to just four. (The research and analysis supporting the conclusions reported in this note are on file with the author.)

305. Lithwick, *supra* note 300 (reporting that Justice Scalia "writes his dissents for the case books," and concluding that, while it might be too late to convince lawyers, "he's still hoping to win over the law students"); Senior, *supra* note 97 (reporting that Justice Scalia wrote for law students because "they will read dissents that are breezy and have some thrust to them"); *see* Scalia, *supra* note 5, at 39 ("In our law schools, it is not necessary to

The frequency of Justice Scalia's dissents[306] demonstrates his reluctance to follow—or perhaps failure to appreciate—Justice Brennan's all-important "Rule of Five."[307] Indeed, "persuading his colleagues [was] not . . . one of Scalia's strengths—or even an objective with which his style seem[ed] concerned."[308] What, then, does he leave behind?

B. Justice Scalia's Judicial Perspectives

Beyond his love of the battle in judicial decisionmaking and his use of sarcasm and scorn as rhetorical aids, Justice Scalia was well known for four judicial perspectives. He was a constitutional originalist. He was a statutory textualist who objected to the use of legislative history as an aid to resolving statutory ambiguities. But he regularly consulted dictionaries when interpreting statutory language. And he was generally a strong proponent of judicial deference to agency interpretation. In each of these areas, Justice Scalia's speeches, books, articles, and opinions shaped the law by influencing the philosophies that courts draw upon, even though the bulk of his dissents have failed to carry the day.

---

assign students the writings of prominent academics [to explain] the principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself, and can be studied from that text.").

306. The only other member of the Court to write more dissents than Justice Scalia was Justice Stevens, who was well known as a prolific writer. *See, e.g.*, Jeffrey Rosen, *The Dissenter: Justice John Paul Stevens*, N.Y. TIMES (Sept. 23, 2007), https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html (noting that Justice Stevens "files more dissents and separate opinions than any of his colleagues").

307. Justice Brennan "famously used to tell his law clerks that the most important 'law' at the Supreme Court was the 'Rule of Five.' He would constantly remind them that it takes five justices for the court to reach a decision and they should never forget it." Eric Segall, *Supreme Court Justices Are Not Really Judges*, SLATE (Nov. 14, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/supreme_court_justices_are_not_judges_they_rule_on_values_and_politics_not.html; *see also* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 273 & n.17 (2013) (telling the story in more detail).

308. Kapgan, *supra* note 6, at 97; *but see* Autumn Fox & Stephen R. McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia,* 19 CAMPBELL L. REV. 223, 225 (1997) ("It may be . . . that Scalia's failure to build a consensus on the Court will, in the end, matter very little. Instead, it is his intellect, his legal principles, and his writing ability that will be his legacy to the Court.").

1. Constitutional Originalism

Justice Scalia was especially well known for his views about constitutional interpretation. He believed that constitutional language should be interpreted in historical context to grasp how the Framers intended their written words to be understood.[309] He rejected the view that the Constitution is a living, evolving document to be interpreted consistent with changing times.[310] He sometimes quipped that his originalist philosophy treated the Constitution as if it were "dead," but he preferred to call it "enduring."[311]

The Court's recent decisions suggest that most Justices are prepared to interpret the Constitution so that it remains relevant to a changing culture. And even Justice Scalia was willing to bend on occasion, at least with respect to the impact of modern technology on Fourth Amendment jurisprudence.[312] The

309. Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1945 (2017) (referring to Justice Scalia as "the leading judicial theorist and advocate of originalism of his era"); *see* Scalia, *supra* note 124, at 862–64 (explaining his support for constitutional originalism despite its faults, but conceding that "in a crunch I may prove a faint-hearted originalist. I cannot imagine . . . upholding a statute that imposes the punishment of flogging").

310. Scalia, *supra* note 124, at 853–56 (identifying and criticizing scholars he considered "non-originalists").

311. "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted." All Things Considered: Originalism: A Primer on Scalia's Constitutional Philosophy (Nat'l Public Radio broadcast Feb. 14, 2016), *available at* http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy (quoting Justice Scalia). During a 2006 debate with Justice Breyer, Justice Scalia explained originalism more colorfully. He objected when the moderator asked whether he thought the so-called "living Constitution" was "idiotic": "'You are misquoting me. . . . I was describing the argument in favor of the living Constitution—that it's a living organism that must grow or become brittle and snap. . . . That is idiotic.'" Lithwick, *supra* note 300 (quoting Justice Scalia). He wondered aloud how "a Constitution that clearly allowed for the death penalty now explicitly prohibit[s] it." *Id.* "'That's the living Constitution I am talking about, and it's the one I wish would die.'" *Id.*

312. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33–34 (2001) (Scalia, J.) (opining that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," and holding that use of heat-sensing technology outside defendant's home to detect possible marijuana-growing operation inside amounted to Fourth Amendment search).

ultimate fate of Justice Scalia's originalism depends on the jurisprudence of his successors, including Justice Gorsuch.[313]

2. Statutory Textualism and Disregard of Legislative History

Justice Scalia was the leading textualist of his era. He believed that judges should focus on the text of a statute rather than extrinsic sources of meaning.[314] While there is nothing new about beginning the task of statutory interpretation with the "plain language,"[315] Justice Scalia would also end with the text.[316] He explained his method this way:

> The exclusive reliance on text when interpreting text is known as *textualism*. . . . [T]his approach elicits both better drafting and better decision-making. . . . Textualism, in its purest form, begins and ends with what the text says and fairly implies. Its principal tenets have guided the interpretation of legal texts for centuries. . . . Textualism is not well designed to achieve ideological ends, relying as it does on the most objective criterion available: the accepted contextual meaning that the words had when the law was enacted.[317]

---

313. During his confirmation hearings, Judge Gorsuch testified that he considered himself a constitutional originalist, but he thought his approach could keep pace with the modern world. *Hearings on the Nomination of Judge Neil Gorsuch, to be an Associate Justice of the United States Supreme Court Before the S. Comm. on the Judiciary* 115th Cong., 1st Sess. (Mar. 21, 2017), *available at* https://congressional.proquest.com/congressional/result/congressional/pqpdocumentview?accountid=147014&groupid=1087361&pgId=b5531681-2674-401c-993c-55f861bf4043&rsId=1628CC1E0A7 ("And what I would say is the Constitution doesn't change, the world around us changes and we have to understand the Constitution and apply it in light of our current circumstances." (responding to question from Senator Klobuchar)).

314. *See* Antonin Scalia, J., S. Ct. of the U.S., Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws 92 (Mar. 8–9, 1995), *available at* https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf ("It is the *law* that governs, not the intent of the lawgiver . . . . Men may intend what they will; but . . . only the laws that they enact bind us."). In his early years on the bench, Justice Scalia consulted legislative history on occasion, but as time went on he refused to consider it at all. Eventually, he declined to join any part of an opinion that discussed legislative history. Morrison, *supra* note 89, at 16.

315. *E.g.*, Lake Cnty. v. Rollins, 130 U.S. 662, 671 (1889) (noting that "when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation").

316. ANTONIN SCALIA & BRYAN A. GARNER: READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

317. *Id*.

Justice Scalia's textualist approach did not mean that he was necessarily a strict constructionist—in fact, he disclaimed that characterization.[318] On the other hand, his rigid textualist approach to statutes is difficult to reconcile with his embrace of constitutional originalism. He once explained the challenges of the originalist approach, which include researching the historical context of constitutional language and consulting extrinsic documents, including the ratification records of state legislatures,[319] all analogous to legislative history.

A survey concluded a decade ago that the federal appellate courts had not yet "bought" Justice Scalia's position that legislative history is "*per se* inauthentic."[320] But the influence of his skepticism was both "discernible" and "significant" to some observers, who suggested that his cautious approach to legislative history might be his "most lasting influence."[321] Justice Scalia once speculated that although he might not win on originalism,[322] he had made progress in persuading fellow justices against the use of legislative history.[323] Be that as it may, he certainly "narrow[ed] the battlefield."[324]

---

318. Scalia, *supra* note 314, at 98 ("[S]o-called strict constructionism . . . is a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist.").

319. Scalia, *supra* note 124, at 856–57. At least one scholar has aptly questioned how the rejection of legislative history as an authoritative source of statutory meaning can be reconciled with constitutional originalism. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1302 (1998) ("[T]he new textualists, particularly Justice Scalia, refuse to consider the debating history of statutes as relevant context but do consider such history of the Constitution and its amendments, sometimes in great detail.").

320. JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA IN THE FEDERAL COURTS OF APPEALS 100 (2007) (recognizing that "Justice Scalia has repeatedly inveighed against the use of legislative history in cases where the statute is unambiguous"); *see also* Morrison, *supra* note 89, at 16.

321. GERKEN, *supra* note 319, at 14; *see also id.* at 319–20.

322. *See* Robert Schapiro, *Justice Antonin Scalia: More Quotable Than Influential*, CONVERSATION (Feb. 15, 2016 10:31 PM EST), http://theconversation.com/justice-antonin-scalia-more-quotable-than-influential-54721 (noting that Justice Scalia's "attempt to reorient interpretation of the Constitution . . . failed to achieve lasting success").

323. Senior, *supra* note 97 (reporting Justice Scalia's 2013 statement that the Court then paid "much more attention to the words of a statute" and "much less [to] legislative history" than did "opinions from the eighties, . . . two thirds of [which] were discussing committee reports and floor statements and all that garbage," a change he believed he had helped influence); *but see* Linda Greenhouse, *Justice Scalia's Fading Legacy*, N.Y. TIMES (Mar. 15, 2018), https://www.nytimes.com/2018/03/15/opinion/justice-antonin-scalia-legacy

3. Dictionaries as Legal Authority

Compared to his penchant for textualism and his disdain for legislative history, considerably less has been written about Justice Scalia's fondness for what might be called dictionary shopping.[325] The Court has long consulted lay dictionaries to determine the ordinary meaning of terms not otherwise defined in the statute.[326] But to a greater degree than any other Justice in history, Justice Scalia routinely referred to dictionary definitions,[327] which led to a striking increase in the Court's use of dictionaries after he was appointed in 1986.[328]

The Scalia-initiated trend of relying on dictionaries as interpretive authority is cause for concern. Dictionaries do not

---

.html (noting two years after Justice Scalia's death that Justices "now feel free to invoke legislative history," and no longer feel obligated "to defend or even explain" its use); Schapiro, *supra* note 322 (noting that Justice Scalia changed "how advocates and judges talk about statutes, but not how they ultimately interpret them").

324. Morrison, *supra* note 89, at 16.

325. To illustrate, Justice Scalia once devoted three full pages and two lengthy footnotes to explaining the petitioners' mistake in relying on *Webster's Third International Dictionary* to interpret the statutory term "modify." MCI Telecomm'ns Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225–28 & nn.2, 3 (1994) (Scalia, J.). He focused on the word's alternative definitions in *Webster's Third*—"to make minor changes" or "to make a basic or important change"—which "contradict[ed] [the more narrow definition in] virtually all others." *Id.* at 225–26 (citing just four dictionaries, including *Webster's Third*).Conceding that he might be "gilding the lily," he noted that in 1934, when the controlling statute was enacted, "the most relevant time for determining a statutory term's meaning, . . . *Webster's Third* was not yet even contemplated." *Id.* at 228. Instead, he cited the 1934 edition (*Webster's Second*) and yet another dictionary published in 1993 in declaring that the Court had "not the slightest doubt that [moderate change] is the meaning the statute intended." *Id.* at 227.

326. *See, e.g.*, Nix. v. Hedden, 149 U.S. 304, 306–07 (1893). "There being no evidence that the words . . . have acquired any special meaning . . ., they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice . . . and upon such a question dictionaries are admitted . . . as aids to the memory and understanding . . . ." *Id.*

327. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 495 (2013) (noting that the number of opinions consulting dictionaries more than doubled between 1986 and 2011); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become A Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 261 (1999) (analyzing Court's dictionary use during Justice Scalia's first twelve terms).

