# TRIBUTE TO JUSTICE SCALIA

I have a book at home entitled *The Wit & Wisdom of Winston Churchill*, authored by James C. Humes. I doubt that there are many prominent figures in American contemporary life for whom such a book could be written. Ronald Reagan would surely qualify, but most of our leading citizens, I regret to say, are neither witty nor wise, and the few that are wise are not very witty, and vice versa.

The list of potential candidates for such a book narrows to the vanishing point when eligibility is limited to lawyers. Aside from being a fertile subject matter for jokes, lawyers are not widely regarded as funny. The same is true for judges—wise maybe, but seldom witty.

But I fully expect someday to possess a book entitled *The Wit & Wisdom of Antonin Scalia*. This is a jurist whose opinions, whether you agree with them or not, are typically wise, eminently readable, and often very witty.

Justice Scalia's wit, originality, and writing skills are important, it seems to me, because it is one thing to produce thoughtful, insightful legal opinions. That is challenging enough and all too rare. It is quite another, however, to produce brilliant legal analysis in a style that not only conveys the intended message, but does so with style, brevity, uniqueness, sagacity, *and* wit. Justice Scalia has an extraordinarily rare capacity to express himself with succinct, incisive, and colorful language and phrasing that conveys ideas that are at once persuasive and memorable.

Let me, in my few minutes, give you some examples.

You may have noticed that Justice Scalia does not hesitate to dissent when, in his view, his colleagues have read their personal values into the Constitution, withdrawing those issues from debate and resolution by the political branches, and by the people. He does so in powerful and indelible language. For example, one memorable passage deplored the Court's decision striking down as unconstitutional Virginia's financial support for single-sex higher education:

> The virtue of a democratic system . . . is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to

> change. The same cannot be said of this most illiberal court, which has embarked on a course of inscribing one after another of the current preferences of the society . . . into our Basic Law.[1]

Justice Scalia has expressed similar frustration with what he calls the Court's "famed sweet-mystery-of-life passage"[2] that was given birth, so to speak, in the Court's abortion jurisprudence and later imported into the Court's sodomy decision. That passage, as you know, declares that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[3] That dictum, Justice Scalia explained in *Lawrence v. Texas*:

> "[C]asts some doubt" upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.[4]

Justice Scalia is vigilant to point out when the Court makes value judgments that, in his view, have no business being pronounced and imposed by judges. As he explained in the right-to-die case:

> [T]he point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate" are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory . . . .
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> . . . This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.[5]

Justice Scalia has been bluntly skeptical concerning the meaning and jurisprudential soundness of certain of the Court's multipart subjective tests, which it often employs to resolve constitutional

1. United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

2. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

3. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

4. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

5. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293, 300–01 (1990) (Scalia, J., concurring).

questions—none more so than the famed three-part *Lemon* test employed by the Court in Establishment Clause cases. He colorfully explained:

> Like some ghoul in a late-night horror movie that repeatedly sits up in his grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[6]

Justice Scalia's frustration with the Court's tendency to take on subjects that he perceives to be beyond the Court's competence led him to observe in one recent case that "[t]his Court seems incapable of admitting that some matters—*any* matters—are none of its business."[7] That exasperation was near its zenith when, as Justice Scalia put it, the majority's faulty logic required the Court not long ago to decide "What is Golf."[8] As he explained:

> I am sure that the Framers of the Constitution, aware of the 1457 Edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.
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> Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question.[9]

6. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment) (citations omitted).

7. Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment).

8. PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

9. *Id.*

As a fierce proponent of separation of powers and judicial restraint, Justice Scalia believes that judges must be very careful not to let their personal views substitute for constitutional analysis, lest the rule of law be replaced by the rule of whatever judges want it to be. As he put it in one of the abortion cases:

> [T]he best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that *simply decorate a value judgment and conceal a political choice* . . . . But it is obvious to anyone applying "reasoned judgment" that the same adjectives [such as "intimate relationships" and "personal autonomy and bodily integrity"] can be applied to many forms of conduct that this Court . . . has held are *not* entitled to constitutional protection . . . . *It is not reasoned judgment that supports the court's decision; only personal predilection*.[10]

Justice Scalia is, of course, the jurisprudential master of those concise but colorful sentences or phrases that capture a full opinion's worth of wisdom in a few words. One remembers his point because his words so adroitly capture his concept. Some examples:

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> A priest has as much liberty to proselytize as a patriot.[11]

* * *

> [N]o government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify."[12]

* * *

> It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*.[13]

* * *

> If the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would

10. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 983–84 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (second and fourth emphases added) (citation omitted).

11. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 (2001) (Scalia, J., concurring).

12. *Casey*, 505 U.S. at 981.

13. Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

surely have said so. It did not do so, I think, because the juice is not worth the squeeze.[14]

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From the nude dancing free speech case a few years ago: "The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd."[15]

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Once in a while, Justice Scalia explains that the temptation to respond to something his colleagues have expressed is simply more than he could possibly be expected to resist. For example, he stated in the *Casey* case: "I must . . . respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered."[16] "[T]o come across this phrase ['liberty finds no refuge in a jurisprudence of doubt'] in the joint opinion—which calls upon federal district judges to apply an 'undue burden' standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear."[17]

* * *

And, once in a while, his frustration simply cannot be contained: "The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."[18]

* * *

Let me conclude with my personal favorite. As you might have guessed, it is from a case known as *Morrison v. Olson*:

> [T]his suit is about . . . [p]ower. 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

14. McConnell v. Fed. Election Comm'n., 540 U.S. 93, 259 (2003) (Scalia, J., concurring in part and dissenting in part).

15. Barnes v. Glen Theater, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).

16. *Casey*, 505 U.S. at 981.

17. *Id.* at 984–85.

18. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

not immediately evident, and must be discerned by a careful and perceptive analysis. *But this wolf comes as a wolf*.[19]

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Thank you, Justice Scalia, for making your opinions so clear, so persuasive, so provocative, and so enjoyable to read.

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19. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (emphasis added).