Of Golf and Ghouls: The Prose Style of Justice Scalia

Love him or hate him, Antonin Scalia demands attention[1].

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INTRODUCTION

Well-written prose is a rare commodity. And it receives little attention in the law profession. Legal writing beckons for uniformity, often obscurity, and suffers from general dullness. It is the rare legal writer who leaves an audience with a particularly memorable impression. One commentator has observed that a "bland, homogenous style . . . dominates" the Supreme Court today.[2] Another has noted a similar trend in the lower federal courts as well, observing that "the ever-expanding shelfloads of the Federal Reporter supply little nourishment for the linguistic gourmet."[3]

Scholars have generally considered only a handful of Supreme Court Justices to possess "good" writing style. Typically at the top of the list are Benjamin Cardozo, Oliver Wendell Holmes, and Robert Jackson. All of them happen to be long dead. There is one jurist, however, who remains alive and well, whose writing combines metaphors with witty aphorisms and sharp turns of phrase, and who, it might be said, has as "good" a writing style as any other jurist, past or present: Justice Antonin Scalia. Justice Scalia's "easy, literate, lively, hard-hitting style" makes him "probably the best writer on the Court."[4]

Countless commentators have written about the merits of Scalia's judicial philosophy, but few have examined at any length the style he uses to express his thinking.[5] Without defining good writing style, and with the thought that showing is better than simply telling, my task in this Article is to relate, by way of

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[1]Autumn Fox & Stephen McAllister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia,*, 19 Campbell L. Rev. 223, 224-225 (1997).

[2] William Domnarski, *In the Opinion of the Court* 90 (U. Ill. Press 1996).

[3] David Franklin, *Judge Bruce Selya, Resipiscent Recidivist*, 1 Green Bag 2d 95, 95 (1997).

[4] Stephen R. Barnett, *Free Speech in the New Court*, 73 ABA J. 48, 48 (Dec. 1, 1987).

[5] One notable exception (and the only one I know of) is Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 Harv. J.L. & Pub. Policy 529, 529–536 (1993). However, Fried's short essay devotes only four pages of text to discuss Scalia's style.

example, the strength of Scalia's rhetorical power.[6] I ask the reader to join me in this quasi-literary journey of sorts.

Lest one ask why writing style is important in a judicial opinion, I offer the following observation by Richard Posner, a federal court judge and a law and literature buff of sorts: "The power of vivid statement lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought."[7] In another judge's view, "[s]tyle must be regarded as one of the principal tools of the judiciary[,] and it thus deserves detailed attention and repeated emphasis."[8]

Cardozo long ago recognized that style and substance are intimately connected.[9] Judicial opinions that are thought-provoking tend to be the ones that are well written, most like literature. One might go so far as to say that "[l]egal writing is literature, even though the writing may be merely factual or expository. Ideally, a writing is elevated to literature if it is of an enduring quality."[10] In the end, it may be that style is important because "[t]he literary judge wears best over time."[11]

If style and substance are inextricable, then it should come as little surprise that Scalia's most memorable writing embodies both stylistic clarity and his substantive preference for clear rules.[12] Likewise, his most literary moments harbor criticism for stylistic ambiguity and what he believes to be the Court's preference for unclear rules. In sharply worded dissents, Scalia persistently

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[6] *See* Huntington Brown, *Prose Styles* 15–16 (U. Minn. Press 1966) ("The nature of our subject [defining 'a style'] is that of eternally unfinished business. There would not seem to be any harm in designating as 'a style' something of which we can furnish only a meager description. . . . [N]o critic can hope to describe any style exhaustively.").

[7] Richard A. Posner, *Cardozo: A Study in Reputation* 136 (U. Chi. Press 1990). I do not propose to canvass the entire law and literature (or law *as* literature) landscape in this Article.

[8] Griffin B. Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214, 214 (1966).

[9] *See Selected Writings of Benjamin Nathan Cardozo* 339–340 (Margaret E. Hall ed., Fallon Pub. 1947) ("Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity."); *see also* Bell, *supra* n. 8, at 219 ("[T]here can be no substance without form. Form holds and preserves substance, and for that reason judges must pay close attention to form.").

[10] Elliott L. Biskind, *Simplify Legal Writing* 1 (Arco Publg. 1975).

[11] Posner, *supra* n. 7, at 143.

[12] *See e.g.* Fox & McAllister, *supra* n. 679 at 309 (noting Scalia's "preference for clear rules, clear lines, and clear text").

admonishes the Court for adopting vague legal standards that cater to judicial discretion.[13]

Though the linchpin of Scalia's philosophy is the advocacy of clear legal rules that minimize judicial discretion,[14] my focus is on Scalia's prose style. I leave it up to the reader and legal commentators to debate the merits of his jurisprudence. Undoubtedly, that jurisprudence would be decidedly less seductive and more tiresome absent his command of language. The passages I have chosen from Scalia's opinions illustrate how he uses his command of language to make what Charles Fried calls "a moral and political point about judging, about the law, and about the kind of institution the Supreme Court should be."[15]

How did I choose excerpts to discuss? Call it "a built-in literatometer"[16]—I selected "[w]riting which manages to move, to instruct, or to entertain in such a way as wholly to engross a reader . . . ."[17] To be sure, selection necessarily engenders exclusion, and to select particular passages within Scalia's vast repertoire of writing is to overlook text that may be equally noteworthy or more so. Indeed, perceptions of written style can vary as much as perceptions of fashion style; what is stylistically noteworthy to one individual may be ordinary to another. The passages I selected are the more stylistically unusual ones Scalia has written, for usual ones would scarcely demand comment. They are unusual in the sense that the word choice, the particular metaphors, the turns of phrase are uncommon not only among the writings of the Court's Justices, but also among legal writing more generally. They are about as close to literature as court opinions come.

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[13] *See e.g. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–399 (1993) (Scalia, J., concurring in the judgment); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[14] The literature canvassing Scalia's jurisprudence is enormous. *See e.g.* Richard A. Brisbin, Jr., *Justice Antonin Scalia and the Conservative Revival* (Johns Hopkins Univ. Press 1997); J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. Va. L. Rev. 19 (2000); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385 (2000); Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 S.M.U. Rev. 121 (2000); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 Emory L.J. 1377 (1999).

[15] Fried, *supra* n. 5, at 536.

[16] Louis Blom-Cooper, *Introduction*, in *The Language of the Law: An Anthology of Legal Prose* xxi (MacMillian Co. 1965) (internal quotations omitted).

[17] *Id.* at xx.

Scalia's memorable writing defies tidy organization. The emphasis throughout this Article is on the clarity and novelty of Scalia's prose style. To that end, Part I introduces several examples of the novel—and often metaphorical—language Scalia employs to criticize the reasoning of his colleagues on the Court. Part II reflects, in its excerpts, what may be considered the climax of both Scalia's vitriolic dissenting language and his persistent admonition to be wary of judicial discretion. In Part III, I touch on the psychological effect of Scalia's rhetoric and lay some foundation for the notion that Scalia's style should, and probably does, have a measurable effect on his audience. Part IV ties together the relationship between dissenting opinions, metaphors, and Scalia's writing style. I argue that dissenting opinions are particularly suited to Scalia's style as well as his message—his sharp wit, biting critiques, elaborate use of metaphors, and preference for bright-line rules find refuge in dissent.

I. MEMORABLE LANGUAGE

Different styles of writing may be equally memorable for different reasons. For example, the eighteenth-century English style of Justice Cardozo's writing is marked by inversion of standard word order, witty maxims, and pithy phrases.[18] On the other hand, Judge Friendly's writing completely avoids any hint of literary or rhetorical devices.[19] Justice Robert Jackson's writing "had a jaguar's power, swiftness, and agility."[20] Judge Selya of the First Circuit is best known for his flowery language and arcane word choice,[21] while Judge Kozinski of the Ninth Circuit is known for his humor.[22]

To understand what makes Scalia's prose compelling—demanding of attention—we need to understand what makes certain language memorable and others forgettable. First and

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[18] *See* Richard A. Posner, *Law and Literature* 279–280 (2d ed., Harv. U. Press 1998).

[19] *See* Pierre N. Leval, *Judicial Opinions as Literature*, in *Law's Stories: Narrative and Rhetoric in the Law* 206, 209–210 (Peter Brooks & Paul Gewirtz eds., U. Chi. Press 1996).

[20] Domnarski, *supra* n. 2, at 69.

[21] *See id.* at 105–106 ("Ironically, for someone with significant writing gifts, Selya's weakness as a writer is his propensity for flashiness that too often betrays even that questionable objective and creeps into cuteness. The dominant impression Selya's prose creates is that he wants it to be noticed. He consistently and frequently uses obscure diction, for no other apparent reason than to show off."); Franklin, *supra* n. 3, at 95–96.

[22] *See e.g.* David A. Golden, Student Author, *Humor, The Law, and Judge Kozinski's Greatest Hits*, 1992 BYU L. Rev. 507, 513–548.

foremost, Scalia's use of metaphors deserves attention. Part of what makes his style persuasive, even as criticism, is its novelty. Clichés are the archetypal use of outworn language and the bane of bad legal writing. In the words of one judge, a "cluster [of clichés] robs the opinion of the sudden insight which imparts persuasion."[23] But even clichés can leave a memorable impression with the reader if they are used in an unexpected way. Take this lone dissent by Scalia:

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish. . . . 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 not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[24]

The Biblical allusion to a wolf in sheep's clothing is a metaphor that has been used countless times to convey the message that appearances can be deceiving. In this case, however, the metaphor conveys just the opposite: there is no disguise here, no sheep's clothing, appearances are what they are—clear.