328. *See, e.g.*, J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretive Problems*, 76 MISS. L.J. 55, 66 (2006) (noting the irony that "we are treated to the truly absurd spectacle of august justices and judges arguing over which unreliable dictionary and which unreliable dictionary definition should be deemed authoritative" (footnote omitted)).

reflect the only—or even the best—meaning of a term as used in ordinary American English.[329] One of the disputes surrounding the 1961 publication of *Webster's Third International Dictionary*, for example, was whether a lay dictionary should describe how words are actually used or instead prescribe how they should be used.[330] Contrary to Justice Scalia's justifications for consulting dictionaries to discover the ordinary meaning of a word, many traditional lay dictionaries were compiled by editors who focused more on preserving correct usage than on describing how ordinary Americans then used and understood words.[331]

More important, consulting dictionaries to interpret statutory meaning assumes that statutes are drafted with ordinary dictionary definitions in mind. If this were so, Congress could be expected to draft a statutory definition for any term it intends to carry a specific or unusual meaning. But research does not support that implicit hypothesis.[332] Legislative drafters may in fact lack access to authoritative dictionaries, or simply fail to consult them.[333] And the time pressure of the legislative process[334] may mean that drafters have no opportunity to consult

329. 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, 95 & n.84 (2010) (noting scholarly criticism of dictionaries for inaccuracy).

330. *Id.* at 96. Justice Scalia demonstrated a clear preference for *Webster's Second. Id.* at 96–97 (explaining than since 2000, Justice Scalia had cited *Webster's Second* in twelve cases, but *Webster's Third* only "discriminatingly."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 213 (2008) (recommending several dictionaries).

331. Brudney & Baum, *supra* note 327, at 489 (noting that Justice Scalia favored *Webster's Second* and the *American Heritage Dictionary*, which lexicographers consider prescriptive); *see also id.* at 507–08 (distinguishing prescriptive dictionaries from descriptive).

332. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 938 (2013) (reporting that some survey respondents "specifically referenced Justice Scalia—acknowledging that the Court frequently uses dictionaries but noting that they remain mostly irrelevant to the drafting process," including one drafter who "said while laughing that 'Scalia is a bright guy, but no one uses a freaking dictionary'").

333. *Id.* at 907, 930, 934. Gluck and Bressman also reported that "[m]ore than 50% of our respondents said that dictionaries are never or rarely used when drafting," *id.* at 938, and that "[o]nly 15% said dictionaries were always or often used," *id.* at 938 n.111.

334. *See, e.g.*, Jim Tankersley & Alan Rappeport, *A Hasty, Hand-Scribbled Tax Bill Sets Off an Outcry*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/

a library of dictionaries to ensure that undefined statutory terms convey the "ordinary meaning" that a Court might attach after consulting a host of lay dictionaries.

4. Administrative Deference

By the time he became a judge, Justice Scalia was already an expert on administrative law.[335] He previously chaired the Administrative Conference of the United States[336] and led the Department of Justice's Office of Legal Counsel.[337] As a Justice he strongly supported *Chevron* deference to agency interpretations of ambiguous statutes.[338] In 2001, for example, he wrote a visceral dissent when the Court held that informal agency interpretations were not necessarily entitled to *Chevron* deference, but should be assessed according to a variety of factors.[339]

---

politics/hand-scribbled-tax-bill-outcry.html (quoting Senator's concern that a major tax-overhaul bill received just before a vote "literally ha[d] hand scribbled policy changes on it").

335. *See, e.g.*, Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REGULATION 25 (July-Aug. 1981).

336. Hearing Before the Subcomm. on Comm. & Admin. Law, H. Comm. on the Judiciary, 111th Cong., 2d Sess. 22, 24 (May 20, 2010) (prepared Statement of the Honorable Antonin Scalia), *available at* https://www.acus.gov/sites/default/files/documents/Breyer%2520and%2520Scalia%2520Testimony_May%25202010%2520Congressional%2520Hearing_0.pdf; *see also* Admin. Conf. of the U.S., *Antonin Scalia*, https://www.acus.gov/contacts/antonin-scalia. Later he was a senior fellow of the Conference. *Id.*

337. *Confirmation Hearings*, *supra* note 160, at 1 (statement of Senator Thurmond, noting that Judge Scalia's experience included serving as "assistant attorney general for the Office of Legal Counsel").

338. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 10 J. NAT'L ASS'N ADMIN. L. JUDGES 118, 119–22 (1990) (explaining and defending *Chevron* deference); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L.J. 511, 511–14 (1989) (same); *but cf.* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way . . . difficult to square with the Constitution of the framers' design.").

339. United States v. Mead Corp., 533 U.S. 218, 239–61 (2001) (Scalia, J., dissenting); *see also id.* at 261 ("I dissent even more vigorously from the reasoning that produces the Court's judgment, and that makes today's decision one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.").

Just as Justice Scalia's position on legislative history evolved, so did his administrative-deference jurisprudence. In 1997, he had written for a unanimous Court in *Auer v. Robbins*[340] that the Labor Department had discretion to interpret its own ambiguous regulations. First, he deferred to the agency's interpretation of an ambiguous controlling statute under *Chevron*, finding it not "unreasonable."[341] But then, turning to the agency's interpretation and application of its own ambiguous *regulation*, he reasoned that the Secretary's interpretation controlled unless plainly erroneous or inconsistent with the regulation's language. After consulting two lay dictionaries, Justice Scalia decided that it was neither.[342]

Auer has been criticized by courts,[343] by scholars,[344] and even by Justice Scalia himself.[345] Beginning in 2011, he dropped increasingly direct hints that *Auer* warranted reconsideration, if not outright overruling.[346] The majority refused to go along. And

340. 519 U.S. 452 (1997).

341. *Id.* at 458.

342. *See id.* at 461.

343. *E.g.*, Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs., 718 F.3d 488, 494 (5th Cir. 2013) (refusing to extend *Auer* because "[a]ffording deference to agency interpretations of ever more ambiguous regulations would allow the agency to function not only as judge, jury, and executioner but to do so while crafting new rules").

344. *See, e.g.*, Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?* 63 ADMIN. L. REV. 77, 85 (2011) (concluding that the *Auer* Court seemed to be messaging lower courts to give "extraordinary deference" to "agency interpretations of agency rules"); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 696 (1996) (critiquing *Seminole Rock*, on which *Auer* relied); *but cf.* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 306–07 (2017) (defending *Auer*).

345. *See infra* note 346 (citing Justice Scalia's separate opinions criticizing *Auer*). Justice Thomas reportedly recalled hearing Justice Scalia once remark, "in typical Nino fashion, that one of our opinions that had become an important precedent was . . . 'Just a horrible opinion, one of the worst ever.' I thought briefly about what he had said, and whispered 'Nino, you wrote it.'" Aaron L. Nielson, Cf. Auer v. Robbins, 21 TEX. REV. L. & POL. 303, 305 (2017); Sunstein & Vermeule, *supra* note 344, at 299 (noting that Justice Scalia was "both *Auer*'s author and (late in his career) its leading judicial critic").

346. *See* Perez v. Mortg. Bankers Ass'n, ___ U.S. ___, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) ("I would . . . restore the balance originally struck by the [Administrative Procedure Act] with respect to an agency's interpretation of its own regulations . . . by abandoning *Auer* and applying the Act as written."); *see also* Decker v. Nw. Envt'l Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., dissenting) (opining that "it is time" for reconsideration of *Auer*); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring) (expressing "increasing[] doubt[]" about *Auer*'s validity).

soon after Justice Scalia died, the Court denied certiorari in a case asking the Court to overrule *Auer*.[347]

IV. ASSESSING JUSTICE SCALIA'S IMPACT ON CIVILITY, JUDICIAL ETHICS, AND INSTITUTIONAL INTEGRITY

> *[E]ven in the most emotion-laden, politically sensitive case, effective opinion writing does not require a judge to upbraid colleagues for failing to see the light or to get it right.*[348]

A. Background

Shortly after Justice Scalia's death, Judge Voros of the Utah Court of Appeals began a presentation on civility in the legal profession by decrying the tone of political discourse that characterized the 2016 presidential campaign.[349] Then he turned to the courts, admitting that some judges act "in a way we would have to call uncivil," and confessing that "it started at the top." Recognizing Justice Scalia as "a brilliant jurist," Judge Voros also pointed out that the late Justice was often criticized as an "example of incivility."[350] After quoting Justice Scalia's dissent in *Obergefell*, Judge Voros measured it against the *Utah Standards of Professionalism and Civility*,[351] which provide that

---

At least one scholar has applauded Justice Scalia posthumously for changing his mind: "Once he realized that what he thought . . . was right was wrong, he switched, and then he was a tireless opponent of *Auer*." Nielson, *supra* note 345, at 306 (footnote omitted).

347. United Student Aid Funds, Inc. v. Bible, ___ U.S. ___, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) ("Any reader of this Court's opinions should think that the [*Auer*] doctrine is on its last gasp.").

348. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1197 (1992) (footnote omitted).

349. J. Frederic Voros, Jr., *Civility in a Time of Incivility*, 30 UTAH B.J. 22, 22 (July–Aug. 2017).

350. *Id.* at 23.

351. Utah is a leader in promoting civility in the legal profession. The Utah Supreme Court adopted *Standards of Professionalism and Civility* in 2003. *See, e.g.*, UTAH S. CT. R. 14-301, *Standards of Professionalism and Civility*, https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%2014-301.%20Standards%20of%20Professionalism%20and%20Civility.&rule=ch14/03%20Civility/USB14-301.html; Michael J. Wilkins, *Views from the Bench: Supreme Court Adopts Professionalism Standard*, 16 UTAH BAR J. 31, 31 (Sept. 2003). In 2015, the Utah Supreme Court linked the Civility Standards to the Utah Code of Professional Conduct by providing that serious or repeated violations of the

> [l]awyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.[352]

"Hostile, demeaning, humiliating?" asked Judge Voros, "I think so." And "Disparaging the intelligence of another?" he asked. "Again, I think so."[353] And then he offered some advice to his listeners: "[E]ven if you look to Justice Scalia as a model in other ways, please do not imitate his tone of incivility."[354]

Judge Voros is right.[355] The buck stops at the top.[356] Judges and Justices should be held to standards at least as high as those applied to other lawyers,[357] setting an example of dignified,

---

Standards "may support a finding that the lawyer has violated [the Utah rule] prohibiting conduct that is prejudicial to the administration of justice." *See* Voros, *supra* note 349, at 22 (citing UTAH R. PROF'L CONDUCT R. 8.4, cmt. 3a).

352. Voros, *supra* note 349, at 23 (quoting UTAH STANDARDS OF PROFESSIONALISM AND CIVILITY R. 3).

353. *Id.* Unfortunately, Justice Scalia was not alone. Judge Voros continued by discussing intemperate outbursts by other appellate judges. *Id.* at 23–24 (citing *In re* Charges of Judicial Misconduct, 769 F.3d 762, 768 (D.C. Cir. 2014)); *see also, e.g.*, Jessie Opoien, *Wisconsin Supreme Court Justice David Prosser to Retire, Replacement Will Serve Until 2020*, CAPITAL TIMES (Apr. 27, 2016), http://host.madison.com/ct/news/local/govt-and-politics/election-matters/wisconsin-supreme-court-justice-david-prosser-to-retire-replacement-will/article_fbd6c7ea-a7e7-535f-8954-2d17c94836af.html.

354. Voros, *supra* note 349, at 23. Judge Voros stopped just short of referring to Justice Scalia as a bully: "[M]ake no mistake, the conduct condemned by Rule 3—hostile, demeaning, and humiliating words and personal attacks—is not just uncivil, but bullying and abusive. And to seek a result in our system of justice by bullying is to repudiate the rule of law." *Id.* at 25.

355. Judge Voros is not the first judge to express concerns about the rhetoric of Supreme Court Justices. *See, e.g.*, Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 IND. L. REV. 381, 389 & nn.43, 44 (2002) ("Venomous language obscures the law and erodes civility in our profession. It is a problem that affects even the United States Supreme Court." (citing examples)).

