Antonin Scalia, a Most Memorable Friend

Richard Epstein

February 15, 2016

The sudden death of Justice Antonin Scalia has elicited many tributes about his achievements. It has also sparked extensive reviews of his judicial body of work—and raised some questions about how filling his spot will affect the 2016 presidential election and the future direction of the Supreme Court. Like many others, I shall have more to say about these weighty issues going forward. But for now, I'd like to write about some of my personal interactions with Justice Scalia prior to his appointment to the Court in 1986.

Scalia graduated in the exceptional Harvard Law School class of 1960 along with the late David Currie, for many years my colleague at University of Chicago Law School. Currie helped arrange for Scalia to interview for a potential faculty position at the University of Chicago in early 1977. By that point, the election of Jimmy Carter as President had ended Scalia's term as head of the Department of Justice's Office of Legal Counsel, to which Gerald Ford had appointed him in August 1974.

When Scalia appeared for his Chicago job talk, he cut a large figure. The topic of the session was executive privilege vis-à-vis the Congress, an issue on which Scalia had sparred with Congress repeatedly as head of OLC. For Scalia, there was no middle ground on this question. He was a passionate and articulate defender of executive privilege, and noted, correctly in my view, that this was an issue that was not defined by party, but by role. Repeatedly, he stressed that every president of both parties had taken this view, which he thought that the constitutional system of separation of powers required.

Needless to say, he got the job, after which he made his views on that subject, and indeed every other, clear around the law school. Most striking of all, he disdained the hedges, doubts, and qualifications that are the common fare of academic debates. His most powerful article written while a member of the University of Chicago Law School faculty was the lengthy "*Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*." In it he chastised the Circuit Court of the District of Columbia for flouting both the specific commands of the Administrative Procedure Act, and a long list of Supreme Court precedents, thereby winning the adulation of large segments of the professoriate. His own administrative law decisions, including *Whitman v. American Trucking Associations*(2001), flow from his by-the-book attitude: "Congress, we have held, 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."

It was clear, moreover, as the 1980 presidential campaign rolled into high gear, that Scalia thought of his academic career only as a way station along the path to a political appointment or judicial nomination. During the fall of 1980, Scalia came into my office to announce that it was time for conservatives like us to get off the sidelines and stand four-square behind Ronald Reagan, which he surely did. He did not become Solicitor General as he had hoped. But he eventually received an offer to sit on the Seventh Circuit Court of Appeals, which he turned down. Shortly thereafter, he was offered a position on the Court of Appeals for the District of Columbia, which gave him what he wanted: a direct line into the vast reservoir of administrative law cases that were concentrated in Washington and proximity to the Reagan White House, which would have the opportunity to nominate at least one Supreme Court justice.

While Scalia was on the D.C. Circuit, *Policy Review* published the cover story, "Beyond the Burger Court: Four Supreme Court Candidates Who Could Lead a Judicial Counterrevolution" in the spring of 1984. That list included Scalia, Robert Bork, William Ball, a staunch defender of religious liberty, and myself.

At the time, there was more than one counterrevolution in conservative jurisprudence afoot. On the one hand, all of us were unhappy with much of the then-current Supreme Court jurisprudence. On the other hand, we had radically different views about what to do about it. Scalia and Bork rightly opposed the freewheeling attitudes of the Warren Court. Many of these slipped over into the Burger Court after 1969, whose agenda in its early years was every bit as interventionist as that of the Warren Court. In 1970, for example, the Supreme Court had decided *Goldberg v. Kelly*, which for the first time imposed, mistakenly in my view, extensive procedural due process protections before terminating welfare privileges. Then, in 1973, the court unwisely abolished criminal statutes prohibiting abortions in the United States in *Roe v. Wade*.

Scalia, Bork, and I regarded these decisions as incorrect. But my reasoning was quite different from theirs. For Bork and Scalia, the watchword was judicial restraint. They believed that the Court should not embroil itself in political disputes unless there was a powerful and explicit textual warrant that supported an intervention. The most villainous Supreme Court decision of all, they believed, was *Lochner v. New York* (1905), which struck down a maximum hour law of ten hours per day and 60 hours per week. They saw it as representing the usurpation of power by an unwise court that had constituted itself as a "super legislature" that had the powers of both Congress and the states.

