



Scalia will be impossible to replace

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If you don't follow the Supreme Court closely -- if you're a normal person -- your impression of Justice Antonin Scalia is that he's a conservative who was on the court for a really long time. Fair enough, but the legacy of the first Italian-American justice is so much more than that.

For one thing, before Scalia joined the court in 1986, legal arguments over constitutional and statutory interpretation often failed to consider the actual constitutional and statutory text.

I've seen old law school casebooks that didn't even have the Constitution printed in them, and legal opinions where statutes were used, at best, to buttress reasoning about legislative intent. Eventually the Constitution made it into Appendix H of the constitutional-law readers and finally into the opening pages.

While Scalia wasn't wholly responsible for the advent of originalism -- that a constitutional provision means what it meant when it was ratified -- and revival of textualism, he was their highest-profile and most powerful expositor.

We may still disagree about the meaning of the Constitution, often vehemently. But we're all originalists now, playing on Scalia's field (or at least paying lip service to it, as Sonia Sotomayor did at her confirmation hearings). Look no further than the competing opinions in *District of Columbia v. Heller*, the 2008 case that confirmed the individual right to keep and bear arms.

Plus Scalia went about his craft with unprecedented verve. As those law school casebooks began acquiring a more serious intellectual rigor, they also began filling up with his writings -- at first dissents, but then a healthy dose of majority opinions and concurrences.

Indeed, those dissents often ended up carrying the day, as with 1988's *Morrison v. Olson*, which upheld the office of the independent counsel but which came to be so discredited that both parties in Congress decided not to renew the law a decade later.

Scalia knew that he was writing for more than the lawyers before him and that the Supreme Court's reputation depended on the clarity and logic behind its rulings. Agree with him or not -- I

thought he was hopelessly wrong on gay rights and deference to administrative agencies, for example -- there was a method to his acerbic pen. It was not mere "legalistic argle-bargle" or "interpretive jiggery-pokery," to quote two recent witticisms.

Moreover, to say that Scalia was "conservative" is to misunderstand what that means in the judicial context. I'm sure his personal views were very much what we'd call "socially conservative" and that he voted Republican, but it's hard to argue that he made his legal decisions that way. Take *Texas v. Johnson*, for example, the 1989 case where Scalia voted to uphold the right to burn the American flag.

"If you're going to be a good and faithful judge," he explained in a 2005 speech, "you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."

Perhaps the best example of Scalia's going against his policy preferences would be in the area of criminal procedure.

One would presume that a conservative of Scalia's generation would be a "law and order" type concerned about criminals getting off on technicalities. Well, there's been no greater supporter of those constitutional "technicalities" than Antonin Scalia.

If you care about the Fourth Amendment right to be free from unreasonable searches (*Kyllo v. Florida*, *Jardines v. United States*, *United States v. Jones*), the Sixth Amendment right to confront witnesses testifying against you (*Crawford v. Washington*, *Davis v. Washington*) or the right to be sentenced based only on facts found by a jury (*Apprendi v. New Jersey*, *Blakely v. Washington*), Scalia is your justice.

This legacy shows why the President and Senate shouldn't be too hasty to fill Scalia's seat, which instantly becomes the swing vote in cases where Justice Anthony Kennedy joins the conservatives. The last time someone was confirmed to a Supreme Court vacancy that arose during a presidential-election year was 1932 and the last time a justice was confirmed in this circumstance by a Senate controlled by the opposing party was 1888.

Legal pundits try to make the judicial appointments a focus in every election, but we typically fail because the American people have more immediate concerns such as the economy and national security.

Scalia's last gift to his beloved nation is to ensure that in this craziest of political years, the fate of the Supreme Court just became the paramount issue.

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