356. *See* Voros, *supra* note 349, and accompanying text; *see also* Randall T. Shepard, *Judicial Professionalism and the Relations between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223, 223 (2000) ("While judges and lawyers are cut from the same cloth, judges have many obligations that practitioners do not.").

357. *See* Everett V. Abbott & Charles A. Boston, *The Judiciary and the Administration of the Law,* 45 AM. L. REV. 481, 512 (1911) ("The bench comes from the bar, and the standards of the bench are ultimately the standards of the bar.").

civil, and professional conduct. Judicial incivility and intemperance, especially when displayed by members of the Supreme Court, set the wrong example for other judges and the legal profession.

Dismayed by the lack of civility that Judge Voros highlighted, many state supreme courts have adopted standards of professionalism and civility to supplement the Model Rules of Professional Conduct for lawyers.[358] The professionalism movement has also addressed judicial civility. As this Part explains, however, the development and evolution of judicial codes of conduct have followed a different path and timeline. Indeed, while most civility and professionalism codes have been initiatives of the bench and bar, judicial conduct codes in particular were often adopted in response to Congressional concerns and initiatives. And one small but influential group is exempt from even the standards of conduct that now apply to all other federal judges: the nine Justices of the Supreme Court.[359] Whether that significant gap warrants reconsideration is discussed below.

Standards of conduct for lawyers and judges alike all trace their history to the 1908 *ABA Canons of Professional Ethics*. An analysis of the century-long effort to encourage lawyer civility is beyond the scope of this article. Instead, this section touches on the professionalism codes and standards pertaining to judges, which were initially developed by the ABA and for decades were cited as ethical guidelines for federal judges. But since the late 1970s, the federal judiciary's code of conduct for federal judges has departed in significant ways from the *ABA Model Code of Judicial Conduct*.

358. *E.g.*, UTAH S. CT. R. 14-301, *supra* note 351; *see* Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701, 707–09, 739–44 (2015) (surveying and critiquing state professionalism creeds adopted since late 1980s).

359. *See* Joseph P. Williams, *The Ethical Honor System*, USNEWS.COM (June 9, 2017), https://www.usnews.com/news/the-report/articles/2017-06-09/supreme-court-justices-play-by-their-own-ethics-rules (discussing Justices' travel).

B. Judicial Conduct Codes

Judicial codes of conduct have a complex history.[360] Two parallel systems—state supreme courts overseeing state courts and federal courts subject to Congressional oversight—complicate the picture. While most federal judges are appointed for life, some state judges are elected and others are selected under merit-based procedures. This section focuses on the federal courts, where Justice Scalia spent his entire judicial career.

1. The ABA's Canons of Judicial Ethics

The bar began calling for canons of judicial ethics soon after the ABA issued the *Canons of Professional Ethics* for lawyers.[361] The effort gathered force in 1922 when federal judge Kennesaw Mountain Landis accepted a generous salary to serve as the first commissioner of baseball while still on the bench.[362] The ensuing controversy led the ABA to adopt *Canons of Judicial Ethics* in 1924.[363]

In the meantime, at the urging of then-Chief Justice Taft, Congress established the Conference of Senior Circuit Judges, charged with overseeing the business of the federal courts.[364] After advisory ethics opinions issued by the Conference began

360. Lievense & Cohn, *supra* note 56, at 272. Beginning with the Judiciary Act of 1789, Lievense and Cohn provide a concise overview of early congressional efforts to regulate the conduct of federal judges, beyond the Constitution's provision for appointment for life conditioned on the judge's good behavior. Much of this section's discussion relies on Lievense and Cohn's work.

361. *Id.* at 272–73; *see also, e.g.*, Abbott & Boston, *supra* note 357, at 506 (calling for judicial reform, including a code of judicial ethics).

362. Lievense & Cohn, *supra* note 56, at 272–73. Judge Landis's appointment as baseball commissioner followed the 1919 World Series scandal. *Id.* at 273. He resigned from the bench after the ABA censured him. The resulting controversy cleared away the last opposition to ethical guidelines for judges. *Id.*

363. *1924 Canons*, *supra* note 59.

364. Pub. L. No. 67-298, ch. 306, § 2, 42 Stat. 837, 838 (1922). That group would later become known as the Judicial Conference of the United States, which continues to serve as the rule-making and conduct-regulating arm of the federal court system. 28 U.S.C. § 331 (2012); *see also, e.g.*, Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POLICY REV. 33, 39 & n.26 (2012).

citing the *1924 Canons,*[365] they became guiding principles for the federal judiciary over the next several decades.[366] But as history has shown, that practice changed after 1973, when the Conference first adopted its own code of conduct for federal judges.

2. The ABA Model Code of Judicial Conduct *and the* Code of Conduct for U.S. Judges

The failed 1968 nomination of Justice Fortas to serve as Chief Justice triggered further efforts to establish a code of conduct specifically for federal judges.[367] After proposed legislation was introduced in Congress, Chief Justice Burger called on the Judicial Conference, which adopted several resolutions that generated a favorable congressional response.[368] These events rekindled ABA efforts to strengthen regulation of judicial conduct,[369] leading to appointment of an ABA committee to revisit the *1924 Canons*.[370]

In 1972, the ABA issued its substantially revamped *Model Code of Judicial Conduct*.[371] In the meantime, the Judicial

---

365. Lievense & Cohn, *supr*a note 56, at 274, 275; Remus, *supra* note 364, at 41 & nn.38, 39. Before 1980, neither the Judicial Conference nor its predecessor had any binding authority over federal judges. Remus, *supra* note 364, at 40.

366. In particular, Canon 19 cautioned appellate judges against issuing separate opinions except in cases of special public significance. *See supra* notes 59–61 and accompanying text. Canons 10 and 34 envisioned judges who were "courteous to counsel . . . and also to all others . . . in the court," who refrained from seeking "public praise," and who did not "administer the office for the purpose of . . . popularity." *1924 Canons*, *supra* note 59, at Canon 10, Canon 34.

367. Justice Fortas had accepted fees from a foundation associated with a former client then under investigation for securities violations. Remus, *supra* note 364, at 44 & n.51. After a filibuster forced President Johnson to withdraw the nomination, Justice Fortas continued on the Court for a time, but soon resigned after repeated threats of impeachment. *Id.*; *see also* Elizabeth King, *A Filibuster on a Supreme Court Nomination Is So Rare It's Only Worked Once*, TIME.COM (Feb. 8, 2017), http://time.com/4659403/neil-gorsuch-filibuster-abe-fortas/ (describing downfall of Justice Fortas); *see also* Lievense & Cohn, *supra* note 56, at 274–75 (discussing Justice Fortas, related inquiries, and proposed judicial-reform legislation).

368. Lievense & Cohn, *supra* note 56, at 275; Remus, *supra* note 364, at 46–47.

369. Remus, *supra* note 364, at 46–47.

370. Lievense & Cohn, *supra* note 56, at 275.

371. *Id.* at 276; ABA MODEL CODE OF JUDICIAL CONDUCT (1972), http://fsmsupremecourt.org/pdf/1972codeofjudicialconduct.pdf [hereinafter *ABA Model Code*]; *see also* E. Wayne Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, 1977

Conference considered whether the *ABA Model Code* should apply to federal judges. A few months later, the Conference adopted the first version of what is now the *Code of Conduct for U.S. Judges*. Closely following the *ABA Model Code*, it included a few variations.[372] For example, it expressly applied to all federal judges except Supreme Court Justices.[373]

For the most part, the Conference's adoption of the *Code of Conduct for U.S. Judges* persuaded Congress that the federal judiciary could police its own. Even so, Congress remained concerned about the lack of standards for judicial disqualification.[374] To address that concern, it amended and expanded the statutory circumstances warranting

---

Utah L. Rev. 395, 396 ("[T]the Preface to the Code makes clear that its standards are intended to be enforceable.").

372. Judicial Conference of the United States, *Code of Judicial Conduct for United States Judges*, 69 F.R.D. 273, 273 (1975) [footnoted hereinafter as *Code for U.S. Judges*] ("The Code is based upon the [ABA] *Code of Judicial Conduct* . . . . To the extent possible the language of the [ABA] Code has been retained."); *see* Proceedings of the Judicial Conference of the United States, April 5–6, 1973, 93d Cong., 1st Sess., H. Doc. No. 93-103, at 9–11 (adopting *ABA Model Code* with modifications); Remus, *supra* note 364, at 48. The *Code for U.S. Judges* acknowledged federal statutes governing judicial conduct, removed some of the ABA's commentary about extrajudicial income, and amended the ABA canon regulating judges' political activities. Lievense & Cohn, *supra* note 56, at 276; *see also Code of Conduct for United States Judges*, UNITED STATES COURTS, http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf (March 20, 2014) (providing current text of *Code for U.S. Judges*).

373. *See Code for U.S. Judges*, *supra* note 372, at 273 (omitting Supreme Court Justices from its reach); Thode, *supra* note 371, at 395; *see also* Caprice L. Roberts, *The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 138 (2004) (reasoning that the *Code for U.S. Judges* "[t]echnically . . . does not govern the Justices" (citations omitted)); *see also* Warren Weaver, Jr., *Tough Code of Ethics Adopted for Judges in Federal Courts*, N.Y. TIMES, at 1 (Apr. 7, 1973) ("A tough and comprehensive new code of ethics covering all Federal judges *except the nine members of the Supreme Court* was adopted today by the Judicial Conference of the United States." (emphasis added)).

374. Congressional concerns about judicial disqualification may have been prompted in part by then-Justice Rehnquist's refusal to recuse in *Laird v. Tatum*, 408 U.S. 1 (1972), despite having advocated for the government's position while an Assistant Attorney General. Thode, *supra* note 371, at 403 n.36. Justice Rehnquist's decision was criticized as inconsistent with Canon 3C of the *ABA Model Code*, even though it did not apply to Justices. By amending the language of Canon 3C into Title 28, Congress settled the issue. Thode, *supra* note 371, at 403 n.36.

disqualification,[375] which were expressly extended to Supreme Court Justices.[376]

3. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

In the aftermath of Watergate and President Nixon's resignation, Congress enacted the Ethics in Government Act of 1978, which applied to all "judicial officers"[377] and required the Judicial Conference to appoint a Judicial Ethics Committee to enforce the Act.[378] The Conference soon proposed legislation that would become the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[379] Significantly, the 1980 Judicial Conduct Act shifted primary authority over misconduct complaints and sanctions to the chief judges of the federal courts of appeals and circuit judicial councils.[380] Congress reserved a limited role for the Conference[381] and "a loose oversight role" for Congress.[382] But the Act's vague definition of "misconduct" left it to the Conference and the judicial councils to determine

375. Thode, *supra* note 371, at 402 (citing 28 U.S.C. § 455). *Compare* Pub. L. No. 93-512, 88 Stat. 1609 (1974) *with ABA Model Code*, *supra* note 371, at Canon 3C (1972).

376. Pub. L. No. 93-512, 88 Stat. 1609 (1974); *see* 28 U.S.C. § 455(a), (e); Thode, *supra* note 371, at 402. Professor Thode researched the reported cases interpreting and applying Canon 3C and 28 U.S.C. § 455 and concluded that the primary legal issue was not whether a federal judge was subject to discipline for failing to recuse, but whether the judge's participation in deciding the case was reversible error. *Id.* at 402; *e.g.*, Shell Oil Co. v. United States, 672 F.3d 1283, 1294 (Fed. Cir. 2012) (vacating Federal Court of Claims judgment for judge's failure to recuse and remanding for reassignment to different judge).

377. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 5 U.S.C. app. 4 §§ 101–11 (2012)). The Act defined "judicial officer" to include the members of the Supreme Court. *Id.* at § 308(9), 92 Stat. at 1861 (codified as amended at 5 U.S.C. app. 4 § 110(9)). The Judicial Conference may have withdrawn its early opposition to the 1978 Act for strategic reasons. *See* Remus, *supra* note 364, at 48–52.