Scalia conceded that the kind of issue before the Court will often be "clad . . . in sheep's clothing." After the colon he explained that the disruption of equilibrium between the branches of government may not be "immediately evident," and only through "careful and perceptive analysis" can the wolf be revealed for what it is—effecting an unconstitutional change in the balance of powers. Yet in that lengthy space of prose Scalia deliberately avoided using the term "wolf," leading the reader to believe that the metaphor of "sheep's clothing" was over. And so it is with some surprise that the reader stumbles upon the next sentence that clinches the metaphor: "But this wolf comes as a wolf." Its

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[23] James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Tr. Judges' J. 49, 50 (1969).

[24] *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). For an insightful commentary on the impact of this metaphor a decade after the opinion was written, see Jeffrey L. Bleich & Eric B. Wolff, *Executive Privilege and Immunity: The Questionable Role of the Independent Counsel and the Courts*, 14 St. John's J. Leg. Comment. 15, 15–19 (1999).

brevity stands in stark contrast to the immediately preceding sentence: seven syllables in seven words compared to seventy-nine syllables in forty-seven words. The last sentence sneaks up on the unsuspecting reader just as the sly wolf catches its prey by surprise. Scalia thus rescued the familiar metaphor from certain death by employing it in an unfamiliar way, and thereby made his substantive point clear.[25]

As this excerpt indicates, Justice Scalia is a professional among his peers when it comes to using metaphorical language. Take another example:

> I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress.[26]

The novelty in Scalia's language is immediately evident: as Charles Fried points out, the Supreme Court has used the term "junior-varsity" only once before, in a case involving the real thing.[27]

Fresh metaphors like these can imbue the clarity that legalese typically shuns. Well-conceived metaphors convey ideas clearly. A wonderful example of such clarity appeared in a case dealing with the ability of corporations to contribute money to candidates in elections for state government.[28] In that case, the majority reasoned that a state law banning independent corporate expenditures for candidate elections was a reasonable means to prevent corporations from engaging in "corruption" by amassing wealth and distorting elections.[29] The Justices were persuaded by the corporation's ability to amass wealth because of certain state-conferred "special benefits."[30]

In dissent, Scalia attacked the logic of the majority opinion, arguing that it attempted "to make one valid proposition out of two

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[25] For a humorous treatment of the "Little Red Riding Hood" and "Big Bad Wolf" metaphor, see FCC v. League of Women Voters, 468 U.S. 364, 402–403 (1984) (Rehnquist, J., dissenting).

[26] *Mistretta v. U.S.*, 488 U.S. 361, 427 (1989).

[27] Fried, *supra* n. 5, at 536.

[28] *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

[29] *Id.* at 659–660, 668-669.

[30] *Id.* at 661.

invalid ones."[31] The majority cited "corruption" and "special privilege" as two reasons that corporations should be denied certain expenditures, but Scalia believed both reasons to be unpersuasive. He wrote:

> When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.[32]

Scalia analogized the majority's reasoning to two different ships: "the vessel labeled 'corruption'" and "the good ship 'special privilege.'" The majority held out the corporation's potential for corruption as one reason that its spending should be curbed, a reason that Scalia found unconvincing. Not only is it unconvincing, though, but it verges on the illogical, Scalia intimated. The burden of irrationality weighs so heavy that the argument begins to sink under its own weight. The majority must jump ship—or abandon this line of reasoning—to the "good ship" and cling to the corporation's alleged "special privilege." It is this corporate "special privilege," Scalia related, that provided the majority with adequate reason to deny corporations the right to contribute certain funds.

Yet Scalia found this reason as unconvincing as the first. It, too, begins to sink, and the majority has no choice but to return to its first haven, which in fact turns out to be no haven at all. Both lines of reasoning are sinking, Scalia argued, but the majority is resigned to "hopping back and forth between the two." Both ships are inevitably doomed from a gash in their woodwork, as both arguments suffer from a fatal flaw.

Interestingly, Scalia conceded that "the argumentation may survive" even though he tells us there is no conclusion to be drawn from it. Usually, one puts forth an argument to support a particular *conclusion*, unless it is an illogical argument that can bear no conclusion. And it is this latter affliction that Scalia suggested the Court suffered from. Two sinking ships do not make

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[31] *Id.* at 685 (Scalia, J., dissenting).

[32] *Id.*

a seaworthy one, just as "one valid proposition" cannot be had "out of two invalid ones."

This maritime metaphor is especially compelling because of the personification of language that it employs. What is nothing more than some words on a page, a few thoughts by some judges, is an argument that "makes no headway towards port, where its conclusion waits in vain." The very notion of an *argument* drifting aimlessly, but unable to reach its *conclusion* that waits in port, is sheer linguistic beauty, for Scalia makes his point metaphorically clear: the majority's argument never reaches its conclusion because its line of reasoning cannot support the proposition that corporations should be banned from spending money a certain way. The conclusion waits uselessly—"in vain"—while the Court's arguments sink under the burden of their own illogic. Scalia gives us a sort of legal poetry: the language is clear and the metaphor is sublime.

The description of a conclusion waiting in vain—though not overtly funny—may have brought a smile to the faces of some readers. At the very least, it catches attention. Humor does have its place among court opinions. "A touch of humor in a judicial opinion succeeds because it is a rare flower blooming in a desert of dry legal prose."[33] It personalizes the message the judge conveys, making it less formal and more conversational. For that reason, however, its place in court opinions is somewhat odd considering that formality and authority usually go hand-in-hand. Seriousness generally characterizes pronouncements from a court; humor might be seen as inappropriate.[34]

Yet in the context of court opinions, humor's informality may be its very strength. "Humor can be an exceedingly persuasive

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[33] Kent C. Olson, *Those Who Play with Cats*, 1 Green Bag 2d 217, 218 (1998).

[34] *See e.g.* Joyce G. George, *Judicial Opinion Writing Handbook* 145 (2d ed., Wm. S. Hein & Co. 1986) ("Litigation should not be treated lightly or flippantly. The written decision is a matter of grave importance to the parties involved."); *The Judicial Humorist* at vii (William L. Prosser ed., Little Brown & Co. 1952) ("Judicial humor is a dreadful thing. . . . [T]he bench is not an appropriate place for unseemly levity."); Thomas E. Baker, Book Review, *A Review of Corpus Juris Humorous*, 24 Tex. Tech. L. Rev. 869 (1993) (reviewing John B. McClay & Wendy L. Matthews, *Corpus Juris Humorous* (McClay-Matthews 1991)); Richard Delgado & Jean Stefancic, *Scorn*, 35 Wm. & Mary L. Rev. 1061, 1061–1099 (1994) (discussing uses of scornful humor in Supreme Court opinions and arguing that such humor is not appropriate when deployed against "weaker" or "disempowered" parties); Paul A. LeBel, *Legal Education and the Theatre of the Absurd: "Can't Anybody Play This Here Game?"* 1992 BYU L. Rev. 413, 414; Marshall Rudolph, Student Author, *Judicial Humor: A Laughing Matter?*, 41 Hastings L.J. 175, 179 (1989) (arguing that judicial humor at the expense of litigants is inappropriate).

device."[35] It is a sort of aside, an indication to the reader that the judge is more than a mere automaton caught up in the humdrum of the judicial machinery.

In perhaps the most humorous passage in his oeuvre, Scalia created an elaborate, extended metaphor that surprises through its utter strangeness:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its 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 of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have . . . personally driven pencils through the creature's heart . . . .
>
> 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. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[36]

Scalia employed the playful metaphor to compare his colleagues' application of precedent to a wicked but obedient monster. His critique is of unworkable tests that cater to judicial discretion. But ever the one for drama, Scalia eschewed making that point so bluntly, lest its effect be tempered by its staleness. After all, if one wants to criticize a thing, why not call the thing a ghoul, a creature, or a monster? And so Scalia looked for a new way to express a worn point, setting a strange scene indeed: the *Lemon* test stalks the constitutional landscape of religion, so menacing in its gait that it scares "little children" and "school attorneys" alike. Its perpetual resurrection, despite repeated stabbings through the heart, confirms the unfettered discretion of

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[35] J.T. Knight, Student Author, *Humor and the Law*, 1993 Wis. L. Rev. 897, 907.

[36] *Lamb's Chapel*, 508 U.S. at 398-399 (Scalia, J., concurring in the judgment) (internal citations omitted).

judges who employ it ("we can command it to return to the tomb at will"). The monster remains entirely at the judges' mercy.

Scalia's farcical horror story is memorable not for its truth, but for its ability to create a kind of truth out of metaphor. In the words of one commentator, "[Y]ou've got to wonder: are little children really frightened of the Lemon test? 'Mommy, there's something hiding under my bed—and it has three prongs!'"[37] The passage impels the reader to believe the *Lemon* test is as unworkable as the story he tells is imaginary. Once again, novelty is the hallmark of Scalia's language: no other reference to a "ghoul" exists in the history of Supreme Court opinions.

The monster metaphor in particular catches attention because Scalia seems acutely aware of his audience; in fact, he refers specifically to the Court's "audience." It is no wonder that humor in a judicial opinion is useful as "a means to make the unfamiliar humane"[38]—especially to an audience for whom legal rhetoric may be unfamiliar.[39]

This style is also effective at least in part because Scalia often writes for less than a majority of the Court.[40] As one judge notes, "The strategy of personalization in dissent is to separate the dissenter from the cold, impersonal, authoritarian judges of the majority, who impliedly do not take the human condition into account when they mercilessly impose 'the law.'"[41] One might say that humanness engenders credibility, and credibility engenders persuasion.

