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## Justice Scalia's Bottom-up Approach to Shaping the Law

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# JUSTICE SCALIA'S BOTTOM-UP APPROACH TO SHAPING THE LAW

Meghan J. Ryan\*

## ABSTRACT

Justice Antonin Scalia is among the most famous Supreme Court Justices in history. He is known for his originalism and conservative positions, as well as his witty and acerbic legal opinions. One of the reasons Justice Scalia's opinions are so memorable is his effective use of rhetorical devices, which convey colorful images and understandable ideas. One might expect that such powerful opinions would be effective in shaping the law, but Justice Scalia's judicial philosophy was often too conservative to persuade a majority of his fellow Justices on the Supreme Court. Further, his regular criticisms of his Supreme Court colleagues were not conducive to building majority support for his reasoning. Hoping to still have a lasting impact on the law, Justice Scalia seemed to direct his rhetoric at a different audience. Instead of focusing on persuading his Supreme Court colleagues, Justice Scalia concentrated on persuading the general public. Instead of shaping law in the traditional trickle-down manner, Justice Scalia sought to shape it from the bottom up.

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## INTRODUCTION

One of the most prolific, acerbic, and famous Supreme Court Justices has recently passed away. Justice Antonin Scalia was known for his intellect and wit, as well as his ultra-conservative approach to legal issues before the Supreme Court. Although he was in the minority throughout much of his judicial career, Justice Scalia had a profound impact on the law. Indeed, Judge Richard Posner has described him as “the most influential justice of the last quarter-century.”<sup>1</sup> Further, upon Justice Scalia’s passing, his Supreme Court colleagues—legal giants themselves—painted him as “a towering figure who will be remembered as one of the most important figures in the history of the Supreme Court and a scholar who deeply influenced our legal culture,”<sup>2</sup> “a jurist of captivating brilliance and wit,”<sup>3</sup> “a towering intellect; a legal giant,”<sup>4</sup> “a legal titan,”<sup>5</sup> and “one of the most transformational Supreme Court Justices of our nation.”<sup>6</sup> Justice Sotomayor remarked that “[h]e left an indelible mark on our history,”<sup>7</sup> and Justice Kennedy stated that, “[i]n years to come any history of the Supreme Court will, and must, recount the wisdom, scholarship and technical brilliance that Justice Scalia brought to the [C]ourt.”<sup>8</sup> Chief Justice Roberts declared that Justice Scalia’s passing is “a great loss to the [C]ourt and the country.”<sup>9</sup>

Perhaps realizing that he would often be in the minority in Supreme Court decisionmaking, Justice Scalia took a unique approach to shaping the law. Instead of using his judicial opinions to try to persuade his Supreme Court colleagues of his positions, Justice Scalia seemed to try to shape the law from the bottom up. He employed rhetorical stratagems to reach a broader audience in his opinions. For example, in the recent Obamacare case of *King v. Burwell*,<sup>10</sup> the dissenting Justice Scalia compared the majority’s reasoning to “somersaults of statutory interpretation” that would “be cited by litigants endlessly, to the confusion of honest jurisprudence.”<sup>11</sup> Through this approach of using accessible language and imagery, Justice Scalia targeted

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<sup>1</sup> See Richard A. Posner, *The Court of Celebrity*, NEW REPUBLIC (May 4, 2011), <https://newrepublic.com/article/87880/supreme-court-burger-blackmun-media-celebrity> [<https://perma.cc/64X7-YCKE>].

<sup>2</sup> *Supreme Court Justices Remember Scalia*, N.Y. TIMES (Feb. 14, 2016, 2:08 PM), <http://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/supreme-court-justices-remember-scalia/> (statement of Justice Samuel A. Alito Jr.).

<sup>3</sup> *Id.* (statement of Justice Ruth Bader Ginsburg).

<sup>4</sup> *Id.* (statement of Justice Clarence Thomas).

<sup>5</sup> *Id.* (statement of Justice Stephen G. Breyer).

<sup>6</sup> *Id.* (statement of Justice Elena Kagan).