378. Ethics in Government Act, Pub. L. No. 95-521, § 303, 92 Stat. 1824, 1858 (1978) [hereinafter 1978 Ethics Act].

379. Pub. L. No. 96-458, 94 Stat. 2035 (1980) [hereinafter 1980 Judicial Conduct Act]; Remus, *supra* note 364, at 52; *see* Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 284–85 (1982).

380. Remus, *supra* note 364, at 52; *see also id.* at 37–38.

381. *See* 28 U.S.C. § 357 (2012).

382. Remus, *supra* note 364, at 52; *see* 28 U.S.C. §§ 351–64 (2012).

what it encompassed.[383] By enacting these provisions, Congress effectively ceded its sweeping constitutional authority over the federal courts to the Judicial Conference,[384] authorizing it to enforce standards of judicial conduct.[385]

4. The Judicial Discipline and Removal Reform Act of 1990 and the National Commission on Judicial Discipline and Removal

In the 1980s, Congress impeached three federal judges, renewing concern about misconduct and the effectiveness of Judicial Conference oversight.[386] In 1989, Congress amended the 1978 Ethics Act, further restricting federal employees, including federal judges and Justices, from receiving outside income, honoraria, and gifts while broadening the Judicial Conference's enforcement authority.[387]

As part of the Judicial Improvements Act of 1990,[388] Congress enacted the Judicial Discipline and Removal Reform Act,[389] which established the short-lived National Commission on Judicial Discipline and Removal.[390] The National

383. 28 U.S.C. § 351(a). Not until 2009 did the Judicial Conference adopt its own rules expressly defining what qualifies as judicial "misconduct." *See infra* notes 402–03 and accompanying text.

384. *See* Stephen B. Burbank & Sheldon Jay Plager, *Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science*, 142 U. PA. L. REV. 1, 3 (1993) (describing Act as granting the federal judiciary "formal authority to deal with cases of misconduct and disability" while reserving to Congress "the ultimate power of removal for the few cases warranting that action").

385. Remus, *supra* note 364, at 52, 54.

386. *Id.* at 57 & n.127; *see* Burbank & Plager, *supra* note 384, at 4 (citing "concerns about the difficulty of removing federal judges"); *see also* Remus, *supra* note 364, at 57 & n.128 (citing proposed bills and amendments pending in 1989).

387. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified as amended at 5 U.S.C. § 7353 (2012)); Remus, *supra* note 364, at 56; *see also* 5 U.S.C. app. § 109(8) (defining "judicial employee"), § 109(10) (defining "judicial officer" to include Supreme Court Justices); 5 U.S.C. § 7353(d)(1)(C) (defining "supervising ethics office" to include Judicial Conference for judicial branch personnel, including judges). In early 1990, the Judicial Conference amended the *Code for U.S. Judges* to incorporate this expanded regulatory authority. Remus, *supra* note 364, at 56 & n.121 (citing REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14, 15 (Mar. 13, 1990)).

388. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

389. *Id.* §§ 401–18 (codified at various sections of Title 28, U.S.C., including 28 U.S.C. § 372 note).

390. *See* Judicial Improvements Act of 1990, Title IV, Subtitle II, §§ 408–18, *codified at* 28 U.S.C. § 372 note (National Commission on Judicial Discipline and Removal Act).

Commission's final report[391] was generally favorable to the Judicial Conference, finding that its implementation of the 1980 Judicial Conduct Act was mostly effective. Among other recommendations, the Commission urged Congress to retain impeachment as the exclusive method for removing federal judges from office.[392]

5. The Judicial Improvements Act of 2002

For a time, Congress seemed at ease with allowing the federal judiciary to self-regulate judicial conduct[393] as long as the Conference was responsive to public and political concerns.[394] But the Conference had gradually amended the *Code of Conduct for U.S. Judges* until it deviated significantly from the *ABA Model Code*, and the Conference appeared increasingly resistant to outside suggestions for regulating judicial conduct.[395] Other legislation that would have involved Congress in regulating the conduct of federal judges failed.[396] In 2002, Congress added a new chapter to Title 28 governing the filing and processing of complaints against federal judges,[397] superseding a minor subsection of the 1980 Judicial Conduct Act. By defining "judge" narrowly, the 2002 legislation

391. *Report of the National Commission on Judicial Discipline and Removal*, 152 F.R.D. 265 (1993).

392. *Id.* at 280–81; Remus, *supra* note 364, at 58 & n.132; *see* Cynthia Gray, *National Commission on Judicial Discipline and Removal Calls for Moderate Changes*, 77 JUDICATURE 271, 271 (Mar.-Apr. 1994) (summarizing recommendations); *see generally* Burbank & Plager, *supra* note 384 (summarizing National Commission's work).

393. "In a word, the [1980] Act relies upon internal judicial branch investigation of other judges . . . ." JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE, IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1 (Sept. 2006), https://www.supremecourt.gov/publicinfo/breyer committeereport.pdf [hereinafter *2006 Study Committee Report*].

394. Remus, *supra* note 364, at 54; *see id.* at 61 (noting Congress's "willing[ness] to acquiesce in judicial self-regulation" after 1980 Act).

395. *Id.* at 58 (referring to the federal judiciary's "increasingly insular and assertive approach"); *id.* at 60 (noting that the "Conference appeared unresponsive to calls for the introduction of relatively moderate accountability measures . . . aimed at increasing judicial legitimacy and improving the quality of judicial conduct regulation").

396. *See id.* at 60.

397. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, §§ 11041–44, 116 Stat. 1758, 1848–56 (2002) (Judicial Improvements Act of 2002, codified as amended at 28 U.S.C. §§ 351–64 (2012)).

expressly put Supreme Court Justices beyond the Judicial Conference's regulatory authority.[398]

6. The 2009 Revisions to the Code of Conduct for U.S. Judges

While the *ABA Model Code* had become increasingly regulatory with subsequent revisions, the *Code of Conduct for U.S. Judges* continued in the form of "guiding principles by which judges should abide" rather than black-letter rules of conduct.[399] In the first decade of the new century, however, the Judicial Conference proposed revisions[400] that consolidated the Canons into just four, but otherwise made no "startling substantive changes."[401]

---

398. The 2002 Act added the following new provision: "[T]he term 'judge' means a circuit judge, district judge, bankruptcy judge, or magistrate judge." 28 U.S.C. § 351(d)(1). Its predecessor subsection in the 1980 Judicial Conduct Act did not specifically define "judge," but rather authorized anyone to file a complaint with the appropriate federal court of appeals alleging misconduct or disability against a federal circuit, district, bankruptcy, or magistrate judge. See Pub. L. No. 96-458, § 3, 94 Stat. 2035, 2036 (1980) (codified at 28 U.S.C. § 372(c) (repealed by Pub. L. 107–273, § 11043(a)(1)(B), 116 Stat. 1758, 1855 (2002)). The 1980 Judicial Conduct Act did not preclude anyone from filing complaints against Justices alleging misconduct or disability. *See* Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 Yale L.J. 1117, 1122 n.31 (1985) (noting that 28 U.S.C. § 372(c)(1) omitted any reference to Supreme Court Justices, and quoting House Committee Report for the rationale). The statutes, then and now, are simply silent on how any complaint against a Justice is to be handled. Congress undoubtedly retains plenary power to address that gap short of initiating impeachment proceedings against a Justice. *See* text accompanying notes 468–74 (describing various Congressional proposals that would do so).

399. Remus, *supra* note 364, at 65 & n.176; *see* Gordon J. Quist, *Interview: Giving Advice on Ethics Seldom Simple*, 40 THIRD BRANCH 1, 10 (June 2008). Judge Quist, who then chaired the Judicial Conference's Committee on Codes of Conduct, explained that "the Committee has always reviewed its Code after the [ABA] adopts and recommends its Model Code." *Id.* But he disclaimed concern that the *Code for U.S. Judges* simply follows *ABA Model Code* amendments. *Id.* He explained that the *Code for U.S. Judges* takes a more aspirational approach:

> The ABA has developed a more detailed regulatory approach in its Model Code. Regulations tend to be black and white. Our Canons are guiding principles by which [federal] judges should abide. . . . [We] try to get the whole Judiciary to adhere to and aspire to achieve these principles, recognizing that there are vast areas of judgment.

Id.

400. Remus, *supra* note 364, at 65.

401. Quist, *supra* note 399, at 10.

After the revisions were adopted in March 2009,[402] the *Code of Conduct for U.S. Judges* for the first time included rules specifically defining judicial "misconduct." The rules were most recently amended in 2015. As of this writing, "cognizable misconduct"

> (1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:
>
> > (A) using the judge's office to obtain special treatment for friends or relatives;
> >
> > (B) accepting bribes, gifts, or other personal favors related to the judicial office;
> >
> > (C) having improper discussions with parties or counsel for one side in a case;
> >
> > (D) *treating litigants, attorneys, or others in a demonstrably egregious and hostile manner*;
> >
> > (E) engaging in partisan political activity or making inappropriately partisan statements;
> >
> > (F) soliciting funds for organizations;
> >
> > (G) retaliating against complainants, witnesses, or others for their participation in this complaint process;
> >
> > (H) refusing, without good cause shown, to cooperate in the investigation of a complaint under these Rules; or
> >
> > (I) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.
>
> (2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.
>
> (3) does not include:
>
> > (A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling,

402. *See Code for U.S. Judges*, *supra* note 372.

> including a failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, *such as personally derogatory remarks irrelevant to the issues*, the complaint is not cognizable to the extent that it attacks the merits.
>
> (B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.[403]

Justice Scalia's many dissenting opinions excoriating his colleagues and others appear to meet the Conference's own definition of misconduct. His vituperative tone was neither necessary to state his points nor relevant to the issues they addressed. In particular, his frequent outbursts delivering "personally derogatory remarks irrelevant to the issues" did not qualify as "merits-related" action, otherwise excluded from the definition under subsection (3)(A). Instead, his disrespectful rhetoric appears to have violated subsection 1(D) by treating "others in a demonstrably egregious and hostile manner."

7. The Judicial Conference's Ongoing Role in Promoting Judicial Civility and Exemplary Conduct

In addition to its many other statutory duties,[404] the Judicial Conference regulates the ethical conduct of federal judges[405] and

403. *Rules for Judicial-Conduct and Judicial-Disability Proceedings, United States Courts*, http://www.uscourts.gov/sites/default/files/guide-vol02e-ch03.pdf (May 4, 2016) (emphasis added) [hereinafter *Conduct and Disability Rules*]; *see also Code for U.S. Judges*, *supra* note 372.

404. 28 U.S.C. § 331 (requiring Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" and to recommend "changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense"); *see generally Governance & the Judicial Conference*, UNITED STATES COURTS, http://www.uscourts.gov/about-federal-courts/governance-judicial-conference.

405. *See* 5 U.S.C. app. § 111(3) (2012) (designating Judicial Conference to administer the 1978 Ethics Act with respect to judicial officers and employees).

handles complaints[406] that allege "conduct prejudicial to the effective and expeditious administration of the business of the courts," or inability "to discharge all the duties of office by reason of mental or physical disability."[407] But most of the relevant statutes narrowly define "judge" to mean every sort of federal judge except Supreme Court Justices.[408] For that reason, Justice Scalia was not subject to Judicial Conference standards and discipline once he joined the Court in 1986.

8. Congressional Oversight of Article III Courts

The Constitution famously provides that federal judges hold office during "good behaviour."[409] Controversies between Congress and the federal courts over regulating judicial conduct ultimately revolve around which branch of government has the constitutional power to decide what constitutes good judicial behavior. Congress, with the acquiescence and support of the federal judiciary, has exercised some of this regulatory authority but has delegated most of it to the federal courts themselves.[410]

But neither the Supreme Court nor the Judicial Conference has set a high standard for judicial civility. Through nearly three decades, under two Chief Justices, Justice Scalia wrote hundreds of dissents that were at best discourteous and at worst egregiously disrespectful. Even though some members of the Supreme Court have championed civility and professionalism in the law,[411] Justice Scalia's judicial colleagues most often acquiesced in his behavior, remaining silent instead of expressing disapproval. Worse, some linked their work to his by joining his aggressively worded dissents, or by using

406. 28 U.S.C. §§ 351–364 (2012).