Often a judge's language catches attention simply because of its incongruous placement in a judicial opinion.[42] In his familiar

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[37] David Franklin, *Occassional Dispatches from the Intersection of Language and the Law: Mixologists*, 2 Green Bag 2d 205, 207 (1999).

[38] Thomas G. Barnes, *Introduction,* in *Great American Law Reviews* 3, 16–17 (Robert C. Berring ed., 1984).

[39] I discuss Scalia's audience in *infra* Pt. III.

[40] I elaborate on this point in *infra* Pt. IV.

[41] Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1413 (1995).

[42] One commentator has noted these types of

> moves in the writing of opinion by which the author will suddenly, and apparently pointedly, lapse into a homely or popular mode of diction . . . . [T]he mere lapse itself is a rhetorical move . . . induc[ing] a kind of rhythmic change . . . . As if one were suddenly speaking. Rather than writing. It is as if this not only operated aesthetically on the attention but rhetorically in the realm of pathos (to the degree that the author might want to make the reader relax, smile, or even giggle) and thereby, perhaps, of ethos: The essential humanity, good humor, sincerity, or whatever of the writer would be claimed by what was a sort of stage aside.

diatribe against the Court's use of amorphous legal tests, Scalia in one opinion accused his brethren of creating "endless, uncertain, case-by-case, balance-all-the-factors-and-who-knows-who-will-win litigation."[43] The comical effect of this line lies in its elementary-school-like use of hyphens between words that should have a concise substitute. Yet in this case the style can hardly be separated from the substance: Scalia suggested that the Court engaged in elementary-school-like reasoning.

Interestingly, the adjectival catch phrase connected by hyphens is not an aberration in Scalia's writing. Over the years, Scalia has unleashed these hyphens against his colleagues on the Court as well as litigants in the particular case. Take these examples:

- "throw-in-the-towel approach"[44]
- "look-alike-but-inapposite cases"[45]
- "a fiction of Jack-and-the-Beanstalk proportions"[46]
- "catch-as-catch-can approach"[47]
- "'we'll-look-at-all-the-circumstances-and-see-if-it-looks-dangerous' approach"[48]
- "'it-is-so-because-we-say-so' jurisprudence"[49]
- "I am in an I-told-you-so mood"[50]
- "the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence"[51]
- "whatever-it-takes proabortion jurisprudence"[52]
- "give-it-a-try litigation"[53]

John Hollander, *Legal Rhetoric*, in *Law's Stories: Narrative and Rhetoric in the Law* 176, 184 (Peter Brooks & Paul Gewirtz eds., U. Chi. Press 1996); Rudolph, *supra* n. 34, at 182–185 (discussing "humor derived by using an unexpected literary device").

[43] *Bd. of County Commrs. v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

[44] *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n. 9 (1999).

[45] *Steel Co. v. Citizens for a Better Envt.* 523 U.S. 83, 100 n. 3 (1998).

[46] *Bank One Chi. N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment).

[47] *Crandon v. U.S.*, 494 U.S. 152, 180 (1990) (Scalia, J., concurring in the judgment).

[48] *Id.*

[49] *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 552 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[50] *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).

[51] *Minn. v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

[52] *Hill v. Colo.* 530 U.S. 703, 762 (2000) (Scalia, J., dissenting).

[53] *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

- "standard of 'grossly-excessive-that-means-something-even-worse-than-unreasonable'"[54]
- "Thoreauvian 'you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else' beau ideal"[55]
- "whatever-the-industry-wants standard"[56]
- "this new, keep-what-you-want-and-throw-away-the-rest version"[57]
- "the real question is whether a jury can tell the difference —whether *Solomon* can tell the difference—between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*.[58]

Form and substance are intimately connected in these examples. The hyphen-filled adjectival phrase is a peculiar stylistic manifestation of Scalia's criticism and, often, his substantive philosophy. Scalia employs hyphens to embody the naiveté of the object of his criticism, luring his audience into implicit agreement through oversimplification. Opposing arguments or interpretations are reduced to childish-sounding catch phrases lacking authority. Often the object of his criticism is what he believes to be a group of unelected, life-tenured and therefore unaccountable judges who resolve questions of policy under the guise of legal reasoning.[59]

The gaggle of hyphens is precisely the kind of "homely or popular mode of diction"[60] that grabs and amuses the reader largely because of its apparent incongruity. The informality is Scalia's way of comforting his audience by reminding them of his own humanity, invoking the very same formative thought process that engages his audience—namely, that step between thought and communication. He writes as if he spewed his thoughts onto

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[54] *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 471 n. * (1993) (Scalia, J., concurring in the judgment).

[55] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).

[56] *Wis. Dep't of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214, 229 n. 5 (1992).

[57] *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[58] *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 375 n.5 (1991) (emphasis in original).

[59] See *Casey*, 505 U.S. 833, discussed in Part II. B, *infra*.

[60] Hollander, *supra* n. 42, at 184.

paper without thinking enough to form the appropriate words. Yet his witticisms are certainly deliberate.

Because Scalia is so interested in linguistic detail, his diatribes rarely become monotonous. In one notable passage Scalia distilled into a single sentence his most direct criticism of what he viewed as the Court's elitism:

> When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.[61]

The *Oxford English Dictionary* reveals that the peculiar spelling of "villeins" is not scrivener's error; villeins, sometimes spelled "villains," were a class of serfs in the feudal system of the Middle Ages.[62] "Templars" refers to the Knights Templar, a religious military order of knighthood established during the twelfth century and divided into four classes: knights, sergeants, chaplains, and servants.[63]

Interestingly, Scalia associated the Court with the first and highest class: the knights. His words were carefully chosen as he painted a picture of class conflict: surely the Court would have nothing to do with the peasants (American society), Scalia suggested, since its interests are those of the elite Middle Ages knight caste (the contemporary "lawyer class"). The implication is that the Court's decision is biased and elitist, more appropriate to a feudal system than a democracy.

Along with this implication Scalia planted another: that the Court delved into the "culture wars," far removed—in fact, poles apart—from its proper legal function. He ended the arcane metaphor with a subtle but important grammatical twist, referring to the Court's "Members" rather than "members." The purposeful use of a capital letter produces an effective stylistic parallel to "Templars" and is meaningful in the context of the sentence

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[61] *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting); *see also U.S. v. Va.*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (accusing the Court of "inscribing . . . in some cases only the counter majoritarian preferences of the society's law-trained elite"); *Lawrence v. Texas*, 123 S. Ct. 2472, 2497 (2003) (Scalia J., dissenting) ("the court has taken sides in the culture war").

[62] 19 Oxford English Dictionary 637 (2d ed. 1989).

[63] 17 Oxford English Dictionary 752 (2d ed. 1989).

because it reinforces the Court's elitism, separating its Members from the lower-case (and lower-caste) "villeins." The message would have been decidedly less powerful absent the metaphor and Scalia's attention to linguistic detail such as word choice, spelling, and even capitalization.

Patricia Wald has observed that Scalia also "uses conceptual phrases sarcastically, always set out in capital letters."[64] In a recent case that received a fair share of media attention, Scalia belittled the Court for requiring the Professional Golfing Association to allow golfer Casey Martin (who suffers from a rare circulatory disorder) to play golf with the aid of a golf cart (instead of adhering to the usual "walking rule"). Deploying capital letters to heighten the sarcasm, Scalia wrote:

> If one assumes . . . that the PGA TOUR has some legal obligation to play classic, Platonic golf—and if one assumes the correctness of all the other wrong turns the Court has made to get to this point—then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "to regulate Commerce with foreign Nations, and among the several States," U.S. Const., Art. I, § 8, cl. 3, to decide What Is Golf. 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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[64] Wald, *supra* n. 41, at 1416.

> 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.65

Sarcasm is indeed par for Scalia's course. The contrast between the authoritative and the ridiculous make an effective mockery of the Court's approach. Scalia introduced in the first sentence what he called the Court's "awesome responsibility" in ruling on the PGA's "legal obligation to play classic, Platonic golf." Scalia juxtaposed essentially incongruent roles for the Court, making the sarcasm all the more conspicuous — interpreting the Americans with Disabilities Act, passed by Congress through its constitutional power to regulate commerce, and answering the more lofty and ultimately metaphysical question of "What Is Golf?" Scalia continued the conflicting analogy with the quaint (and alliterative) thought that the authors of the Constitution rationally contemplated "the paths of golf and government, the law and the links" traversed centuries earlier by King James II of Scotland. "[T]he judges of this august Court would," in similarly authoritative fashion, "wrestle with that age-old jurisprudential question" of who is "*really* a golfer?" The final sarcastic phrase set out in capital letters ridiculed the Court for decreeing "the Law of the Land, that walking is not a 'fundamental' aspect of golf." Scalia ended his opinion by calling the Court's determination "Kafkaesque," "Alice in Wonderland," and "Animal Farm"[66] (all used as adjectives), and quoted from Orwell's *Animal Farm*: "The year was 2001, and 'everybody was finally equal.'"[67]

II. SCATHING CRITICISM

Although "Scalia has distinguished himself for his quick tongue and acerbic wit,"[68] in some cases he may have "crossed the line between lively language and impermissibly caustic speech."[69] I devote this section largely to one case that straddles that line: *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[70] It

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[65] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

[66] *Id.* at 705.

[67] *Id.*(quoting Kurt Vonnegut & Harrison Bergeron, *Animal Farm and Related Readings* 129 (McDougal Littell 1997)).

[68] Delgado & Stefancic, *supra* n. 34, at 1077.