<sup>7</sup> *Id.* (statement of Justice Sonia Sotomayor).

<sup>8</sup> *Id.* (statement of Justice Anthony M. Kennedy).

<sup>9</sup> *Id.* (statement of Chief Justice John G. Roberts Jr.).

<sup>10</sup> 135 S. Ct. 2480 (2015).

<sup>11</sup> *Id.* at 2507.

average Americans to have an effect on the law, whether that be through legislation or political pressure on judges and other relevant decisionmakers.

This Article outlines Justice Scalia's unique approach to impacting the law. Part I describes the typical role and power of judicial decisions. It explains that most judges use their written opinions to carefully describe the legal bases for their decisions. Part II explains how rhetoric is employed in crafting persuasive judicial opinions and in particular describes the roles of metaphors, colloquialisms, and humor in persuading audiences. Part III studies Justice Scalia's use of these rhetorical stratagems in his opinions, and Part IV asserts that, unlike most Justices, Scalia layered his rhetoric with harsh criticisms of the Court and his colleagues. Although Justice Scalia's written opinions are lively and colorful, and although his opinions strategically employ rhetorical devices more effectively and in ways that his colleagues' opinions do not, Justice Scalia's opinions often deride other Supreme Court Justices—the very people that Justice Scalia had to persuade to create a majority decision on his issues. Part V argues that, instead of directing his persuasion at his colleagues on the Court, Scalia primarily attempted to influence public opinion by directing his rhetoric at the general public, including legislators, practicing lawyers, legal scholars, and other influential persons. Part VI suggests that, instead of just wanting to be known as a great linguist, Justice Scalia attempted to impact the law in a nontraditional manner. He was working on writing a legacy in the law. Justice Scalia realized that it would be difficult for him to impact the law one majority decision at a time—primarily because he often did not reach the same legal conclusions as his colleagues. He therefore directed his accomplished rhetoric at the general public. He attempted to make an end-run around his colleagues—foregoing attempts to marshal the Court—and shape the law in a roundabout fashion. He sought to shape the law from the bottom up. Justice Scalia crafted entertaining and readable opinions that could interest and persuade the average American. He effectively employed metaphors, colloquialisms, and humor to convey his reasoning to the lay public and create a grassroots movement to shape the law. Now that Justice Scalia has passed, he leaves this legacy behind.

### I. THE FUNCTIONS OF JUDICIAL OPINIONS

Judicial opinions serve a variety of functions and are the primary means of judicial communication.<sup>12</sup> Serving such an important role, it is imperative that these opinions, whether for the majority, or a concurrence or dissent, are persuasive. Depending on the audience to which a judicial opinion is directed, though, the approach a judge might take will vary. Opinions are generally addressed to a number of audiences, including the litigants, lawyers, lower courts, other judges, and the

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<sup>12</sup> See HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 33 (Robert K. Burdette ed., 1992).

public at large.<sup>13</sup> These are important factors to consider in determining how to effectively construct a persuasive opinion.

Majority opinions comprise the bulk of judicial opinions. One of their primary functions is to justify the outcome of the case to the litigants and their attorneys.<sup>14</sup> At the Supreme Court level, majority opinions have even greater significance and therefore multivarious functions. Unlike most district court opinions, Supreme Court opinions can affect legal decisions across the country for decades to come and are read by a broader audience. As with appellate majority opinions generally, these opinions are often directed at persuading a judge's colleagues.<sup>15</sup> At the Supreme Court, opinions are circulated among the Justices' chambers, providing Justices with an opportunity to join the majority opinion or write a supplementary opinion questioning the majority's reasoning.<sup>16</sup> These opinions also are written to give guidance to lower courts and to potential litigants who may have questions about the constitutionality of their actions.<sup>17</sup> A clear judicial opinion will illustrate to lower court judges how to analyze specific problems and the parameters for their decisions. By providing a strong foundation for the ruling, and coherent reasoning, they can also serve to satisfy the public that justice has been done and that the result was not reached by partial or arbitrary reasoning.<sup>18</sup> This aids in maintaining confidence in the judiciary and consequently respect for the law.<sup>19</sup> Concurrently, majority opinions serve the function of preserving history and law through reaffirming precedent.<sup>20</sup> They can also serve to convince the authors themselves that they have decided the case correctly.<sup>21</sup> Through the process of writing out an opinion and reviewing the supplementary drafts of concurrences and dissents, a Justice has the chance to clearly map out his reasoning and conclusion.<sup>22</sup> Majority opinions become the law of the land and thus should be built upon a foundation of strong reasoning so as to provide guidance to lower courts and attorneys, and to maintain respect for the Court and its jurisprudence.