407. *Id.* at § 351(a); *see generally 2006 Study Committee Report*, *supra* note 393 (reporting findings of Committee appointed by Chief Justice Rehnquist and chaired by Justice Breyer in response to congressional concerns about deficiencies in complaint processing by chief judges of federal courts of appeals).

408. *See* note 398, *supra*. Only the judicial disqualification statute, 28 U.S.C. § 455, expressly applies to Supreme Court Justices. *See supra* note 376 and accompanying text.

409. U.S. CONST. art. III, § 1. But Congress can specify the scope of the Supreme Court's appellate jurisdiction. *Id.* at § 2. (enabling Congress to regulate and make exceptions to the appellate jurisdiction of the Supreme Court).

410. *See supra* notes 380–85 and accompanying text.

411. *See, e.g.*, *infra* notes 427–31 and accompanying text (discussing Justice Ginsburg); Thomas, *supra* note 3, at 515–16.

intemperate or disrespectful rhetoric of their own. They are in part responsible for the legacy of disrespect that Justice Scalia left in the Court's reported opinions.

V. JUDICIAL INCIVILITY, INSTITUTIONAL INTEGRITY, AND PUBLIC DISCOURSE

> *Judges need and welcome guidance on their ethical responsibilities, and sources such as the Judicial Conference's Code of Conduct provide invaluable assistance. But at the end of the day, no compilation of ethical rules can guarantee integrity.*[412]

A. Background: The Scalia Effect

Justice Scalia's aggressively blunt style of opinion writing and the media attention it drew meant that his reputation for incivility extended beyond legal circles. A team of political scientists studying the differences in rhetoric between the Rehnquist and Roberts Courts concluded that Justice Scalia fueled "divisiveness" on the Court, describing his style as "belligerent" and noting that he "relentlessly attack[ed] those who might disagree with his ideology or judging philosophy."[413] Justice Scalia's aggressive—albeit sometimes witty—rhetoric was read outside academia as well, passages from his dissents routinely appearing in the popular media.[414] Although members of the general public rarely read multi-page court opinions, Justice Scalia had a knack for using catchphrases that would attract public attention, even if the opinions in which they appeared had failed to attract a majority of votes on the Court. If

412. John G. Roberts, Jr., *2011 Year-End Report on the Federal Judiciary* 11, S. CT. OF THE U.S. (Dec. 31, 2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [hereinafter *2011 Report*].

413. Yalof et al., *supra* note 102, at 12–13.

414. *E.g.*, Katy Steinmetz, *This Is What "Jiggery-Pokery" Means*, TIME (June 25, 2015), http://time.com/3936188/scalia-jiggery-pokery/ (noting Justice Scalia's use of "interpretive jiggery-pokery" in *Obergefell* dissent); *see* Schapiro, *supra* note 322 (noting use of "I would hide my head in a bag").

his motive for using disrespectful rhetoric was public attention,[415] the record shows that he succeeded.

But a Supreme Court dissent should do more than generate attention. It should educate and enlighten judges, lawyers, law students, and law professors, and help clarify points of disagreement among the Justices.[416] If carefully and concisely expressed, its reasoning can influence the way the Justices and other readers think about legal issues even though it failed to garner the support of the majority. The dissent's role in clarifying points of disagreement and shaping legal thinking does not, however, justify separate opinions written in a pointedly vituperative tone. Disrespectful rhetoric, hyperbole, venom, and personal attacks in Supreme Court dissents reflect poorly on the entire judiciary.[417] And if the justification for publishing dissents is in part their capacity to persuade future readers,[418] a bombastic and disrespectful tone hardly advances that purpose.

Yet Justice Scalia refused to acknowledge both the internal and external effects of his biting dissents. Beginning in 1994, when he posited that the dissenting tradition reflected favorably on the Court, he reassured readers that dissents "do not, or at least need not, produce animosity and bitterness among the

---

415. *See, e.g.*, Kapgan, *supra* note 6, at 98–99; *but see 1924 Canons*, *supra* note 59, at Canon 34 (providing that a judge should not seek public praise or popularity).

416. *See, e.g.*, Greg Goelzhauser, *Silent Acquiescence on the Supreme Court*, 36 JUSTICE SYS. J. 3, 5 (2015) (describing value of dissents); *id.* at 7 (observing that dissents have higher value in "important" cases); Scalia, *supra* note 5, at 39 (explaining that issuing separate opinions "to set forth clear and consistent positions on both sides of the major legal issues of the day . . . has kept the Court in the forefront of the intellectual development of the law"); Sunstein, *supra* note 19, at 806 ("Certainly a dissenting opinion can serve as a rhetorical resource for those who object to a decision.").

417. *See, e.g.*, Jones, *supra* note 2, at 53 (pointing out that as Supreme Court's "political nature becomes more easily discerned—both because of the issues it is deciding and the language used in the Court's decisions—reverence to the institution, its Justices, and more importantly, its decisions, appears to be increasingly scarce").

418. *See, e.g.*, Scalia, *supra* note 5, at 36–37. Justice Scalia explained that dissents "can help to change the law," but as he readily conceded, "[t]hat effect is most common in the decisions of intermediate appellate tribunals." *Id.* at 36. On the other hand, Justice Ginsburg has estimated that up to four times each term, an opinion initially circulated internally as a dissent gains sufficient votes to become the opinion of the Court. Ginsburg, *supra* note 5, at 4. But dissents' internal value as part of the Court's decisionmaking process does not justify publishing verbose diatribes that reflect a lack of respect for judges and the American judicial system as a whole.

members of the Court."[419] Whatever Justice Scalia might have thought about dissents' effects on intra-Court relationships, it is much worse for a Supreme Court Justice to engage in disrespectful rhetoric than for any other appellate judge to do so. A heated dissent cannot diminish the precedential value of the Court's opinion. But if it takes a combative tone toward other Justices (or even toward appellate counsel), the dissenting opinion reflects unfavorably on the judicial author and threatens public respect for the Court as an institution.

Some of Justice Scalia's biting rhetoric and sharp witticisms might be entertaining to read, but they reflect poorly on the Court that failed to do anything about them. In particular, Chief Justices Rehnquist and Roberts, who led the Court during Justice Scalia's tenure, bear some responsibility for allowing his dissents routinely to cross "the rhetorical Rubicon between professional critique and personal attack."[420] Chief Justice Rehnquist even joined many Scalia dissents, turning a blind eye to any damage they might do. And while Chief Justice Roberts rarely joined a Scalia dissent,[421] some of his own separate opinions tread dangerously close to the line between expression of strong disagreement and disrespectful hyperbole.[422]

---

419. Scalia, *supra* note 5, at 40. Notably, Justice Scalia's 1994 article addressing dissents did not mention the then-new civility standards adopted by the Seventh Circuit in 1992. *See Standards for Professional Conduct Within the Seventh Federal Judicial Circuit: Judges' Duties to Each Other* [hereinafter *Seventh Circuit Standards*], http://www.ca7.uscourts.gov/rules-procedures/rules//rules.htm#standards. The *Seventh Circuit Standards* include recommendations on improving civility among judges, particularly in judicial opinions. As Justice Ginsburg once noted before joining the Court, there is room for improvement. Ginsburg, *supra* note 348, at 1194–95 (citing several Scalia dissents that excoriated the Court's reasoning).

420. Porto, *supra* note 10, at 28.

421. In their decade together on the Court, the current Chief Justice joined twenty-one dissents written by Justice Scalia, two of them only in part.

422. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., Scalia & Thomas, JJ., dissenting):

> Five lawyers [in the majority] have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.
>
> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." . . . As a result, the Court

Justice Scalia will be missed, but not because he was a role model for exemplary judicial conduct.[423] Historians will assess the impact of his tenure on the Court. We cannot yet know what his true legacy will be—how his judicial writing will be received by future law students, lawyers, judges, and scholars. But Justice Scalia likely will be remembered less for the influence of the reasoning behind his dissents than for his intemperance in expressing his views.[424]

Justice Scalia was apparently aware of the Court's fragile hold on its own institutional legitimacy. Among the most offensive comments in his dissents was a repeated critique of his colleagues' opinions for seeming to reflect or even underscore the Court's own "impotence."[425] He frequently reminded his fellow Justices of the Court's tenuous hold on its own posterity. History has already proved him right on that score. The conservative "lion on the Court"[426] most certainly did not elevate public or scholarly opinion of the Court. Instead, his scathing dissents cast it into disrepute.

Before joining the Court, Justice Ginsburg, who would become Justice Scalia's closest friend on the Court, expressed her distaste for disrespectful dissent. In 1992, soon after the beginning of the civility movement, then-Judge Ginsburg observed that if judges expect their decisions to be respected,

---

> invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia . . . . Just who do we think we are?

Id.

423. *See, e.g.*, Voros, *supra* note 349, at 23; Yalof et al., *supra* note 102, at 12–13.

424. *See, e.g.*, Greenhouse, *supra* note 323; Schapiro, *supra* note 322.

425. *E.g.*, *Obergefell,* 135 S. Ct. at 2631 (Scalia, J., dissenting). Justice Scalia's approach in *Obergefell* is a classic of this type:

> Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

Id. (citation omitted).

426. *E.g.*, David Helling, *Reaction to Antonin Scalia's Death: "A Lion on the Court and an Unwavering Defender of the Constitution"*, KAN. CITY STAR (Feb. 13, 2016), http://www.kansascity.com/news/politics-government/article60286391.html (quoting Senator Blunt).

they should write with a degree of reserve appropriate to the judicial office:

> [T]he effective judge . . . strives to persuade, and not to pontificate. She speaks in "a moderate and restrained" voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues.[427]

Then she cited examples of opinions she classified as "condemnations" of other judges "that generate more heat than light,"[428] including several separate opinions authored by Justice Scalia.[429] She found these examples regrettable, asserting that "even in the most emotion-laden, politically sensitive case, effective opinion writing does not require a judge to upbraid colleagues for failing to see the light or to get it right."[430] The soon-to-be next nominee to the Supreme Court was absolutely correct.[431]

---

427. Ginsburg, *supra* note 348, at 1186 (quoting Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963)).

428. *Id.* at 1194.

429. *Id.* at 1194–95 & nn.49–51, 54, 57 (citing Planned Parenthood v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in part and dissenting in part) ("I must . . . respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered." . . . "To portray *Roe* as the statesmanlike 'settlement' of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian."); Lee v. Weisman, 505 U.S. 577, 633, 636, 638, 644 (1992) (Scalia, J., dissenting) (describing Court's opinion as "oblivious to our history," "incoherent," "nothing short of ludicrous," and "a jurisprudential disaster"); Morgan v. Ill., 504 U.S. 719, 751–52 (1992) (Scalia, J., dissenting) ("Today, . . . the Court strikes a further blow against the People in its campaign against the death penalty."); Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part) ("Justice O'Connor's assertion . . . that a fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously.")).

430. Ginsburg, *supra* note 348, at 1197.

431. Just as her article went to press, Judge Ginsburg was nominated by President Clinton to serve on the Supreme Court with Justice Scalia himself. *Id.* at 1185 n.* Whether Judge Ginsburg would have penned the same article after her confirmation as Justice is highly doubtful. In 2010, she wrote again about dissents, raising and then sidestepping the question whether dissents have a negative effect on the Court's internal working relationships:

> Are there lasting rifts sparked by sharply worded dissents? Justice Scalia spoke to that question nicely. He said: "I doubt whether any two [J]ustices have dissented from one another's opinions any more regularly, or any more sharply, than did my former colleague Justice William Brennan and I. I always considered him, however, one of my best friends on the Court, and I think that feeling was reciprocated." The same might be said today about my friendship with Justice Scalia.