[69] *Id.* (referring to two environmental standing cases).

[70] 505 U.S. 833 (1992).

contains one of the most unusual passages in the history of the Court's opinions.[71]

A. A Crescendo to Casey

Scalia has reserved some of his most scornful criticism for cases that have revisited *Roe v. Wade*,[72] the case establishing a woman's constitutional right to an abortion. As one commentator has noted, "Scalia's rejection of abortion rights has been clear, but at times it has swelled over banks and turned into a torrent of abuse submerging the ordinarily depersonalized language of opinions."[73] Because Scalia believes that the Court should explicitly overrule *Roe*, he is critical of members of the Court who (in his view) chip away at *Roe*'s foundation but cling to what remains of the landmark case.[74]

In a notable example preceding *Casey*, Scalia criticized the Court for carving out an exception to *Roe* without explicitly reconsidering the decision:

> It thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.[75]

Scalia's main point is apparent to lawyer and layman alike: the Court stubbornly picks apart "abortion law" piecemeal instead of eliminating it entirely. He analogized a court case to no ordinary mansion, but one that was "constructed overnight"—immediately denying it any integrity. Bolstering the metaphor is the adjective used to describe the mansion: it is not "constitutional" but rather "*constitutionalized* abortion law"—Scalia suggested abortion had undergone an implicitly illegitimate process of becoming constitutional, especially evident in its "overnight" construction.

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[71] One commentator calls *Casey* "one of the most striking judicial texts in the history of American constitutional law." Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 Vand. L. Rev. 1227, 1241 (1993). For a discussion of the language used in *Casey*, see *id.* at 1241–1250.

[72] 410 U.S. 113 (1973).

[73] Brisbin, *supra* n. 14, at 277.

[74] *See e.g. id.* at 277–281 (describing Scalia's approach to abortion rights).

[75] *Webster*, 492 U.S. at 537 (Scalia, J., concurring in part and concurring in the judgment).

Because over time various court cases have steadily undermined *Roe*'s provisions, Scalia tells us that the mansion has become "disassembled doorjamb by doorjamb," though its foundation seems to remain intact and is "never entirely brought down." The tedious repetition of the image—"doorjamb by doorjamb"—reinforces what Scalia believes to be the futility of the Court's efforts. When combined with the thought that the mansion must be "disassembled," the consequent alliteration serves notice to the reader that Justice Scalia is perhaps as much concerned with the sound of language as with its meaning.

Linguistic imprecision is one of Scalia's most favored targets of contempt, and it is part of his more general criticism of amorphous legal tests. On the same page of the mansion metaphor Scalia inserted a footnote criticizing one of his colleagues for the way she *phrased* her sentence:

> Similarly irrational is the new concept that Justice O'Connor introduces into the law in order to achieve her result, the notion of a State's "interest in potential life when viability is possible." Since "viability" means the mere *possibility* (not the certainty) of survivability outside the womb, "possible viability" must mean the possibility of a possibility of survivability outside the womb. Perhaps our next opinion will expand the third trimester into the second even further, by approving state action designed to take account of "the chance of possible viability."[76]

Time and time again in dissent, Scalia has criticized the majority for introducing "new," "novel," or otherwise "unprecedented" reasoning into its opinion. Scalia is clinical in his dissection of the phrase employed by Justice O'Connor. Courtesy of his translation, we are struck by the sense that what O'Connor *meant* is not exactly what she *wrote*, and Scalia would have us believe that the imprecision is fatal to her argument. Whether fatal or not, the attention to linguistic detail is more than an exercise in high school grammar; it is Scalia's message to the Court that it must choose its words carefully and deliberately.

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[76] *Id.* at 537 n. * (citations omitted emphasis in original).

B. The Casey Climax

It was in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that Scalia unleashed a torrent of criticism probably unmatched in the history of court opinions. He took the unprecedented step of quoting, in boldface type, portions of the Court's opinion which he felt "beyond human nature to leave unanswered,"[77] and responding to each in succession. To the Court's pithy observation that "Liberty finds no refuge in a jurisprudence of doubt,"[78] Scalia mocked, "Reason finds no refuge in this jurisprudence of confusion."[79] Scalia was critical of the Court's use of stare decisis. While claiming to adhere to *Roe*, the Court had actually abandoned a major underpinning of that decision, the trimester framework. Scalia wrote:

> The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.[80]

Scalia flippantly accused the Court of so misunderstanding the very concept of stare decisis that it should have *reviewed precedent* to learn how the Court *applied precedent* in those cases. This foregone recursive opportunity of sorts introduced what Scalia called the Court's novelty in applying stare decisis: taking only one part of a preceding case and ignoring the rest. Scalia *confessed*—as if he were going to concede a point—but the point was not a concession, for it only introduced criticism, that he had "never . . . heard of this new" procedure. To paraphrase, instead of saying, "I admit I am wrong," Scalia said, "I admit *you* are wrong." The rhetorical device is a subtle but effective way of passing blame. The stylistic rifle of hyphens in the final clause supports Scalia's substantive point that the Court's "version" of stare decisis is somehow defective or unsophisticated.

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[77] 505 U.S. at 981 (Scalia, J., concurring in the judgment in part and dissenting in part).

[78] *Id.* at 844 (plurality opinion).

[79] *Id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

[80] *Id.*

Responding to another section of the Court opinion in *Casey*, Scalia was incensed by the Court's belief that *Roe* "call[ed] the contending sides of a national controversy to end their national division."[81] On the contrary, Scalia was sure that the decision by the Supreme Court on the issue of abortion only provoked more controversy:

> [T]o portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees.[82]

Historical and literary references effectuate Scalia's criticism in this passage. He explained the striking contrast between what he believed were the consequences of *Roe*—namely, controversy—and what the Court believed were its consequences—namely, peace. The reader will note, however, that it was no simple lilliputian peace, as one between squabbling siblings might be; no, it amounted to the Peace of Westphalia, a far more momentous occasion, which in the seventeenth century brought an end to the Thirty Years' War in Europe and inaugurated 150 years of relative stability. For the Court erroneously believed, Scalia related, that *Roe* represented just that kind of occasion. And for the Justice who thinks *Roe* signified precisely the opposite, such a decree is simply Orwellian.

Significantly, while Scalia employed the Westphalia metaphor to emphasize what *Roe* was *not*, its effect continued past the first sentence. The metaphor firmly anchors the rest of the passage: while the Peace of Westphalia was agreed upon between contending sides of a controversy, Scalia implied that in both *Roe* and the present case it was a third party—the Court—that "decrees" in Orwellian fashion the proper resolution. The purposeful tension created between "jurisprudential" and "Peace of Westphalia" belies the inherent contradiction between the two

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[81] *Id.* at 994–995.

[82] *Id.* at 995–996.

terms. Hence, what the Court viewed as a "*Pax Roeana*" (a sarcastic jibe Scalia apparently could not resist) Scalia argued is more properly a *faux Pax Roeana*. By latinizing *Roe*, Scalia poked fun at the Court's interpretation of the landmark case by lending it an air of authority and meaning he thought undeserved. Scalia also suggested the presumably illegitimate (and decidedly unglamorous) role the Court acquired for itself as abortion-umpire.

But Scalia's criticism did not end there. He quoted another portion of the Court's opinion that expressed fear that the legitimacy of the Court would be undermined if it were to "overrule [*Roe*] under fire"[83]—popular pressure. He then proclaimed:

> The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.[84]

History, incredulity, and innuendo combined in this passage to form a critique pointedly aimed at ridiculing what Scalia perceived to be an arrogant and elitist Court. He effectively interspersed quotations from the Court's opinion in an attempt to show how its arguments became foolish—and Orwellian—when combined. The proclamation in the first sentence casts the judiciary as an institution of illimitable authority, kingly and "Imperial,"[85] suffering from a "Nietzschean vision" of themselves

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[83] *Id.* at 996.

[84] *Id.* (quoting *id.* at 867–868). Scalia responded to the following quotes from the Court's opinion (which he recited in boldface type): (1) "To overrule under fire . . . would subvert the Court's legitimacy . . . ."; (2) "To all those who will be . . . tested by following, the Court implicitly undertakes to remain stead-fast . . . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and . . . the commitment [is not] obsolete. . . ."; and (3) "[The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals." *Id.*

[85] The term "imperial judiciary" apparently was first coined in Nathan Glaser, *Towards an Imperial Judiciary?*, 41 Public Interest 104 (Fall 1975) (*see In re Hayes*, 608 P.2d 635, 646 (Wash. 1980) (Rosellini, J., dissenting); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 120 (Wash. 1981) (Dolliver, J., concurring)). The term may owe its

as a superior and elite group of justices—"unelected" and "life-tenured" and therefore unaccountable. They lead a mass of followers, a "Volk"—evoking the *Oxford English Dictionary's* definition of that word as "[t]he German people, esp. in the ideology of National Socialism."[86] The metaphor brings to mind images of Hitler (as the Court) leading his Nazi party (as American society—the Volk) who will be "tested by following." The analogy is extreme, but for Scalia a little (or a lot of) metaphorical exaggeration never hurts. The particular phrase "mystically bound up" lends a kind of metaphysical aura to the Court's ruling, depriving it of integrity and placing the Court squarely on a pedestal no higher than one occupied by seers and soothsayers.