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<sup>13</sup> *See id.* at 31.

<sup>14</sup> *See id.* at 27.

<sup>15</sup> *See id.* at 33.

<sup>16</sup> *See* DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 283–84 (5th ed. 2000).

<sup>17</sup> *See* BOSMAJIAN, *supra* note 12, at 30.

<sup>18</sup> *See id.*

<sup>19</sup> *See* *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.”); BOSMAJIAN, *supra* note 12, at 30.

<sup>20</sup> *See* BOSMAJIAN, *supra* note 12, at 30.

<sup>21</sup> *See id.* at 28–29.

<sup>22</sup> *See id.*

While the majority opinion is often the most valuable to practicing attorneys because it has the force of law, concurrences and dissents also serve key roles in shaping the law. The circulation of draft opinions provides Justices with the opportunity to shift their votes and build further coalitions or catalyze fragmentation within the Court.<sup>23</sup> Drafts of dissents are sometimes converted into majority opinions, and vice versa, after the Justices have had a chance to review their colleagues' reasoning.<sup>24</sup> Thus, persuasive opinions may be effective in changing the outcome of an important case.

Judges write concurrences and dissents for varying reasons. Concurrences explain how the court's decision could have been otherwise rationalized.<sup>25</sup> In Justice Stevens's view, they are defensible because a compromised opinion would be meaningless.<sup>26</sup> They also may be written to send a signal to lower courts to guide them in "the direction of Supreme Court policymaking," or for egocentric or political reasons.<sup>27</sup> Dissents, on the other hand, function to demonstrate flaws the author perceives in the majority's legal analysis.<sup>28</sup> They are also used to emphasize the limits of a majority decision that perhaps sweeps unnecessarily broadly, or to provide lower courts with practical guidance.<sup>29</sup> According to Justice Ginsburg, the most effective dissents stand on their own legal footing and spell out differences without jeopardizing collegiality, public respect for the Court, or confidence in the judiciary.<sup>30</sup> According to Justice Brennan, the most enduring dissents are those that ring with rhetoric, "straddl[ing] the worlds of literature and law."<sup>31</sup>

## II. EMPLOYING RHETORIC TO PERSUADE

The most effective judicial opinions employ rhetorical stratagems to achieve persuasive effects. Just as in any discipline, there is an art to persuasion. A communicator can usefully employ rhetorical devices such as the metaphor, colloquialisms, and humor to simplify complex issues, create a bond with his reader, and, perhaps insidiously, mask his agenda.<sup>32</sup> While effective in persuading, these can be dangerous tools in that improper use of them may alienate or repel a reader, or even complicate the issues.

<sup>23</sup> See O'BRIEN, *supra* note 16, at 283–84.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at 306.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.* at 307.

<sup>28</sup> See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

<sup>29</sup> See *id.* (stating that a dissent can serve as "a sort of 'damage control' mechanism").

<sup>30</sup> See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1196 (1992).

<sup>31</sup> See Brennan, *supra* note 28, at 431.

<sup>32</sup> See *infra* Parts II.A–C.