B. The Code of Conduct for U.S. Judges

1. Relevant Provisions

The *1924 Canons* directly addressed the ethics of opinion writing:

> It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissents should be discouraged in courts of last resort.[432]

But nothing like that provision has so far appeared in any version of the *Code of Conduct for U.S. Judges*.[433]

The current *Code* is primarily aspirational rather than mandatory.[434] Yet Canon 3 addresses judicial civility, providing that a judge, when acting in an official capacity, should "be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others" and should "require similar conduct of those subject to the judge's control."[435] The related commentary elaborates, providing that the duty to be respectful imposed by Canon 3 "includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias."[436] And it also explains that a judge who has "reliable evidence" that another judge has failed to comply with the canons should take "appropriate action,"

Ginsburg, *supra* note 5, at 4 (quoting Scalia, *supra* note 5, at 41 (citation omitted)).

432. *1924 Canons*, *supra* note 59, at Canon 19 para. 4; *see also supra* note 366 and accompanying text.

433. The *ABA Model Code* provisions on civility have also evolved over the years. But because Justice Scalia spent his entire judicial career on the federal bench, a full discussion of that process is beyond the scope of this article. For general information about those developments, see Thode, *supra* note 371.

434. The canons are presented as black-letter aspirational standards. *See, e.g.*, *Code for U.S. Judges*, *supra* note 372, at Canons 1 & 2 ("A Judge *Should* Uphold the Integrity and Independence of the Judiciary," and "A Judge *Should* Avoid Impropriety and the Appearance of Impropriety in All Activities" (emphasis added)).

435. *Id.* at Canon 3(A)(3).

436. *Id.* at Canon 3(A)(3) cmt.

such as "direct communication with the judge . . . [or] reporting the conduct to the appropriate authorities."[437]

Just as the *Code of Conduct for U.S. Judges* omits any standard on writing separate opinions, it also fails to provide explicit guidelines for the conduct of judges in their interactions with one another. Ironically, the United States Court of Appeals for the Seventh Circuit set the right example twenty-five years ago when it adopted its *Standards for Professional Conduct.*[438] With regard to judicial opinions, the *Seventh Circuit Standards* require judges to be "courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly." They also provide that a judge must in "all written and oral communications . . . abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge."[439]

2. Reach of the Code of Conduct for U.S. Judges

In 2011, Chief Justice Roberts took it upon himself to announce in his annual report to Congress[440] that "[t]he Code of

437. *Id.* at Canon 3(B)(5) cmt. Just who the "appropriate authorities" are with respect to the conduct of Supreme Court Justices is the central question of this Part.

438. *Seventh Circuit Standards*, *supra* note 419:

> Judges' Duties to Each Other
>
> 1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.
>
> 2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.
>
> 3. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

Id.

439. *Id.* The author's exhaustive research failed to unearth any evidence that the Supreme Court has ever taken a position on the *Seventh Circuit Standards* generally or their judicial civility provisions in particular.

440. *See* 28 U.S.C. § 331 ("The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.").

Conduct, by its express terms, applies only to lower federal court judges."[441] He went on to explain the rationale:

> That reflects a fundamental difference between the Supreme Court and the other federal courts. Article III . . . creates only . . . the Supreme Court . . . , but it empowers Congress to establish additional lower federal courts . . . . Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.[442]

But the Compliance section of the *Code*, which dictates who must comply with its provisions, defines "judge" broadly to mean "[a]nyone who is an officer of the federal judicial system authorized to perform judicial functions."[443] Supreme Court Justices surely qualify under that definition.

---

441. *2011 Report*, *supra* note 412, at 3. As the Chief Justice recognized, the *Code for U.S. Judges*, by its express terms, does not apply to Supreme Court Justices. But as he conceded, statutes requiring financial disclosures do. *Id.* at 6. Moreover, Congress in 1974 amended what was then Canon 3C of the *Code for U.S. Judges* into the disqualification statute, 28 U.S.C. § 455, and expressly applied those provisions to Supreme Court Justices, *see id.* at § 455(a); *see also* Pub. L. No. 93-512, § 1, 88 Stat. 1609 (1974). Thus, while Canon 3C itself does not expressly apply to the Justices, § 455 and its mandatory disqualification provisions unquestionably do.

The Chief Justice also reported in 2011 that the Court had adopted "an internal resolution" agreeing to comply with Conference rules on gifts and extrajudicial compensation. *2011 Report*, *supra* note 412, at 6–7. But he did not mention that the 1978 Ethics Act, with its restrictions and reporting requirements for extrajudicial compensation and gifts, expressly applies to Supreme Court Justices. *See* 5 U.S.C. app. §§ 101(f)(11), 109(10) (2012). Adopting an internal resolution to voluntarily comply with Conference rules that mirror existing federal statutes suggests that some Justices might question the constitutionality of statutory ethics requirements that expressly apply to the Supreme Court. But no direct evidence suggests that the Court has ever challenged the applicability of ethics statutes to the Justices, including the 1978 Ethics Act as well as the disqualification statute, which Congress amended in 1940 to expressly apply to all federal judges, including the Justices. 28 U.S.C. § 455 note.

442. *2011 Report*, *supra* note 412, at 3–4. No doubt the Chief Justice was relying on the scope provision of the *Code*, which does not mention Supreme Court Justices. *See Code for U.S. Judges*, *supra* note 372, at 1–2. But his point begs the question. The Conference is "an instrument for the management of the lower federal courts" only because Congress in 2002, perhaps at the Supreme Court's behest, expressly restricted its reach to judges of the lower federal courts. Before then, no such restrictive definition appeared in the relevant statute. *See* 28 U.S.C. § 372(c)(1) (repealed 2002); *see also supra* notes 397–98 and accompanying text.

443. *Code for U.S. Judges*, *supra* note 372, at Canon 5 cmt.

3. Federal Judicial Center Guidelines on Opinion Writing

The Federal Judicial Center manual on judicial writing[444] generally supports the right of judges and justices to write separate opinions. The *Writing Manual* nonetheless cautions judges against doing so for the wrong reasons, acknowledging that "[d]issenting opinions are written at a potential cost."[445]

> A dissent that sounds strident or preachy may contribute to divisiveness and ill feelings in the court, may undermine the authority of the majority opinion and of the court as an institution, and may create confusion. Whether judges should dissent depends on the nature of the case and the principle at issue. *Judges generally should not write dissenting opinions when the principle at issue is settled and the decision has little significance outside the specific case.* Cases that involve emerging legal principles or statutory interpretation in areas that will affect future activities of the bar, the public, and the government are more likely to warrant dissenting opinions than cases of limited application. The issue should be significant enough that the judge's "fever is aroused" as one judge said, but *the motivation for writing a dissent should be to further the development of the law rather than to vent personal feelings.* Judges considering whether to dissent should ask themselves whether the likely benefits outweigh the potential costs.[446]

---

444. FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES (2d ed. 2013) [hereinafter *Writing Manual*]. The Federal Judicial Center is a creature of Congress, directed by statute "to further the development and adoption of improved judicial administration in the courts of the United States" by providing research, training, and staff support to the Judicial Conference and its committees. Pub. L. 90-219, 81 Stat. 664 (1967) (codified as amended at 28 U.S.C. §§ 620–629 (2012)). The Chief Justice chairs the Center's governing board. 28 U.S.C. § 621(a)(1); *see About the FJC*, FED. JUDICIAL CTR., https://www.fjc.gov/about.

445. *Writing Manual*, *supra* note 444, at 29.

446. *Id.* (emphasis added). Similarly, Judge Wald has wisely cautioned judges against using intemperate rhetoric in their opinions, citing the animosity that can result:

> The temptation can be overpowering for a writing judge to give vent to longstanding frustrations with a colleague by pejorative references to his point of view as "hopelessly muddled"; "reminiscent of Marie Antoinette's advice to let them eat cake"; "beyond all reason"; "pure speculation and fantasy"; "a Linnaean leap"; "shoddy"; an "ad hoc judgment"; "devoid of precedent"; "ungoverned by law." Chronic antagonists relentlessly dig out old cases or even old law review articles to show inconsistencies in each other's positions. Tensions build on a court as judges of all stripes work together over decades.

And when a judge decides to write a dissent, the *Writing Manual* urges caution in choosing the content and tone of the opinion:

> A dissenting opinion should not simply slash at the majority opinion or its author. *Personal attacks, offensive language, or a condescending tone should not be used*, although some judges believe that expressing moral outrage and restrained indignation may sometimes be appropriate.[447]

C. Effects of Incivility in Dissent on Judicial System Integrity

In 1953, long before the beginning of today's civility movement, Professor Pound expressed concern about the impact of "heated" dissents on the integrity of the judicial system.

> Maintenance of our characteristic American constitutional-legal polity demands that the courts hold, as they have in the past, the respect and confidence of the public. *What amounts to attacks on our courts from within*, however well-intentioned and motivated only by sincere convictions as to the precise content and application of particular legal precepts[,] *are highly unfortunate at this time if they ever had a place in the common-law judicial process*.[448]

Far too many dissents authored by Justice Scalia amounted to stinging attacks from within. He routinely attacked his colleagues (often singling them out by name) for expressing

---

> The result is often, unconsciously or even consciously, to let their heartfelt likes or dislikes for other judges seep into their rhetoric.

Wald, *supra* note 90, at 1381.

447. *Writing Manual*, *supra* note 444, at 29 (emphasis added). Judges should, for similar reasons, exercise restraint in writing concurring opinions:

> Most of the considerations applicable to dissenting opinions also apply to concurrences. . . . A judge should not write a concurring opinion simply to add a point of view or personal statement that does not further either the decisional or educational value of the majority opinion. In deciding whether to write a concurring opinion, the judge should ask the question: Am I writing this for myself or for the good of the court?

Id. at 30; *see also* Scalia, *supra* note 5, at 33 (disapproving "separate concurrences that are written only to say the same thing better than the court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue before the court" and asserting that he regarded "such separate opinions as an abuse, and their existence as one of the arguments against allowing any separate opinions at all").

448. Pound, *supra* note 31, at 797 (emphasis added) (criticizing injudicious dissents repeatedly issued by California Supreme Court Justice Jesse Carter).

points of view that differed from his own and often criticized the Court's prior opinions, including those authored by his fellows just a few years earlier.

Disrespectful Scalia-style judicial opinions not only reflect poorly on the integrity of the Court and the judicial system; they send the wrong message about acceptable professional demeanor.[449] Justice Scalia sometimes said that he wrote his dissents for law students[450]—the group most vulnerable to the influence of his negative tone. Yet from the beginning of his judicial career, he must have understood his duty to set a good example. Calls for judges to model appropriate behavior are not new:

> Judges must, by example and by comments in written opinions, set the proper tone of civility in the courtroom. One has only to peruse the pages of current volumes of reported cases to come upon vitriolic and demeaning condemnations by the score of a court, judicial colleagues' opinions, or attorneys. Like it or not, judges are role models in our profession. Judges cannot ask lawyers to accept a standard of professional conduct to which they do not abide.[451]

Now that Justice Scalia is no longer a member of the Supreme Court, the Justices must take the initiative to ensure that every one of its published opinions, whether written for the Court or as a separate opinion, sets an example of civility for all other courts and judges.

The *1924 Canons*, the *ABA Model Code*, the *Code of Conduct for U.S. Judges*, and the *Seventh Circuit Standards* differ in some respects, but they share an essential norm expecting judges to promote "public confidence in the integrity and impartiality of the judiciary,"[452] and to be "patient,

---

449. CHEMERINSKY, *supra* note 2, at 323 (referring to the sarcasm and derogatory tone characteristic of Justice Scalia's written opinions: "I think that this sends exactly the wrong message to law students and attorneys about what type of discourse is appropriate in a formal legal setting and what is acceptable in speaking to one another").

450. *See* Scalia, *supra* note 5, at 39; Senior, *supra* note 97.

451. Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 519–20 (1994) (reporting on the then-recently adopted *Seventh Circuit Standards*); *see also, e.g.*, Ginsburg, *supra* note 348, at 1194.

452. *Code for U.S. Judges*, *supra* note 372, at Canon 3(A)(3) cmt.; *see also ABA Model Code*, *supra* note 371, at Canon 1, R. 1.2 (requiring judges to "avoid impropriety and the appearance of impropriety."); *id.* at Canon 1, R. 1.2 cmt. 5 (describing test for appearance

dignified, respectful, and courteous,"[453] especially when acting in an adjudicative capacity. This norm does not call for artificial judicial consensus; indeed, appellate judges are expected to approach cases differently and sometimes to disagree on outcomes. But every set of canons, rules, and standards for judicial conduct has incorporated an expectation of judicial civility, respect, dignity, and courtesy. And measured against any of these guideposts, many of Justice Scalia's dissents were outside the norm.

The Justices should accept their duty to model civility and courtesy instead of resisting calls to comply with standards of conduct that apply to all other federal judges.[454] Because the public hears from the Court only through its opinions, every Justice's published opinions must exemplify civility and dignity.[455]

---

of impropriety as "whether the conduct would create in reasonable minds a perception that the judge . . . engaged in . . . conduct that reflects adversely on the judge's . . . impartiality, temperament, or fitness to serve as a judge."); *id.* at Canon 2, R. 2.3(A), (B) (requiring judge to "perform the duties of judicial office . . . without bias or prejudice" and barring judge "by words or conduct" from showing "bias or prejudice"); *id.* at Canon 2, R. 2.3 cmt. 2 (defining bias or prejudice to include "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts . . . and irrelevant references to personal characteristics").

453. *Code for U.S. Judges*, *supra* note 372, at Canon 3(A)(3). The *ABA Model Code* includes similar provisions emphasizing patience, dignity, and courtesy. *ABA Model Code*, *supra* note 371, at R. 2.8(B). The *Seventh Circuit Standards* are even more expansive. *Seventh Circuit Standards*, *supra* note 419, at R. 1, 2 (requiring judges to be "courteous, respectful, and civil in opinions" and to "abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments"). And the *1924 Canons* also included a courtesy provision. *1924 Canons*, *supra* note 59, at Canon 10 (providing that judges "should be courteous" to "everyone involved in the administration of justice").

454. *See, e.g.*, *2011 Report*, *supra* note 412, at 3–4. This resistance may reflect the Justices' knowledge that the *Code* expects judges to act when one of their number fails to meet its standards. *See* text accompanying note 437, *supra*; *cf.* Heffernan v. City of Paterson, ___U.S. ___, 136 S. Ct. 1412, 1418 (2016) ("[I]n the law, what is sauce for the goose is normally sauce for the gander.").

455. A Justice's freedom to dissent does not—or should not—include authority to express disrespect for judicial colleagues, appellate counsel, parties, or the Court as an institution. *See* William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 FLA. L. REV. 957, 962 (1999) ("[S]ome judges have been known to cast aspersions upon the competence, diligence, integrity, or temperament of other judges. Judges should categorically abstain from such comments because they detract from the dignity of the judicial system and tend to impugn its integrity."); *see also* Brennan, *supra* note 1, at 435 ("Dissent for its own sake has no value, and can threaten the collegiality of the bench.").

D. Possible Solutions

It is too late to prevent the publication of intemperate Scalia dissents. But anticipating improved judicial civility in the future, this section highlights several proposals and legislative initiatives to address judicial misconduct, including suggestions that existing standards of conduct should apply to Supreme Court Justices.[456]

1. Internal Action by the Court

Dean Chemerinsky has pointed out that in several respects, the Court is guilty of a "monumental failure to communicate with the American public."[457] He has criticized the extreme sarcasm in Justice Scalia's dissents[458] and has advocated for improvements in Supreme Court communications, including "presumptive word and page limits" for published opinions.[459]

Additionally, Dean Chemerinsky has recommended that the *Code of Conduct for U.S. Judges* apply to the Justices.[460] The

---

456. Congress has already applied financial disclosure requirements and disqualification standards to the Justices. *See supra* notes 376 & 441; *see also* 5 U.S.C. app. 4 § 101(a), (d), (f)(11); 5 U.S.C. app. 4 § 109(10); 28 U.S.C. § 455(a). The constitutionality of those longstanding ethics statutes has never been seriously questioned. *See, e.g.*, Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 242 (1993) ("[P]ermitting Congress to authorize judicial disciplinary procedures would not pose a significant threat to judicial independence or the separation of powers.").

457. CHEMERINSKY, *supra* note 2, at 313.

458. *Id.* at 323 ("No justice in Supreme Court history has consistently written with the sarcasm of Justice Scalia.").

459. *Id.* at 324–25 (recognizing that the Court "believes that the discipline of word and page limits leads to better briefs," and opining that "[t]he same is true for the Court"). But he offers no specifics.

The Court could adopt internal operating rules that limit the number of published pages allocated to separate opinions. It is difficult to justify publishing a disrespectful opinion of a lone dissenter, particularly when publishing dissents seemed only to encourage Justice Scalia to write more frequent, longer, and ever more disrespectful dissents that often disparaged the Court itself. The Court could also disqualify any disrespectful separate opinion from publication. A dissent of this type could be preserved as part of the case record, but might appear only on the Court's website or elsewhere instead of being published with the opinion of the Court.

460. *Id.* at 328. Dean Chemerinsky observes that "with the exception of a few laws, the laws regulating ethics that all other judges must follow are not applicable to the Supreme Court." *Id.* But the relevant statutes that do apply are significant. The Ethics in Government Act, which requires financial disclosures by federal employees, expressly applies to the

American Judicature Society has advanced the same proposal.[461] This author agrees. No constitutional, statutory, or even jurisprudential impediment prevents the Court from adopting an internal resolution to apply the *Code* to its own members.[462] If

---

Justices. *See* 5 U.S.C. app. 4 §§ 101(a), (d), (f)(11), 109(10). The judicial disqualification statute does as well. 28 U.S.C. § 455(a); *see also* note 440, *supra*.

Although the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 does not reach Supreme Court Justices, *see* 28 U.S.C. § 351(d)(1), this means only that the Judicial Conference lacks express authority to apply the *Code for U.S. Judges* to them. But just as Congress extended statutory ethics requirements to the Justices, it could amend § 351(d)(1) to extend the Conference's authority to include the Supreme Court. *See* note 398, *supra*, and accompanying text; *but see 2011 Report*, *supra* note 412, at 5, 11 (expressing opposition to extending the *Code* to Justices).

461. Editorial, *Supreme Court Justices and the Code of Conduct*, 95 JUDICATURE 4, 4 (July–Aug. 2011) [hereinafter *Justices and the Code*] (calling on Court to apply *Code for U.S. Judges* to Justices).

462. *See* note 441, *supra*. The Justices themselves are apparently not of one mind as to whether the Court has already done so. Asked at a 2011 congressional hearing why the *Code for U.S. Judges* does not apply to the Supreme Court, Justices Kennedy and Breyer testified in ways that were not entirely in harmony. Justice Kennedy responded that the *Code* applies to the extent that the Court has adopted an internal resolution to voluntarily comply. Justice Breyer explained his belief that the *Code* applies, calling statements to the contrary a reflection of "wrong thinking." He also reported that he consults the ethics rules for federal district judges, as well as outside ethics experts and other resources. *Supreme Court 2012 Budget*, *Hearing Before the H. Appropriations Subcomm. on Fin. Servs. & Gen. Gov't*, 112th Cong., 1st Sess. (Apr. 14, 2011), *available at* https://www.c-span.org/video/?299037-1/supreme-court-2012-budget&start=1687# (partial transcript on file with author).

Justices Breyer and Kennedy may have misunderstood the question as well as the relevant *Code* provisions. First, the mandatory disqualification provisions of 28 U.S.C. § 455 have expressly applied to the Justices for more than forty years, even though Canon 3C of the *Code* does not. *See* note 441, *supra*, and accompanying text. Second, the *Code* addresses a multitude of ethical issues that go well beyond disqualification. While Justice Kennedy's response referred to an internal Court resolution to comply with the *Code*, the Chief Justice's 2011 annual report issued several months later explained that "the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance" because Justices consult other sources as well. *2011 Report*, *supra* note 412, at 5. The Chief Justice's only reference to an "internal resolution" cited a 1991 Court resolution to "follow the Judicial Conference regulations [on gifts and outside income] as a matter of internal practice." *Id.* at 6–7. But the statutory provisions that deal with financial disclosures and restrictions on gifts have expressly applied to the Justices since 1978. *See* note 441, *supra*, and accompanying text; *see also* 5 U.S.C. app. §§ 501–02, 503(3), 505(2). The *2011 Report* does not mention any Court resolution to comply with the *Code*.

In their Congressional testimony, both Justice Kennedy and Justice Breyer emphasized the unique role of Justices who, unlike other federal judges who can be replaced if they recuse, have a "duty to sit" to avoid a tie vote. But research has suggested that "in only a small fraction of cases in which one justice recuses him- or herself . . . does a tie result," and "recusals generally do not produce equally divided Courts." Ryan Black

the Court exercises its inherent constitutional authority to self-regulate by adopting the *Code*, it is hard to imagine how that decision could be subject to constitutional challenge.[463] To the contrary, it would reflect well on the integrity of the Supreme Court and that of the entire federal judiciary.

Compliance with the *Code* would not be onerous.[464] Canon 3C already applies to the Justices because Congress amended its language into the disqualification statute, which expressly applies to them.[465] The only other mandatory *Code* provisions require judges to avoid impropriety and the appearance of impropriety—surely not too much to ask of Justices who enjoy life tenure.[466] Aside from the *Code*'s provisions for disqualification, which mirror the statutory requirements, all of its other provisions are aspirational. And the Chief Justice reported as recently as 2011 that individual Justices already "consult" the *Code* for guidance on ethical issues.[467]

2. Legislative Initiatives

Some earlier legislative initiatives addressing judicial conduct were reintroduced in 2017. Among them was the Supreme Court Ethics Act,[468] which would require the Court to

---

& Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 80–81 (2005).

463. If the Court fails to adopt such a resolution, Congress could close the loophole simply by redefining the term "judge" for purposes of the statute governing the filing and processing of complaints, and by designating the Judicial Conference or the Court itself to handle those complaints. *See* 28 U.S.C. § 351(d)(1) ("[T]he term 'judge' means a circuit judge, district judge, bankruptcy judge, or magistrate judge . . . ."); *see also* 28 U.S.C. § 620(b)(4) (directing Federal Judicial Center to provide staff, planning and research support to Judicial Conference and its committees). But even if the Judicial Conference lacks explicit regulatory "jurisdiction" over the Supreme Court, nothing prevents the Court itself from complying with the norms of conduct that the federal judiciary's own policymaking body has endorsed. *See* 28 U.S.C. § 331.

464. *Justices and the Code*, *supra* note 461, at 5 ("[T]he rules are not burdensome.").

465. *See* 28 U.S.C. § 455(a).

466. *See* U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour . . . .").

467. *2011 Report*, *supra* note 412, at 5, 11.

468. News Release, Ofc. of Sen. Christopher S. Murphy, *Murphy, Blumenthal, Slaughter Introduce Supreme Court Ethics Bill to Restore Public Confidence in the Nation's Highest Court* (Apr. 5, 2017), https://www.murphy.senate.gov/newsroom/press-releases/murphy-blumenthal-slaughter-introduce-supreme-court-ethics-bill-to-restore-public-confidence-in-the-nations-highest-court.

adopt a code of ethics incorporating the canons of the *Code of Conduct for U.S. Judges*, with appropriate modifications.[469] And some in Congress have called on the Court either to adopt the *Code* or to subscribe to its own ethical rules.[470]

Another was the Judicial Transparency and Ethics Enhancement Act,[471] proposing an Inspector General for the Judicial Branch who would be subject to removal by the Chief Justice.[472] The idea has generated some support[473] as well as

---

469. Supreme Court Ethics Act of 2017, S. 835, 115th Cong., 1st Sess. (2017). As of Jan. 1, 2018, the Senate bill had ten co-sponsors, including several members of the Senate Judiciary Committee. *All Information (Except Text) for S.835*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/835/all-info?r=2; *see also* Supreme Court Ethics Act of 2017, H.R. 1960, 115th Cong., 1st Sess. (2017). Virtually identical to the Senate bill, the House bill had eighty co-sponsors by January 1, 2018. *All Information (Except Text) for H.R. 1960—Supreme Court Ethics Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/1960/all-info?r=1.

