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Replacing Scalia

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Replacing Scalia

Abstract

"Scalia was an advocate of 'principled pluralism,' the idea that we should have a society where we not only share a common cause, but we freely and vigorously express and defend our differing views."

Posting about the appointment of a new Supreme Court Justice from *In All Things* - an online hub committed to the claim that the life, death, and resurrection of Jesus Christ has implications for the entire world.

<http://inallthings.org/replacing-scalia/>

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Replacing Scalia

 [inallthings.org/replacing-scalia/](https://allthings.org/replacing-scalia/)

Donald Roth

As you are doubtlessly aware, the [passing of Antonin Scalia](#) has been a major news item over the past few days. In covering this event, many news sources have jumped to the question of the strategy and politics of finding his replacement. Others have focused on remembering the man himself and his immense contribution to the Court over the past several decades. As one of four justices with conservative judicial philosophies on the current court, the decision of who will replace him has potentially enormous consequences for what is often viewed as a 4-4 ideological balance on the Supreme Court (with Justice Anthony Kennedy as a swing vote).

While most news sources seem to be either oriented forward or backward, reflecting on the man or the office, I think it would be valuable to look back at what made this particular man so well suited to the office. That is, looking back at who Scalia was might give us some good insight into who should best take his place on the Court.

What has Scalia meant on the Court?

Since his appointment in 1986, Scalia has had a profound impact on both the judicial voice and the philosophical direction of the Supreme Court. His appointment came with the ascension of William Rehnquist to the position of Chief Justice, and the Rehnquist Court (1986-2005) represented a conservative shift in the decision-making of the Court, particularly a reinvigoration of the doctrine of [federalism](#). Scalia's contribution to this immense, particularly in his focus on textual interpretation. In fact, even a liberal-leaning Constitutional scholar, Ronald Dworkin gives a partial nod to Scalia's efforts by saying of Constitutional jurisprudence, "we're all originalists now."¹ While Scalia's conservative judicial philosophy is certainly a prominent aspect of what he will be remembered for, he also embodied a number of characteristics that I think we should look for in his replacement, regardless of who that is or what end of the political spectrum they represent.

Brilliant Writing

One of the first things that students in a Constitutional Law class will notice when reading a Scalia opinion is that they can actually be *fun* to read. Scalia is known for a clear style and clever turns of phrase that make him one of the most eminently readable jurists in recent memory, and it's that attribute, maybe more than any other, that has allowed him to have such a pronounced impact on the Court.² It's always important that we have Justices on the Supreme Court get it right, but if they can say it well too, that's something we should really treasure.

Of course, it's not just that Scalia was a gifted writer, he also cultivated the craft of quality legal writing to the benefit of the entire profession. I vividly remember sitting in a seminar that he was leading about his book [Making Your Case: The Art of Persuading Judges](#). While I had previously done well in writing classes, I had recently gotten less stellar results in my Legal Research & Writing class in law school, and I was feeling a little put out. Legal writing puts a particularly hard emphasis on a very mechanical writing style referred to as [IRAC](#), and I was having difficulty adopting this style without losing my voice (and coherence to boot) as a writer. Justice Scalia lamented that so many lawyers came into the profession as great writers and then "lost their souls" to the process. He encouraged us to embrace the idea behind the IRAC structure but let ourselves play with the rules in a way that lets the things that made us good writers shine. It really was simple advice, but I still remember that moment as a dawning realization that perhaps I could hack it after all. Whoever replaces Scalia, I hope it is someone who can similarly inspire and equip all members of the profession to advance their craft.

Office Consciousness

While conservatives tend to be more vocal advocates of limited government, Scalia's judicial opinions went beyond political opinions about the extent of government reach or the balance of federal versus state issues. One of the things Scalia brought to the bench on his best days was a strong sense of the role of the office he served in. In its best expressions, this meant a belief that power does not flow from the people in office but from the authority vested in the office itself, an authority which is limited in nature. Scalia's strong view of the delegated nature of authority lent itself to a comprehensive vision of the Constitution and the role of government that emphasized restraint and mindfulness of who the government serves, and I believe that this type of view fosters a government which will be less prone to excess or tyranny, regardless of which party rules the political branches of government.