### A. Metaphors

The use of the metaphor is important in persuasive writing. Metaphors act to represent one thing (the “tenor”) in terms of another (the “vehicle”) to direct a reader’s perception of the tenor by aligning its meaning with that of the vehicle.<sup>33</sup> Metaphors transport concepts from where they are normally located to somewhere else where they are not usually found.<sup>34</sup> Thus, a metaphor allows one to create correspondences in the world which did not have prior existence.<sup>35</sup> It “allows new meanings to occur.”<sup>36</sup> The consequence of the metaphor’s use as a transport device is that it may introduce into the new context qualities derived from the old context.<sup>37</sup> For instance, when Ronald Reagan vowed to fight the “communist cancer,” he conjured up notions of sickness and death, as well as of continuous growth.<sup>38</sup>

In addition to creating new meaning, metaphors are used to help an audience understand complex matters, simplifying the issues at hand.<sup>39</sup> They may also add an imaginative dimension to pique the audience’s interest and make the discussion especially memorable.<sup>40</sup> Additionally, metaphors create a bond between the communicator and audience because they jointly recognize that an illustrative metaphor is being used.<sup>41</sup> In this way, a communicator can create rapport with his audience through the simple use of metaphor. According to Professor Joan Mulholland, metaphors may also be used to set an agenda by injecting unanticipated undertones into a discussion.<sup>42</sup>

### B. Colloquialisms

Colloquialisms are also useful for simplifying the issues and developing rapport with an audience. In addition, they are useful for dismissing an opponent’s argument.<sup>43</sup> Colloquialisms may appeal to an unsophisticated or lay audience because they are understandable to the average reader, causing him to trust the communicator and

<sup>33</sup> JOAN MULHOLLAND, *HANDBOOK OF PERSUASIVE TACTICS: A PRACTICAL LANGUAGE GUIDE* 183 (1994).

<sup>34</sup> See JOANNA THORNBORROW & SHÂN WAREING, *PATTERNS IN LANGUAGE: AN INTRODUCTION TO LANGUAGE AND LITERARY STYLE* 96–97 (1998).

<sup>35</sup> *See id.* at 97.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* (explaining that using the metaphor of horses to describe a forest in an Emily Dickinson poem introduces movement, strength, and wildness—characteristics of horses—into the forest).

<sup>38</sup> See BOSMAJIAN, *supra* note 12, at 41 (citing SEATTLE TIMES, May 12, 1984).

<sup>39</sup> See MULHOLLAND, *supra* note 33, at 184.

<sup>40</sup> *See id.*

<sup>41</sup> *See id.* at 185.

<sup>42</sup> *See id.* at 183.

<sup>43</sup> See *The Internet, Communication, and www.nytimes.com*, [http://www.lcc.gatech.edu/~herrington/gcp/Political/Gore\\_Political.htm](http://www.lcc.gatech.edu/~herrington/gcp/Political/Gore_Political.htm) [<https://perma.cc/2WEC-5P3H>].

identify with him.<sup>44</sup> In this way, colloquialisms are useful in simplifying complex issues. Colloquialisms also develop rapport between a communicator and his audience since they may be viewed as a sign of shared experience.<sup>45</sup> Further, colloquialisms discourage analysis or criticism of the issue at hand; their use of familiar words are effective in sweeping the reader along without recognizing that the issue may be more complicated than it seems.<sup>46</sup> In the same way, colloquialisms serve to dismiss the importance of an opponent's arguments because they simplify the issues and indicate that they are barely worth mentioning.<sup>47</sup> For example, if one communicator responds to another in saying, "Don't have a cow, man,"<sup>48</sup> he effectively dismisses his opponent's objections as trivial. At the same time, the communicator may develop rapport with other audience members since they are familiar with the phrase and thus share it with the communicator. One danger of using colloquialisms is that their effect on certain audiences is to some extent unpredictable; their meanings are incorporated into the specific audience's worldview and thus may communicate unintended connotations.<sup>49</sup> Additionally, colloquialisms may be unpersuasive to audiences who despise their unsophisticated nature and lose respect for the communicator for using them.<sup>50</sup>

### C. Humor

Humor is also an effective rhetorical device. Some of the purposes of humor include lightening the mood of an interaction, enhancing a social relationship with the audience, drawing in the audience, and presenting oneself well.<sup>51</sup> Humor is also effective in dismissing an opponent or his case.<sup>52</sup> According to Mulholland, using humor well communicates to the audience that the speaker is worth listening to, beyond the humor, and is likely to be correct in his assessments.<sup>53</sup> The speaker's intelligence will be manifest if his use of humor is not only relevant and witty, but also illuminating—presenting an idea that makes an important contribution to the communication.<sup>54</sup> To be most effective, though, humor should be a play on ideas,

<sup>44</sup> See *id.*

<sup>45</sup> See MULHOLLAND, *supra* note 33, at 340 (describing the use of colloquialisms—or “slogans”—in the context of marketing).