I, meanwhile, have never thought that the Constitution explicitly mandates judicial restraint. Rather, the document contains a set of terse but broad procedural and substantive guarantees that should be given their ordinary meaning as of the time, subject to the usual rules of constitutional interpretation on such implied matters as the police power, dealing with the power of the state to regulate for the health, safety, general welfare, and morals of the community. That approach yields the same negative judgments of *Goldberg* and *Roe* that Scalia had long championed. But it requires, as David Bernsteinhas clearly shown, a very different view on *Lochner*, where New York's effort to suppress bakery competition does not fall within the ambit of any acceptable police power justifications.

The difference between my views and Scalia became visible at a debate that took place at a conference run by the Cato Institute on economic liberty in 1984. Scalia was the keynote speaker

at that event, and I was listed as the first speaker on the next panel. Having no prepared remarks, I took the occasion to offer my own impromptu refutation of Scalia's view that any embrace of economic liberties in jurisprudence was the equivalent of jumping from the frying pan into the fire. Both Scalia and I published our views thereafter in the January 1985 issue of Regulation Magazine, his under the title of "On the Merits of the Frying Pan," and mine under the title of "The Active Virtues," a conscious play on the "passive virtues" that had been defended in 1960 by Alexander Bickel in his Supreme Court Foreword to the Harvard Law Review.

Ultimately, the difference between us concerned the error rate of judicial interventions. Scalia well knew that there were legislative mistakes on the books, but feared that the courts would only make matters worse by intervening. I took the position that intervention was not only possible but desirable on constitutional grounds, so long as the Court did not stray beyond its textual mandate, which contained the broad takings clause—"nor shall private property be taken for public use, without just compensation." Owing to the lax level of interpretation that had sanctioned the major innovations of the New Deal, the entire statute book was open for attack, so much so that my book *Takings: Private Property and the Power of Eminent Domain* advanced the bold argument that the entire meddlesome corpus of New Deal legislation was unconstitutional because of its interference with private property relations. That conclusion could not have been more at odds with Scalia's jurisprudence, which did not give a central place to the protection of competition or my wholesale attack on legal monopolies. Indeed, at one event at Chicago, he described my views as "bizarre," which to many people they are.

Ironically, however, my views did attract the attention of then–Attorney General Edward Meese, who was curious about how they applied to the scope of federal power under the Commerce Clause. He invited me to speak on these issues at a conference he set up at the Department of Justice. The issue had long vexed me. In examining the sources, I becamemore convinced than ever that the Supreme Court's decisions in *NLRB v. Jones & Laughlin* (dealing with labor) and *Wickard v. Filburn* (dealing with agriculture) expanded the commerce power beyond its earlier limitations to cross-border transactions, and were borne of the same desire to legitimate the cartelization of commerce of the New Deal state.

At the luncheon following the DOJ talk, I sat at a table with Ed Meese, Robert Bork, and Antonin Scalia. The conversation quickly turned to the judicial role in commerce power cases, and elsewhere in the Constitution. Scalia took a strong line in favor of judicial restraint, which thus led to his acceptance of the 1937 settlement on the scope of the commerce power. Bork, as was his wont, pushed hard and wondered whether the difficulties with political faction required a more aggressive stance to curb federal power. Just as the discussion got more intense, an aide came up to Meese and in a stage whisper announced that the President urgently wanted him to go to the White House. Meese promptly left the table, and Scalia's nomination to the Supreme Court was announced shortly thereafter. Who knows what tipped the balance between the only two leading contenders for the first nomination, or just what would have happened if both Scalia and Bork, who was later "borked," had been on the Supreme Court together. But history often turns on strange coincidences.

Richard A. Epstein, the Laurence A. Tisch Professor of Law at NYU Law School, is an expert on numerous areas of the law, including property, torts, land use, civil procedure, contract law, workers' compensation, and Roman law.