The quotes from the Court's main opinion were taken out of context, and their meaning was somewhat changed by Scalia's own embellishment. But persuasion often calls for forceful rhetoric, which itself is quite at home with exaggeration.[87] It simply verifies one commentator's observation that "in legal writing, fact and fiction can become bedfellows."[88] Scalia may be guilty of oversimplifying matters, but the exaggeration goes far towards convincing the reader that, as Scalia noted in an earlier opinion, "[s]omething must be wrong here," and perhaps "it is the Court."[89]

In the final section of the *Casey* opinion, Scalia prophesied a rather bleak future for the Court, crowning his lengthy diatribe with a startling extended metaphor. "There is," Scalia wrote, "a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court."[90] Scalia's incredulous tone is altogether evident, a tone that is itself perhaps as epic as the one he speaks of. Not one to simply dismiss the Court's contention, Scalia

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origin, however, to Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Houghton Mifflin 1973) (*see U.S. v. Meyers*, 432 F. Supp. 456, 459 (W.D. Pa. 1977) (first court case to use the term "imperial presidency"; attributing its possible origin to Schlesinger)).

[86] 19 *Oxford English Dictionary* 744–745 (2d ed. 1989).

[87] *See e.g.* David Franklin, *Of Style & Substance, Law & Lore*, 2 Green Bag 2d 323, 324 (1999) (noting Justice Robert Jackson's "occasional penchant for overstatement" and examining one opinion where "Jackson's rhetoric may have outflown his reasoning"); D.W. Stevenson, *Writing Effective Opinions*, 59 Judicature 134, 135 (1975) (noting that the written judicial opinion "is a persuasive essay directed outward toward specific audiences. Thus the writer's task is to select that information which is necessary to accomplish his rhetorical purpose.").

[88] Norma Procopiow, *The Elements of Legal Prose* 81 (Allyn & Bacon 1999).

[89] I return to this quotation at note 107, *infra*.

[90] 505 U.S. at 1001.

instead created an elaborate metaphor, casting in stark relief what he believed to be the Court's gross error. He analogized the Court's opinion to the infamous *Dred Scott* decision,[91] which in 1856 held that African-Americans could not be citizens of the United States within the meaning of the Constitution (the ruling was later effectively overturned by the Thirteenth and Fourteenth Amendments). Chief Justice Taney wrote for the Court in *Dred Scott* that it was the Court's duty to interpret the Constitution "according to its true intent and meaning when it was adopted,"[92] which considered African-Americans "a subordinate and inferior class of beings, who had been subjugated by the dominant race."[93]

Responding to the Court in *Casey*, Scalia wrote:

> There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is in all black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."[94]

Scalia described the painting in some detail. Chief Justice Taney sits in black—usual court attire. What is interesting, though, is what he sits *on*: "a shadowed red armchair." Shadowed,

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[91] *Scott v. Sandford*, 60 U.S. 393 (1856).

[92] *Id.* at 405.

[93] *Id.* at 404–405.

[94] 505 U.S. at 1001–1002 (quoting 505 U.S. at 994-995).

because there is something dark and sinister going on in the portrait, and conspicuously red, because there is blood. Shadowed red, because the bloodshed is imminent, but not yet evident. Though Scalia only described what he saw in a portrait, the reader might suspect that he emphasized and embellished certain features agreeable to his own metaphor, a suspicion supported by Scalia's description of Taney's "right hand, hanging limply, almost lifelessly." The distraught look on Taney's face and his telling body language are, as Scalia described them, a foreboding of impending doom. That doom, manifest in the "soon-to-be-played-out consequences for the Nation," unfolded with the start of the Civil War. And Taney sits *on top of* the impending carnage. The element of time is crucial to the metaphor, and Scalia knew it: the year of the painting is 1859, midway between the *Dred Scott* decision and the Civil War, both profound harms to the nation's psyche.

But it is the last sentence that clinches the metaphor: Scalia quoted the current Court's opinion, and surmised that Justice Taney had precisely the same thoughts running through his head —namely, that he, too, believed he was successfully ending a national controversy. The quotation of the majority opinion is a subtle psychological ploy: Scalia used the Court's own authority—presumably legitimate—against it, deflating that very legitimacy by equating it to the authority underlying *Dred Scott*.

The analogy between *Dred Scott* and *Casey* rests on the implication that the error in both cases is of the same sort or of equal measure: on the one hand, *Dred Scott* labeled the entire African-American race inferior and therefore undeserving of citizenship; on the other hand, *Casey* confirms that the Court should decide the constitutionality of abortion. While Scalia claimed the effects of the two cases to be commensurate, the parallel is hardly obvious. But in a sense, one does exist: just as *Dred Scott* perpetuated the national controversy over slavery with legal sanctification, Scalia seemed to say that *Casey* perpetuated the same sort of controversy (that started in *Roe*), only this time the dispute centered around the proper resolution of abortion rather than slavery. Abolitionist versus slaveholder. Pro-life versus pro-choice. And in both cases, it is the Court that resolves the issue for both sides.[95]

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[95] For a scathing critique of Scalia's analogy, see Jamin B. Raskin, *Roe v. Wade and the Dred Scott Decision: Justice Scalia's Peculiar Analogy in Planned Parenthood v. Casey*, 1

C. Revisiting Casey

Years after the *Casey* decision Scalia reminded the Court of his notable words. Nostalgia, sarcasm and humor assembled in *Stenberg v. Carhart*,[96] which struck down a state statute criminalizing partial birth abortions. Scalia ironically claimed victory in yet another dissent, quoting liberally from his familiar words in *Casey*: "Today's decision is the proof"[97] that *Casey* is "'as doubtful in application as it is unprincipled in origin,'"[98] "'hopelessly unworkable in practice,'"[99] and "'ultimately standardless.'"[100] Scalia explained the Pyrrhic nature of the majority's victory in his familiar refrain to what he called a "5-to-4 vote on a policy matter by unelected lawyers,"[101] noting blithely that "we disagree with the majority on their policy-judgment-couched-as-law."[102]

A nostalgic Scalia opined tongue-in-cheek:

> While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the joint opinion's expressed belief that *Roe v. Wade* had "called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and that the decision in *Casey* would ratify that happy truce.[103]

The obvious sarcasm is so thick it's almost palpable, for Scalia's point is that neither *Roe* nor *Casey* ever fashioned a "happy truce," but instead engendered quite the opposite—more controversy. Scalia seems particularly giddy in alluding to his "bemusement" in *Casey*, perhaps evoking childhood memories he shares with his audience of being a kid on a playground pointing at another kid and shouting "I told you so."

Am U.J. Gender & L. 61 (1993).

[96] 530 U.S. 914 (2000).

[97] *Id.* at 955 (Scalia, J., dissenting).

[98] *Id.* (quoting *Casey*, 505 U.S. at 985).

[99] *Id.* (quoting *Casey*, 505 U.S. at 986).

[100] *Id.* (quoting *Casey*, 505 U.S. at 987).

[101] *Id.*

[102] *Id.*

[103] *Id.* at 955-956 (quoting *Casey*, 505 U.S. at 867).

This catch phrase is more than mere showmanship—Scalia is playful with his words but serious with his commentary. That he can pull this off in a judicial opinion to make a distinct substantive point demonstrates his exceptional command of the English language; he appears as concerned with *how* he says something as with what he says. His deliberate choice of words makes his commentary clearer—what, after all, could be clearer than "I told you so"?—and therefore more memorable. The final two paragraphs of his dissent end with the same sentence: "*Casey* must be overruled."[104]

III. PERSUASIVE IMPACT AND SCALIA'S AUDIENCE

Scalia employs one of his most effective techniques of persuasion through storytelling, a technique that his colleagues in *Casey* neglected.[105] His emotional appeal in the story of *Dred Scott* rivets the attention of his audience—whichever audience it happens to be. As one author of legal writing has noted, "the main purpose in structuring a legal narrative is to persuade an audience of its truthfulness. Yet, success at persuasion requires a certain skill, such as recognizing the psychological (sometimes unconscious) reception of a narrative by the audience."[106] Whether or not the effect on his audience is unconscious, Scalia at least seems acutely conscious of the psychology involved in his narrative. Let us not repeat the grave errors of the past, the narrative cautions, especially anything as deplorable as racism.

The psychological effect of rhetorical tropes in Scalia's writing is particularly noteworthy because his technique is deliberate. If the persuasive pull of Dred Scott's story is subtle, the psychological impact of an excerpt I alluded to earlier is perhaps

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[104] *Id.* at 955, 956; *see also id.* at 953 ("I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*."); *Lawrence v. Texas,* 123 S. Ct.. 2472, 2488-2419 (2003) (Scalia, J., dissenting) (revisiting *Casey* again)

[105] Kristofor J. Hammond makes this exact point. *See* Kristofor J. Hammond, Student Author, *Judicial Intervention in a Twenty-First Century Republic: Shuffling Deck Chairs on the Titanic?*, 74 Ind. L.J. 653, 705 (1999).

[106] Procopiow, *supra* n. 88, at 88; *see also* Robert A. Prentice, *Supreme Court Rhetoric*, 25 Ariz. L. Rev. 85, 88 (1983) (noting that the Supreme Court "is constrained by the fact that it has no guns, no planes, no troops, and no power of appropriation to enforce its judgments. . . . Having little coercive power, the Supreme Court is painfully vulnerable unless its opinions not only settle disputes but also persuade the American public, or other relevant audiences, that the decision is correct.").

even less obvious: "Something must be wrong here, and I suggest it is the Court."[107]

The quotation appears in a dissent and is typically Scaliaesque. There is something out of place—something positively wrong—the Justice innocently suggests in the first clause. What is wrong (and indeed what is the subject of the sentence), is only revealed in the second clause,[108] heightening the sense of drama. Scalia *suggests* "it is the Court," as if he were open to other views, though we know full well that he is sure in his suggestion. The phrase's very innocence and unpretentiousness strengthens the criticism.