Principled Pluralism

In a senior capstone course at Dordt College, I have had discussions with students in the past where they support the all-too-common idea that disagreement is dangerous to friendship and actually the opposite of "getting along." We see this even more vividly in today's partisan political landscape, where it's virtually political suicide for our representatives to work across the aisle with members of the enemy party. In contrast, Scalia was an advocate of "principled pluralism," the idea that we should have a society where we not only share a common cause, but we freely and vigorously express and defend our differing views. That is, silence on deep issues of politics, religion, and the like actually conflicts with the notion that these are issues that we are passionate about, and a refusal to address concerns or voice disagreement on these passion issues actually reflects a lack of trust in the other party.

Scalia embodied this principle in his work. Despite being noted for his many dissents, around [40-60% of the Supreme Court's decisions each year since 1995 have been unanimous](#). In other words, Scalia could clearly get along with colleagues whom he disagreed with deeply, and this is probably nowhere more true than with his dear friend and ideological rival, Ruth Bader Ginsburg, although [all of the Justice's statements](#) regarding his death echo the same sense. Whoever is appointed to replace Scalia should not be a bitter partisan; instead, they should be someone who is capable of both working together and disagreeing well.

What does it mean to replace him?

Of course, much of the anxiety and concern regarding Scalia's death has to do with concern that he might not be replaced by someone equally conservative. While it is an [unwritten rule](#) that Presidents should not nominate a justice to the Supreme Court in an election year, it's an action with rare, but [relatively recent](#) precedent. Given that President Obama has nearly a full year left in office, it is entirely possible and not inappropriate that the President should nominate a replacement, as he has [pledged to do](#). In some ways, it's impossible to imagine that any president could possibly pass up the opportunity to replace an ideological opponent on the Court; however, due to the politics of the appointment process, there is virtually no way any nominee would be confirmed without a filibuster-proof 60 vote majority or, at the very least, [at least 4 Republican votes](#). This means that any Obama nominee would either need to be [a political stunt](#) or a more moderate ideological candidate with excellent credentials.

If Obama puts forth the latter, then I don't think that Conservatives should fear that all is lost, by any means. When [Samuel Alito](#) was added to the Court in 2006, he was replacing Sandra Day O'Connor. Prior to that time, O'Connor had joined Kennedy as one of two potential swing votes on the Court, and, frankly, I think better decisions resulted at that time, in terms of legal reasoning, than have been handed down recently, when Anthony Kennedy has been the [most powerful member of the Court](#). While there is appeal to a Court balanced ideologically on both sides with a swing vote in the middle, that tends to emphasize the jurisprudence of that

single justice in close cases, and I think the Court might be better off if there were more players in the middle, particularly if a Republican presidential victory in November might lead to the replacement of Justice Ginsburg on the other side. Again, this is mostly speculation at this point, but I don't think Conservatives should be so fearful of the appointment of someone like former O'Connor law clerk, [Sri Srinivasan](#), to the Court. That said, politics seems to be an increasingly all or nothing affair, and this appointment will be nothing if not high politics, so my primary hope for the future then is that the new justice, whoever it may be, will at least embody some of the characteristics that helped Scalia fill the office so well.

Footnotes

1. Originalism is the idea that the scope of current rights and powers of the government are tied to the grants of rights and powers intended by the Framers of the Constitution. Of course, Dworkin means something very different by his brand of "originalism," but the concession is explicitly couched as a praise of the work of Scalia and others in Dworkin's essay in [A Matter of Interpretation](#) (Princeton University Press, 1998), p. 11627. My Constitutional Law students read this book every year, and I recommend it to anyone interested in a fascinating discussion back and forth between Scalia and other eminent scholars over the meaning the Constitution and the purpose of the judiciary. ↩
2. For a great selection of some of Scalia's best work, I recommend reading [Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice](#), edited by Kevin Ring, or, if you can, wait for the upcoming edition: [Scalia's Court](#). ↩