470. H. Res. 568, 115th Cong., 1st Sess. (2017). Similar proposals have been introduced in Congress for years. *See, e.g.*, Remus, *supra* note 364, at 69 & n.185 (citing H.R. 862, 112th Cong. (2001), which would have imposed a code of judicial conduct on Supreme Court Justices).

471. Judicial Transparency and Ethics Enhancement Act, S. 2195, 115th Cong., 1st Sess. (2017) [hereinafter Transparency and Ethics Act]. Senator Grassley first introduced a bill to create an Inspector General for the federal judiciary in 2006. *All Information (Except Text) for S.2195—Judicial Transparency and Ethics Enhancement Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/2195/all-info.

472. Transparency and Ethics Act, *supra* note 471. Similar legislation was introduced as early as 1995. *See, e.g.*, Diane M. Hartmus, *An Inspector General for the Federal Courts,* 81 JUDICATURE 188, 188 (Mar.-Apr. 1998). The idea has been considered by Congress repeatedly ever since.

Senator Grassley's remarks when the legislation was introduced reflected his reasons for sponsoring the bill. He observed that two federal entities that receive less funding than the federal judiciary both have their own Inspectors General (IG). He also expressed concerns about judicial conduct and the effectiveness of Judicial Conference oversight of misconduct-complaint processing:

> [T]he current practice of self-regulation of judges with respect to ethics and the judicial code of conduct has time and time again proven inadequate. In fact, in the past seven years, the Senate received articles of impeachment for not one but two Federal judges.
>
> . . . . .
>
> Judges are supposed to maintain impartiality. They're supposed to be free from conflicts of interest. An independent watchdog for the federal judiciary will help its members comply with the ethics rules and promote credibility within the judicial branch of government. The . . . Act will not only help ensure continued public confidence in our federal courts and keep them beyond reproach, it will strengthen our judicial branch.

115th Cong., 1st Sess., Cong. Rec. S7892–93 (Dec. 6, 2017), https://www.congress.gov/crec/2017/12/06/CREC-2017-12-06-pt1-PgS7892.pdf (statement of Sen. Grassley).

considerable controversy, including published accounts of opposition by some Justices and former Justices.[474]

E. The Chief Justice's 2018 New Year's Resolution: Revisiting Conduct Standards for Federal Judges

Two days after the Inspector General bill was re-introduced in 2017, the media reported allegations of sexual improprieties by Judge Kozinski.[475] More women soon came forward, and the Ninth Circuit began an investigation. Judge Kozinski apologized and announced his immediate retirement.[476]

---

473. Hartmus, *supra* note 472, at 219–20 (supporting concept but suggesting revisions to then-most-recent bill); *see also* Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 267–69 (1999) (same). Professor Rotunda supported a similar proposal, criticizing the handling of a misconduct complaint against a federal judge in the Ninth Circuit. Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301, 310, 316–25 (2010) (explaining the benefits of an IG in bolstering public confidence that judicial misconduct will be addressed).

474. *See, e.g.*, Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 789–97 (2015) (reviewing IG proposals and explaining objections); Eric Robbins, In re Nottingham*, the Model Code of Judicial Conduct, and the Judicial Conduct and Disability Act of 1980*, 23 GEO. J. LEGAL ETHICS 783, 794 (2010) (arguing against IG proposal as impermissibly intruding on judicial independence); Rotunda, *supra* note 473, at 301–02 & nn.5–8 (reporting former Justice O'Connor's opposition); Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 464 (2009) (noting that renewed efforts to create IG had "elicited a condemning response from the judiciary"); Donald E. Campbell, *Should the Rooster Guard the Henhouse: Evaluating the Judicial Conduct and Disability Act of 1980*, 28 MISS. C. L. REV. 381, 407 (2009) ("[T]he proposed legislative cure is more harmful than the disease."); Bruce Moyer, *Inspector General Bills Rile Judiciary*, 53 FED. LAW. 10, 10 (June 2006) (reporting "[w]idespread alarm [that] has gripped the federal judiciary" over IG proposals and reporting its opposition to similar initiatives in 1996); Tori Richards, *Warily Eyeing the Idea of an I.G.: Congressional Bills Would Create an Inspector for Federal Courts*, 5 ABA J. E-REPORT 4 (May 19, 2006) (referring to Justice Ginsburg's comment that the idea was "really scary," and reporting ABA's opposition).

475. *See, e.g.*, Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.4706576730f8.

476. *See, e.g.*, Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017), https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/

The Chief Justice, no doubt anticipating renewed Congressional concern about Judicial Conference oversight of judges' conduct, addressed the issue in his 2017 year-end report to Congress, announcing the formation of a working group to study this "new challenge":

> Events in recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune. The judiciary will begin 2018 by undertaking a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee. . . . These concerns warrant serious attention from all quarters of the judicial branch.[477]

Whether the working group's study of judicial misconduct will be broad enough include a review of the sort of intemperate and disrespectful language that Justice Scalia used in his judicial writing remains to be seen. But the Scalia approach—bullying and bombast, invective and attack—and its effect on the Court and the judicial system[478] should be considered as part of the group's work and its recommendations for addressing and preventing inappropriate judicial behavior.

F. Suggestions for Constructive Alternatives

Justice Scalia's reputation for vitriolic opinions still resonates around the world.[479] The Court can no longer ignore

---

2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.a3b10c15ea56.

477. John G. Roberts, Jr., *2017 Year-End Report on the Federal Judiciary* 11–12, S. CT. OF THE U.S. (Dec. 31, 2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf. The working group was assembled by the director of the Administrative Office of the U.S. Courts. *See, e.g.*, Joan Biskupic, *Chief Justice Roberts Calls for Review of Procedures for Protecting Court Employees From Misconduct*, CNN (Dec. 20, 2017), https://www.cnn.com/2017/12/20/politics/roberts-judicial-misconduct/index.html.

478. *See* Ross, *supra* note 455, at 957–58 ("[I]ncivility among judges is in many ways more troubling than is incivility in other branches of the legal profession or the government because civility is one of the hallmarks of judicial temperament.").

479. *See, e.g.*, Mark Sherman, *Justice Antonin Scalia Dead at 79*, TIMES OF ISRAEL (Feb. 14, 2016, 1:54 AM IST), https://www.timesofisrael.com/justice-antonin-scalia-dead-at-79/ (referring to the "mocking Scalia who in 1993 criticized a decades-old test used by

the public perception that his scorched-earth approach to dissents was approved (and perhaps encouraged) by the rest of the Court. Every Justice should instead counsel fellow Justices against issuing opinions that cast the Court in a negative light.[480]

And whatever becomes of the recently appointed working group's investigation, the Judicial Conference should undertake its own study of judicial incivility, focusing on its impact on the public perception of the federal courts, the profession of law, and the legal system as a whole. As the policymaking body for the federal courts, the Conference has the statutory obligation to recommend changes that will "promote . . . fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[481]

The Conference is particularly well positioned to consider the positive effect of the *Seventh Circuit Standards* that directly apply to judges. If they have substantially improved civility in the Seventh Circuit, the Conference should consider adding at least some of those provisions to the *Code of Conduct for U.S. Judges*. And the Conference should also see that the same expectation of civility applies equally to the Justices of the Supreme Court, whose conduct, right or wrong, sets the national standard. Appointment to the nation's highest Court demands conduct worthy of the dignity of the office. Its members serve as exemplars for civil public discourse. They may disagree in dissent, but they must not demean. The reputation of the federal judiciary depends on the Justices' regulation of their own conduct.

It has often been said that judges are teachers.[482] But what have other judges, lawyers, and future lawyers learned from Justice Scalia's dissenting opinions? Far too many served only

---

the court to decide whether laws or government policies violated the constitutionally required separation of church and state," and quoting Scalia rhetoric).

480. This is so even if the Court no longer includes a Justice cast in the Scalia mold. *See, e.g.*, Irin Carmon, *Justice Ginsburg's Cautious Radicalism*, N.Y.TIMES (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html (noting that Justice Scalia's "fury on the bench" had by then "intensified," and reporting that Justice Ginsburg had suggested that he "tone down" his dissents because he would be "more effective" if he were "not so polemical").

481. 28 U.S.C. § 331.

482. *See, e.g.*, Carmon, *supra* note 480 (reporting that "Justice Ginsburg likes to say she is still a teacher" and that she "'tr[ies] to teach through [her] opinions'").

to teach a generation of Americans that incivility in judicial writing is acceptable at the highest levels. A regrettable legacy indeed.

VI. CONCLUSION

In the current atmosphere of vituperative public discourse and misconduct by celebrities, senior corporate officers, political leaders, and even respected appellate judges, Congress will continue to debate initiatives to address improper judicial conduct. Existing means of judicial self-regulation have proved insufficient. The federal judiciary must take affirmative steps to address all inappropriate judicial behavior—intemperance included.

Dissent need not rely on the invective, insult, and bullying that were all too common in the Scalia years. These rhetorical devices deaden our sense of proportion and our sense of decency. The decline in civility of public discourse did not begin with the last election cycle or the partisan deadlock in today's Congress. But perhaps the first few disrespectful Scalia dissents helped pave the way—not just for his increasingly vitriolic dissents later in life, but also for the remarkable decline in the level of public discourse generally.[483]

Disrespectful language has no place in the work of the federal judiciary, especially the Supreme Court.[484] Many Supreme Court Justices over the years have publicly expressed support for civility and professionalism. But Justice Scalia never did. Instead, he kept turning out dissents rife with intemperance and invective. Some observers might justifiably

---

483. President Trump, known for the belligerence of his own rhetoric, was among Justice Scalia's admirers. *See, e.g.*, Donald J. Trump, Pres. of the U.S., *Remarks by President Trump and Justice Gorsuch at Swearing-in of Justice Gorsuch to the Supreme Court*, WHITE HOUSE (Apr. 10, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-justice-gorsuch-swearing-justice-gorsuch-supreme-court/ (calling Justice Scalia "a terrific judge and a terrific person").

484. *See* Thode, *supra* note 371, at 400 (observing that opinion-writing is within the reach of the *ABA Model Code* (citing *In re* Rome, 542 P.2d 676 (Kan. 1975) (sanctioning judge for issuing an opinion mocking the defendant's livelihood)).

regard the Court's failure to stem the negative impact as silent acquiescence in Justice Scalia's incivility and disrespect.[485]

The Scalia era is over, but his regrettable legacy remains for all time in the Court's published opinions. It is up to the Supreme Court to embrace a standard for judicial opinions that exemplifies civility and professionalism. As every lawyer and every judge knows, "I respectfully dissent" rings true only for dissents that reflect measured, judicious, and civil disagreement with the views of the majority.

485. Justice Ginsburg encouraged Justice Scalia to moderate the disrespectful language in his opinions. Carmon, *supra* note 480. Other Justices perhaps made similar attempts, but no evidence suggests that the Court took action to curb Justice Scalia's intemperance. Yet bullies get away with bullying because good people stand by and do nothing. *See, e.g.*, Martha Minow, *Upstanders, Whistle-Blowers, and Rescuers*, 2017 UTAH L. REV. 815, 815–16 (explaining that a "bystander" is a person "who is near but does not take part in what is happening," while an "upstander," is just the opposite: someone who speaks out against injustice, including those who "resist the temptations of silence and passivity" in the face of injustice).