Note the psychological effect: the thought is purposefully subdued to humble Scalia's opinion to the reader and cast suspicion on the majority. Scalia's claim would have been far less convincing had he simply written, "The Court is wrong" or "The Court errs—as most judges usually do when expressing that view. Instead, Scalia chose to focus the reader's attention on what is "wrong," and the placement of this crucial word at the end of the first clause lies parallel to "the Court" at the end of the next clause. It is reminiscent of Shakespeare's line from *Hamlet*, "Something is rotten in the state of Denmark,"[109] only Shakespeare, to increase the suspense, left out the second clause identifying the source of such rottenness.

If Scalia seems as aware of his audience as Shakespeare certainly was, one might wonder how his style influences this audience. The effective use of language in a court opinion might amount to how successfully it persuades its readers. In the words of one judge, the judicial opinion "is an essay in persuasion. The value of an opinion is measured by its ability to induce the audience to accept the judgment."[110] Moreover, a "judge's choice of language and style may in the end determine whether the opinion and decision are perceived as persuasive and acceptable."[111]

But if persuasion is one measure of style in a judicial opinion, who is it that needs persuading? "Much of the art of being

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[107] *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 93 (1990) (Scalia, J., dissenting).

[108] I sometimes imitate the subject of my discussion. *See also* text accompanying *supra* n. 43. Is that life imitating art—or the other way around?

[109] William Shakespeare, *Hamlet* act 1, sc. 4.

[110] Hopkins, *supra* n. 23, at 49.

[111] Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* 34 (S. Ill. U. Press 1992).

persuasive lies in knowing who it is that must be convinced."[112] Certainly the audience whom a writer addresses influences his writing style,[113] whether or not that writer is a judge. For judges in particular,

> the audiences from which assent must be won are often multiple. In many a Supreme Court opinion . . . one can detect the Court's attempts to address different listeners: dissenting Brethren first of all, then lower court judges, then state legislatures and the police forces of the nation, then the public at large.[114]

But how does one assess to what extent an opinion has influenced any of these audiences? Or whether style had anything to do with it? If Cardozo's intuition that style and substance are "fused into a unity"[115] is right, it may be hard to know for sure.

If, as one commentator suggests, "Judges presumably pick and choose their primary audience, depending on the case,"[116] other Supreme Court justices are often Scalia's most apparent audience. Strangely, given this focus and his linguistic prowess, persuading his colleagues has not been one of Scalia's strengths—or even an objective with which his style seems concerned.[117] His written opinions are almost evenly divided between majority opinions and

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[112] George R. Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 201 (1967).

[113] *See e.g.* Posner, *supra* n. 18, at 290 ("The choice of styles is influenced by the nature of the audience at which the judge is aiming."); Hopkins, *supra* n. 23, at 49 ("The focus of the opinion will be as narrow or broad as the nature of the audience. The style responds to the focus of the opinion—that is, the style is adapted to the audience.").

[114] Peter Brooks, *The Law as Narrative and Rhetoric, in Law's Stories: Narrative and Rhetoric in the Law* 14, 21 (Peter Brooks & Paul Gewirtz eds., U. Chi. Press 1996); *see also* Hopkins, *supra* n. 23, at 49 ("The nature of the audience is defined by the case. When the issue is essentially factual, the audience usually consists of the parties and their attorneys. When the issue is essentially legal, the audience usually consists of the parties, their attorneys, and the bench and bar. When the issue has public implications, the audience includes the legislature, public officials, the news media, and the community."); Abner J. Mikva, *For Whom Judges Write*, 61 S. Cal. L. Rev. 1357, 1366 (1988) ("It is clear . . . that the audiences for judges' opinions have gradually grown in both size and diversity.").

[115] *Selected Writings of Cardozo*, *supra* n. 9, at 339–340.

[116] Sanford Levinson, *The Rhetoric of the Judicial Opinion, in Law's Stories: Narrative and Rhetoric in the Law* 187, 199–200 (Peter Brooks & Paul Gewirtz eds., U. Chi. Press 1996).

[117] *But see* Thomas F. Shea, *The Great Dissenters: Parallel Currents in Holmes and Scalia*, 67 Miss. L.J. 397, 397–425 (1997) (citing instances in which Scalia's rationale in a dissenting opinion was subsequently adopted in a majority opinion).

dissents.[118] Of the justices currently on the Supreme Court, only Justice Stevens has written a greater proportion of dissenting opinions.

As followers of the Court's opinions have observed, Scalia's vitriolic dissents have likely alienated his colleagues.[119] "While Rehnquist and the other conservatives were building a bridge between themselves," one commentator has remarked, "Scalia was tossing gasoline on the bridge and igniting it."[120] Scalia bucks a trend noted by one observer, who took a survey of nearly four dozen appellate court judges and concluded that "by far the most important audience is the opinion writer's colleagues; he may tailor his opinion to get their votes or simply to please them."[121] Scalia seems utterly comfortable in dissent.

Although Scalia's style differs markedly from those of his colleagues on the Court, it may be similar to that of some of his predecessors, especially Justice Robert Jackson.[122] William Domnarski writes that "[m]ore than the other Justices, Jackson would unleash his formidable writing skills—in prose that had a jaguar's power, swiftness, and agility—and go after brethren he wanted to wound or tweak."[123] Indeed, in referring to his favorite opinion of Jackson's, Sanford Levinson writes that "it may be that the decision of Jackson to write so much in his own voice . . . is what explains the fact that none of his colleagues joined the opinion."[124] Scalia's penchant for writing in his own voice may likewise explain his difficulty in garnering consensus.

Though his success at winning over his colleagues has been mixed at best, Scalia's impact on other readers is apparently more

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[118] As of October 10, 2001, Scalia had written 168 majority opinions and 164 dissents (including partial dissents).

[119] *See e.g.* Christopher E. Smith, *Justice Antonin Scalia and the Supreme Court's Conservative Moment* (Praeger 1993); David M. O'Brien, *Scalia's Increasing Incivility Debases the Supreme Court, His Arguments Are More About Sarcastic Dissent Than Reasonable Debate*, Star Trib. (Minneapolis) 9A (July 22, 1996); David G. Savage, *Scalia Virtually Alienated from Supreme Court Circle, He's the Last Voice of Conservatism among Justices Who Vote Differently*, Austin Am.-Statesman A29 (July 28, 1996).

[120] Smith, *supra* n. 119, at 95.

[121] Thomas Marvell, *Appellate Courts and Lawyers* 111 (Greenwood Press 1978); *see also* Prentice, *supra* n. 106, at 101 ("The collegial nature of the Supreme Court's decisionmaking process also affects the style and content of the opinions issued. Variations in individual writing style are moderated by the necessity of each Justice to write the opinion in such a way as to please at least four colleagues.").

[122] *See* Fried, *supra* n. 5, at 531 (commenting on similarities between the styles of Jackson and Scalia).

[123] Domnarski, *supra* n. 2, at 69.

[124] Levinson, *supra* n. 116, at 203.

pronounced. According to two commentators, "Justice Antonin Scalia's flamboyant judicial rhetoric and colorful writing style more than occasionally make headlines. Seemingly alone among the justices, Scalia is the master of the eminently quotable turn-of-phrase, the arresting quip, the provocatively expressed legal argument."[125] Discussions of this flamboyant rhetoric have made their way into popular newspaper commentary as well as more specialized legal journals.

The table below compiles data to numerically compare Scalia's written opinions with his those of his colleagues.[126] Beginning with Scalia's first written opinion as a Supreme Court justice in November 1986, the table shows that Scalia has more citations to his name in law reviews and journals than any of his colleagues, and more citations in major newspapers than all but Justice O'Connor. Notice that Scalia has written more dissents than all but Justice Stevens, and fewer majority opinions than all but Justice Kennedy (whose tenure began two terms later).

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[125] Michael S. Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 Notre Dame L. Rev. 863, 863 (1997).

[126] The table was compiled through a search of Westlaw databases, using the JLR database (referencing law reviews, bar journals, and Continuing Legal Education materials) and the NPMJ database (referencing more than forty of the most widely circulated daily newspapers as provided by Dow Jones). The search I used included the title "Justice" followed by that judge's last name, so that I could include common names such as "Stevens" and "Kennedy." Although this search does not catch all references to the judges' names, it might still prove useful in comparing the number of citations between the judges using the same type of search. Note that the dissenting opinions column includes partial dissents (*e.g.*, "concurring in the judgment in part and dissenting in part"). The statistics for Justice Kennedy begin in 1988 when he took office; other justices currently sitting are not included because their terms began substantially after Scalia's term commenced in 1986.

We could also look to judges in lower courts as Scalia's audience. However, simply measuring citations to his majority opinions might be of limited usefulness in assessing the impact of his language, since his most memorable writing occurs in dissent, as I discuss in Part V, *infra*. Neither LEXIS nor Westlaw record citations to dissenting opinions. Incidentally, the databases do reveal that references to "ghoul in a late-night horror movie" appear fifteen times in subsequent federal court opinions.

In addition, the audience inevitably includes the litigants. *See* Prentice, *supra* n. 106, at 95 ("The litigants will normally follow the Court's decision without question, so the Justices' only concern will be to treat them fairly and (if possible) make even the loser feel as though he has been fairly treated."). Justice Scalia, in particular, "has established a reputation for incisive and persistent questioning of attorneys during oral argument." William H. Rehnquist, *The Supreme Court* 259 (1987) (quoted in Michael P. King, *Justice Antonin Scalia: The First Term on the Supreme Court—1986–1987*, 20 Rutgers L.J. 1, 5 (1988)).

