

PostEverything Perspective

Antonin Scalia's disruption of the Supreme Court's ways is here to stay



By Richard L. Hasen February 13

Richard L. Hasen is the chancellor's professor of law and political science at the University of California at Irvine and the author of "The Justice of Contradictions: Antonin Scalia and the Politics of Disruption."



Supreme Court Justice Antonin Scalia died two years ago.
(Charles Rex Arbogast/AP)

A few years ago, a populist disrupter of the established political order [said](#) that Arizona was right to try to take immigration enforcement into its own hands when the Obama administration was not aggressive enough. Its “citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.” He similarly [expressed](#) sympathy for the “Polish factory workers’ kid” who was going to be out of a job because of affirmative action and [lamented](#) that the Supreme Court’s giving too many constitutional rights to Guantanamo detainees “will almost certainly cause more Americans to be killed.”

Who made the statements? Donald Trump? Newt Gingrich? No, those were the words of Supreme Court Justice Antonin Scalia, who died two years ago Tuesday. Scalia disrupted business as usual on the court just like Gingrich disrupted the U.S. House of Representatives in the 1990s and Trump is now disrupting the presidency. Scalia changed the way the Supreme Court writes and analyzes its cases and the tone judges and lawyers use to disagree with each other, evincing a pungent anti-elitist populism that, aside from some criminal procedure cases, mostly served his conservative values. Now the judiciary is being filled at a frenetic pace by Trump and Senate Republicans with Scalian acolytes like Supreme Court Justice Neil M. Gorsuch, who will

use Scalia's tools to further delegitimize their liberal opponents and continue to polarize the federal courts.

Scalia joined the Supreme Court in 1986 after a stint as a law professor, a government official and a judge on the U.S. Court of Appeals for the District of Columbia Circuit. He arrived at a court in which justices used an eclectic mix of criteria, from text to history and purpose to pragmatism and personal values, to decide the meaning of the Constitution and federal statutes. Justices disagreed with one another, but for the most part, they were polite in their written dissents.

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Scalia came in with different ideas, which he said were compelled by the limited grant of judicial

power in the Constitution and would increase the legitimacy of judicial decision-making. He offered revamped, supposedly neutral jurisprudential theories. Yet, as I argue in my upcoming book, "[The Justice of Contradictions: Antonin Scalia and the Politics of Disruption](#)," his doctrines were usually flexible enough to deliver opinions consistent with his conservative libertarian ideology.

He was an "originalist" who believed that constitutional provisions should be interpreted in line with their public meaning at the time of enactment, [as when he argued that](#) the 14th Amendment's equal protection clause did not apply to sex discrimination — except when he wasn't, as when in affirmative action cases, he consistently ignored evidence that at the time the equal protection clause was ratified, Congress enacted preferences specifically intending to help African Americans.

Under his view of "textualism," the interpretation of statutes turned on wordplay. He refused to look at "legislative history" such as committee reports to figure out what members of Congress thought a statute meant. He'd instead pull out a dictionary and try to parse the words like a grammar lesson. It was this unremitting textualism that led him to dissent in the 2015 case [King v. Burwell](#), one of the court's Obamacare cases. If it were up to Scalia, the law would have gone into a death spiral because of his interpretation of a single clause of a single

sentence in the 2,700-page statute read out of context. But he was not always a textualist — other times, as in [an obscure case](#) involving the admission of evidence that a witness had committed a crime, Scalia argued for rewriting a statute “to do least violence to the statutory text” when its meaning was “absurd.”

He sometimes followed what he considered to be errant precedent because the law was “settled,” and in some cases, he simply ignored originalist or textualist analysis altogether. He saw judges as having a limited role, feeling that they should ensure compliance with the rule of law and otherwise defer to popular sovereignty, freedom and majority rule — but this vision did not always guide his actions.

Scalia, the Harvard law graduate, frequently cast his fellow justices as out-of-touch Ivy League elitists sticking it to the little guy. Yet he often sided with big business over consumers and environmental groups, deciding cases on issues related to standing and arbitration law that made it harder for people to have their rights protected and vindicated in court.

He disagreed with others using a tone like no other justice. The day after it decided *King v. Burwell* in June 2015, the court recognized a right of same-sex couples to marry in *Obergefell v. Hodges*. Scalia, applying his originalist understanding of the 14th Amendment, [unsurprisingly rejected](#) the majority's approach. But he leveled his harshest words at Justice Anthony M. Kennedy's majority opinion, which he described as "couched in a style that is as pretentious as its content is egotistic." He added that "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." He compared the opinion to an aphorism in a fortune cookie.

[\[I'm a liberal lawyer. Clerking for Scalia taught me how to think about the law.\]](#)

The combination of Scalia's view that textualism and originalism were the only legitimate way to decide cases and his caustic dismissal of anyone who dared to disagree with him led to a much coarser, polarized court after his tenure on the bench. He gave the Supreme Court's imprimatur to the practice of delegitimizing one's ideological opponents rather than simply disagreeing with them.

Most important, he gave key conservative acolytes tools to advance an ideological agenda — tools that he presented as politically neutral. The most important of these acolytes is Gorsuch, the newest Supreme Court justice (and, thanks to the refusal of Senate Republicans to consider President Barack Obama’s nomination of Merrick Garland after Scalia died, also the justice who replaced his ideological role model). While not quite a Scalia clone, he is fully following in Scalia’s tradition. Not long after joining the court, Gorsuch [admonished](#) his colleagues in a statutory interpretation case that “if a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation.” And at [oral argument](#) in the 2017 Wisconsin partisan gerrymandering case, he dismissively interjected that “maybe we can just for a second talk about the arcane matter, the Constitution.” Think Scalia, but without the spontaneous wit and charm. Without Scalia, Gorsuch would have been just as conservative, but he would not have been packaging his jurisprudence in Scalian terms. And he perhaps

According to [Time magazine](#), Trump wants to appoint more “originalists” and “textualists” on the court — flamethrowers who will disrupt things even more, following Scalia’s model. Gorsuch’s early record and the posthumous deification of Scalia by Federalist Society members and others on the right since his death show that Scalia’s pugnacious populism is the wave of the future for court appointees by Republican presidents and that the bitter partisan polarization we’ve seen in the political branches is in danger of becoming fixed as a permanent feature of the Supreme Court. Indeed, the main criticism of Scalia’s followers is that he was not consistent enough in insisting that originalism and textualism are the only right way to decide cases, consequences be damned.

Thanks to Scalia’s disruption, the Supreme Court may never be the same.