Nov.4, 1986—June 30, 2003	Law Review and Journal Citations	Major Newspaper Citations	Majority Opinions (written)	Dissenting opinions (written)	Concurring opinions (written)	% of written opinions that are dissents*
Scalia	19,856	1,640	187	185	224	50%
Rehnquist	18,677	1,633	218	93	19	30%
O'Connor	17,069	1,735	212	121	117	36%
Stevens	17,144	1,033	206	496	157	71%
Kennedy	10,072	1,068	162	71	107	30%

* **Does not include concurring opinions.**

As an initial matter, there would probably be little reason to expect that Scalia should receive any more attention than Stevens, who authored almost three times as many dissenting opinions as Scalia and wrote a greater number of majority opinions. Yet Stevens had significantly fewer citations in law review articles than Scalia and fewer citations in the press than all of his colleagues. What might explain this difference?

Undoubtedly, Scalia's judicial philosophy is a more fertile target of debate. "Given his strong and clear approach," one scholar has noted that Scalia "has presented an unusually broad target for academic and journalistic critics."[127] Clearly, something in those opinions accounts for the noticeable difference in impact between the writings of Scalia and Stevens. Whether this difference is due more to style or more to substance would be a foolhardy determination to make. Might writing style account for *part* of this difference? Probably, especially if Posner is right that "rhetorical power may be a more important attribute of judicial excellence than analytical power."[128] Notably, Stevens' collection of opinions appears to turn few heads.

Among his colleagues Scalia is what Posner would call an "impure stylist," in the same league with Justices Holmes and Jackson:[129]

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[127] Fried, *supra* n. 5, at 529.

[128] Posner, *supra* n. 7, at x.

[129] *See* Posner, *supra* n. 18, at 287–291. For a discussion of interesting similarities between the dissents of Holmes and Scalia, see Shea, *supra* n. 117, at 397–425.

> Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of lay persons why the case is being decided in the way that it is. . . . They write as it were for the ear rather than for the eye, and avoid long quotations from previous decisions so that they can speak with their own tongue—make it new, make it fresh.[130]

Posner's comment about the "hypothetical audience of lay persons" is probably literally true. The general populace surely never read court opinions, except for what quotes they glean from a newspaper.[131] Domnarski writes that the judicial opinion, "when used effectively, is a vehicle of communication between the Court and the people. In other words, the Justices see the people as their audience."[132] Well, judges might *see* them as their audience, but that doesn't make it so. One might even stretch to say that legal academics "appear ever less interested in reading the opinions written by judges."[133]

Although Scalia's style is often directed at criticizing his colleagues on the Court, his style caters as much to audiences outside the legal profession, whether real or imagined. His tone is personal and conversational rather than detached and formalistic, certain rather than tentative, rhythmic rather than stilted. He speaks with his own tongue, employing metaphors that help connect him to this audience.[134] "At their best," one commentator has noted, "legal metaphors draw on common experience to illustrate concepts that might otherwise be confusing, especially to

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[130] Posner, *supra* n. 18, at 289–290.

[131] *See e.g.* Prentice, *supra* n. 106, at 97 ("The public is not knowledgeable about complicated legal matters and seldom reads opinions of the Court.").

[132] Domnarski, *supra* n. 2, at 88.

[133] Levinson, *supra* n. 116, at 200.

[134] *See* Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 Conn. L. Rev. 17, 21–22 (1994) (discussing the ability of metaphors to make complex concepts more understandable); Eileen A. Scallen, *Book Review*, 10 Const. Comment. 480, 481 (1993) (reviewing Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (1992)) ("Metaphors and other figures of speech have a wonderful power to make the abstract concepts and doctrines of the law become concrete, and thus real, to those who must understand and apply them."); Prentice, *supra* n. 106, at 89 (noting that "because technical legal arguments are among the most difficult for a lay public to grasp, the Justice, perhaps even more than the politician, must be aware of rhetorical factors in attempting to persuade the public to accept an unpopular decision on a controversial issue").

nonlawyers."[135] Seeing a "ghoul in a late-night horror movie" might be one example of such common experience.

Where Scalia chides his colleagues in sarcastic fashion and metaphoric monologue, a lay person might question whether a squabbling Court decides the case on personal rather than legal grounds.[136] But for most cases, the fact that a nonlegal audience would even ask this question indicates that the language has succeeded, at least, in riveting their attention.

Empirically, it is hard to know how much weight to ascribe to his style, but the foregoing examples of his prose might indicate that the impact *should* be discernable. What circumstantial data is available lends credence to Posner's observation that "[t]he judicial opinion that provokes thought by the force of its rhetoric may also advance thought,"[137] and the belief of another judge that "[t]he style of an opinion may . . . govern the frequency with which the opinion will be cited in other cases and thus determine the influence the opinion will ultimately have."[138] The biting sarcasm and metaphorical exaggeration all heighten the effect of Scalia's rhetoric. Just like Jackson, Scalia may have an "occasional penchant for overstatement."[139] And just like his predecessor, Scalia's writing may very well place him among "the Court's most legendary stylists."[140]

IV. DISSENTS

We have seen two very different sides of Scalia, we might say, even within the same opinion: the humble rhetorician and the scolding pedagogue. The first persona is certainly the more

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[135] Ed Walters, *Not-So-Bright Lines*, 3 Green Bag 2d 93, 93 (1999).

[136] *See* Hammond, *supra* n. 105, at 701–702 (arguing that communication technology makes criticism within a judicial opinion more important because of its ability to mislead a nonlegal audience). Hammond observed: "One . . . criteria one might use to judge the success of a controversial case in the electronic age is whether the opinion is written in a manner which connects with a nonlawyer audience." *Id.* at 703. He considered "whether prose saturated with such blatant, condescending sarcasm should be injected into a court opinion, particularly one likely to be read by nonlawyers whose unfamiliarity with the law may lead them to miss the hyperbolic qualities of Scalia's opinion." *Id.* at 701.

[137] Posner, *supra* n. 7, at 137.

[138] Bell, *supra* n. 8, at 214; *see also* Bosmajian, *supra* n. 111, at 34 ("Indeed, the language and style may ultimately determine whether the principles and doctrines stated in an opinion are subsequently cited by other courts."); *id.* at 13 ("what becomes very clear as one examines the tropes of the law is that what is often quoted from a court opinion to support a subsequent decision is the tropological passages").

[139] Franklin, *supra* n. 87, at 324.

[140] *Id.* at 323.

common among court opinions. But Scalia is more known for the second, which usually makes its appearance in dissent. Scalia's most memorable writing tends to appear when he writes for less than a majority of the Court, perhaps in part because, as Justice Blackmun once said, "[i]t is much easier to write a biting dissent than a constructive majority opinion."[141]

A. Concreteness

More satisfying than Blackmun's comment, however, is the explanation that garnering a majority of votes on the Supreme Court usually requires sedate—or downright dull—language. As then-judge Ruth Bader Ginsburg once wrote about majority opinions, "one must be sensitive to the sensibilities and mindsets of one's colleagues, which may mean avoiding certain arguments and authorities, even certain words."[142] Avoiding certain words may mean neglecting precise thought and suppressing rhetorical effect. Posner may have been on to something when he wrote that "avoidance of the concrete is ubiquitous in legal prose."[143]

If majority opinions tend to avoid the concrete, it is entirely fitting that Scalia's most memorable writing is in dissent and often focuses on what he perceives to be the excessive judicial discretion supplied by imprecise legal tests of the majority. Majority opinions typically eschew bright-line rules[144] in favor of more amorphous standards of reasonableness. Vague statements allow infusion of meaning and foster agreement, and therefore majority opinions; precise statements foster more precise disagreement, and therefore dissents.[145] But it is precision (those bright-line rules) that remains more memorable than imprecision (those standards of reasonableness). And so it is understandable that Scalia's style as well as his philosophy leave more permanent marks in dissent.

Justice Souter, writing for the Court in a recent case, commented that "Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor

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[141] Robert A. Leflar, *Appellate Judicial Opinions* 203 (1974).

[142] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L. Rev. (1992).

[143] Posner, *supra* n. 18, at 286.

[144] One commentator who calls for clearer metaphors in legal writing humorously observes: "Lines may be clear or crisp or sharp, but they certainly are not bright." Walters, *supra* n. 135, at 93.

[145] *See e.g.* Prentice, *supra* n. 106, at 97 ("in forming a majority coalition, a Justice may write in general terms, omitting details which might be criticized by other Justices needed to form the majority").

deference to variety."[146] Scalia responded in the same opinion with a lone dissent (longer than the Court's opinion) that accused the majority of adopting a "test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test."[147] Although he admitted that his own approach "may not be a bright-line standard," Scalia argued that "it is infinitely brighter than the line the Court asks us to draw."[148] This dialogue crystallizes the ongoing debate—stylistic as well as philosophical—between Scalia and his opposition.

B. Use of Metaphors

Contributing to the memorable nature of Scalia's incisive prose is his expert use of metaphors in dissent. Whether a metaphor is effective in conveying a particular message may largely depend on its author. "Because of its very complexity, its multiplicity of meaning, a metaphor is hard to control — to keep from saying things you don't want to say, along with the things you do want to say."[149] Scalia's metaphors remain memorable because he seems utterly in control of the imagery. Remember the wolf who wasn't in sheep's clothing? The frightening ghoul who scared schoolchildren? Scalia even turned the ready-made image of Justice Taney into his own allegory, a story of good versus evil that the unadorned painting itself could hardly supply for its audience. It is this kind of strong and clear imagery that contributes to the lasting impression Scalia's prose leaves with its readers.[150]

The clarity that typically accompanies Scalia's metaphors hints at their useful function in dissents rather than majority opinions. Dissents are the embodiment of judicial individuality. When compelled to write separately and in opposition to the

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[146] *U. S. .v. Mead Corp.*, 533 U.S. 218, 236 (2001).

[147] *Id.* at 241.

[148] *Id.* at 258.

[149] Monroe Beardsley, *Thinking Straight* 245 (2d ed., Prentice-Hall 1950) (quoted in Bosmajian, *supra* n. 111, at 39).

[150] One commentator has noted that "[m]etaphors, regardless of whether they relate to the central analytical thrust of an opinion or article, may improve it stylistically, making it more persuasive by making it more pleasant, thus leading the reader to return to its discussion in thinking about an issue, or to quote its language in her own writing." Oldfather, *supra* n. 134 at 21.

majority, the dissenter does so forcefully and lucidly.[151] Justice Cardozo (creating his own metaphor) once compared the dissenter to "the gladiator making a last stand against the lions."[152] The dissenter wants to make a point in vivid detail, in no uncertain terms. Metaphors are wonderful vessels for the freshness that dissents breed. "In a dissenting opinion . . . the judge is on his own, and can express his personality, his philosophy and his uncensored convictions."[153] Justice Holmes, for example, "liked the freedom of the dissent. He said that 'one of the advantages of a dissent is that one can say what one thinks without having to blunt the edges and cut off the corners to suit someone else.'"[154] Metaphors thus cater to the forcefulness and clarity of prose that is typical in dissents.

Moreover, just as majority opinions often avoid bright-line rules, they also avoid the simplification that metaphors often bear. Legal reasoning and metaphors have a sort of love-hate relationship. As clear as they may be, metaphors can obfuscate or oversimplify. Posner wrote that "[t]he metaphor elides the reasoning process that might indicate both the aptness and the limits of the analogy . . . that the metaphor conveys."[155] We might say that majority opinions distrust metaphors for their oversimplified clarity. By their nature, therefore, metaphors have a more comfortable relationship with dissents than with majority opinions.

Still, novel metaphors remain memorable and increase an opinion's impact despite the fact that their uses in biting dissents are particularly susceptible to oversimplification.[156] "Even a metaphor that has no virtue apart from being memorable can

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[151] *See e.g.* Wald, *supra* n. 41, at 1412 ("Judges write in a different voice when they concur or dissent.").

[152] *Selected Writings of Cardozo*, *supra* n. 9, at 353.

[153] Jesse W. Carter, *Dissenting Opinions*, 4 Hastings L.J. 118, 119 (1953).

[154] Domnarski, *supra* n. 2, at 71–72.

[155] Posner, *supra* n. 18, at 279; *see also* Oldfather, *supra* n. 134, at 24-30 (discussing how metaphors obscure meaning); Scallen, *Supra* n. 134, at 481–482 ("[W]hen we are unconscious or forgetful of the suggestive power of language, we risk becoming limited by the images that we have selected in the past or, more ominously, by the images that others have selected for us."); Leval, *supra* n. 19, at 207–208 ("The deliberate adoption of rhetorical devices to strengthen the persuasive power of an opinion very likely conceals either a failure to perform the analysis or a failure to clarify the resulting rules.").

[156] *See* Richard A. Posner, *The Federal Courts: Crisis and Reform* 233 (Harv. U. Press 1985) ("The abusive dissent characteristically exaggerates and distorts the holding of the majority opinion, to the confusion of the bar and lower court judges.").

increase the impact of an opinion."[157] Posner wrote that "metaphors, because of their concreteness, vividness, and, when they are good, unexpectedness, are more memorable than their literal equivalents."[158] Biting dissents may facilitate overstatement or exaggeration, but metaphors themselves are not the culprit; it is only where they substitute for reasoning rather than supplement it that metaphors are misplaced.[159]

C. The Case of Justice Musmanno

In that vein, it bears mentioning the name of a little-known judge whose metaphors are, if not a substitute for reasoning, then certainly a comfortable addition to the repertoire of frustrated college English majors. Probably few judges have written more dissenting opinions than Justice Michael A. Musmanno of the Pennsylvania Supreme Court,[160] or any more eloquently. The impression conveyed by his many dissents supports his belief that "[i]f there is one thing a court should not have, it is monolithic solidarity."[161] Indeed, Musmanno once brought a mandamus petition against other members of his court to compel them to publish a dissenting opinion of his, delivering an oral argument before his own court that must have been a strange proceeding indeed.[162] "Without the checks and balances of dissenting opinions," he once wrote, "error could be exalted, mistakes glorified, indifference encouraged and eventually injustice become commonplace."[163]

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[157] Oldfather, *supra* n. 134, at 21–22.

[158] Richard A. Posner, *Law and Literature: A Misunderstood Relation* 272 (1st ed., Harv. U. Press 1988).

[159] One legal commentator has noted: "Metaphors . . . are useful and are even, at some level, inescapable. In the long run, though, they are not a substitute for theory." Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 Hastings Const. L.Q. 81, 100 (1987).

[160] A search on LEXIS reveals that of 1064 written opinions, Musmanno wrote 599 majority opinions, 434 dissents (including partial dissents), and 31 concurrences.

[161] Michael A. Musmanno, *Dissenting Opinions*, 6 Kan. L. Rev. 407, 411 (1958).

[162] *Musmanno v. Eldredge*, 114 A.2d 511 (Pa. 1955), *aff'g* 1 Pa. D. & C.2d (Pa. Common Pleas 1955). The court denied the petition on the ground that Musmanno did not follow proper court procedures, and commented: "In the little more than three years that the appellant [Musmanno] has been a member of this court he has filed and has had published in the official State Reports, with this court's full approval, more dissenting opinions than all the other members of the court combined." *Id.* at 512.

[163] Musmanno, *supra* n. 161, at 416.

Musmanno's opinions do make for fascinating reading. Pick almost any of the hundreds he wrote during the 1950s and 1960s at random, and you are bound to find a witty aphorism, an interesting twist on language, and a metaphor. I did just that and discovered, to my surprise, a wolf in sheep's clothing of sorts:

> Stock values are not unchangeable. On the contrary, they are as variable as the weather, as inconstant as the waves of the sea, as unpredictable as Latin-American politics. To convict a man on so unstable a foundation is to build a policy of law on quicksand.
>
> The section of the statute under which this conviction has taken place is a scattershot weapon. While presumably aiming at a specific target it can hit anybody. Today it strikes Mason [the defendant] who may be a wolf in sheep's clothing. Tomorrow it may hit a real sheep.[164]

In another passage that sounds as if Scalia could have authored it, Musmanno wrote:

> The Majority Opinion in this case is legalism run riot, it is conjecture ballooned into theory, theory stretched into assumed facts, imagined facts made the basis for non sequiturs, and non sequiturs built into a decision which makes a mockery of the law, a travesty of justice, and one which will cause laymen to wonder if the courts are intended to seek truth or to play charades with the safety of the people.[165]

Like Scalia, Musmanno's linguistic legerdemain was impressive at times. But unlike Scalia, Musmanno's legal reasoning often surrendered to metaphorical language. Take the following example: "This type of reasoning rips from the ship of dutiful performance the rudder of responsibility; it tears from the ordnance of correction the guiding sight of accuracy."[166] Or this one: "The Court . . . has failed to throw a lifeline to the good ship *Cause-and-Effect* which collided with the submerged rock of

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[164] *Commw. v. Mason*, 112 A.2d 174,177 (Pa.1955) (Musmanno, J., dissenting).

[165] *Commw. v. Holton*, 247 A.2d 228, 232 (Pa.1968) (Musmanno, J., dissenting).

[166] *Sherman v. Yiddisher Kultur Farband*, 99 A.2d 868, 872 (Pa.1953) (Musmanno, J., dissenting).

Technical-Subserviency. I disclaim any responsibility for the foundering of due process which followed and, therefore, dissent."[167] Domnarski's criticism of Judge Selya of the First Circuit may apply equally to Musmanno: "Ironically, for someone with significant writing gifts, Selya's weakness as a writer is his propensity for flashiness that too often betrays even that questionable objective and creeps into cuteness. The dominant impression Selya's prose creates is that he wants it to be noticed."[168]

Rather than supplying the clarity or precision that accompanies strong language in dissent, unnecessarily flowery language is more likely to be confusing. Justice Cardozo recognized this potential pitfall long ago: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[169] Those in whose hands prose flourishes—as it often did in Musmanno's as well as Scalia's—are keenly aware of linguistic niceties. Attention to such detail leaves lasting memories in the minds of those who become the judge's audience.

V. CONCLUSION

Tellingly, Scalia's language remains fresh and vivid though his point is often the same. His passion and writing meld. Justice Brennan once wrote that "[t]he most enduring dissents . . . soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law."[170] For the savvy reader of Supreme Court opinions, the preceding excerpts from Scalia's writing might suggest that his style is unique among current and even former dissenting voices on the Court.

One can almost sense in Scalia's writing that he takes away a certain pride from penning a fresh metaphor or a peculiar phrasing. That Scalia has a distinguishable voice while he takes on the role of the embattled dissenter showcases a sort of written personality. That personality is central to what makes his writing memorable. He has that certain signature, that piercing wit, that fresh language—that *style*.

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[167] *Cantwell v. Bristol*, 194 A.2d 922, 926 (Pa. 1963) (Musmanno, J. dissenting).

[168] Domnarski, *supra* n. 2, at 105-106.

[169] *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

[170] William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 430–431 (1986).