<sup>46</sup> See *id.* at 126.

<sup>47</sup> See *The Internet, Communication, and www.nytimes.com*, *supra* note 43.

<sup>48</sup> This phrase was popularized by the character of Bart Simpson on the cartoon *The Simpsons*. See “Don't Have a Cow, Man,” *Quotes*, SHMOOP, <http://www.shmoop.com/quotes/dont-have-a-cow-man.html> [<https://perma.cc/T8QQ-97UD>].

<sup>49</sup> See MULHOLLAND, *supra* note 33, at 340.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 126.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 126–27.

<sup>54</sup> See *id.* at 127.



not just word play.<sup>55</sup> “Humor is powerfully persuasive if it generates shared amusement or laughter, particularly if it can remind [the audience] of things shared with [the speaker] . . .”—if it can establish, “common ground” and suggest that the audience and the speaker “are likely to share views.”<sup>56</sup> If this is accomplished, the audience might conclude that it should agree with the speaker’s communication.<sup>57</sup> Humor can also be used to set up alliances and oppositions by separating those who share the laughter from those who do not.<sup>58</sup> Further, it can be persuasive by relaxing the audience and hampering their discovery of some detail that they might oppose.<sup>59</sup> Moreover, humor may be used to destroy the opposition’s credibility since laughing at the opposition suggests that it is not worth serious attention.<sup>60</sup>

While humor can be incredibly persuasive, it may also be a dangerous tactic.<sup>61</sup> If the communicator contributes only humor to the dialogue, it may suggest that he is uncomfortable with the subject or that he has nothing else to say.<sup>62</sup> Additionally, the communicator may be viewed as arrogant,<sup>63</sup> or the humor might be viewed as an avoidance device.<sup>64</sup> Further, Mulholland argues that *written* humor is “always problematic” since the communicator has no way of determining his audience’s mood and cannot take account of the audience’s characteristics or situation.<sup>65</sup>

### III. JUSTICE SCALIA’S APPROACH

Rhetorical stratagems like the metaphor, colloquialisms, and humor can be powerfully persuasive devices, yet it is surprisingly rare that Supreme Court Justices make use of them. Unlike the other Justices, Justice Scalia, throughout his time on the Court, made regular use of such devices—especially metaphors, colloquialisms, and humor.<sup>66</sup> Justice Scalia’s opinions have employed rhetoric to a greater extent than those of his colleagues. His use of metaphors exhibited his intelligence and creativity, and served to form a bond with many of his readers. His use of colloquialisms was effective in communicating with a lay audience and again establishing rapport with them. Justice Scalia also had a great sense of humor, which is reflected in his opinions. This served to make his opinions memorable and drew in audiences who might otherwise have been uninterested in reading judicial opinions.

<sup>55</sup> *See id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* According to Mulholland, “[i]t is wise to note when humor occurs, and what in the immediate context it might be intended to hide.” *Id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 128.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See infra* Parts III.A–C.

### A. Justice Scalia's Use of Metaphors

Justice Scalia made use of metaphors in many of his opinions.<sup>67</sup> Such metaphors appear to arise most often when he was writing for himself, either in concurrence or dissent, instead of in a majority opinion.<sup>68</sup> Further, when they appeared in his concurrences instead of dissents, Scalia tended to disagree altogether with the majority's reasoning. For example, perhaps Scalia's most famous metaphor was his comparison of the Court's *Lemon* test,<sup>69</sup> which is used to determine whether there has been an unconstitutional establishment of religion, to a haunting ghoul:

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 . . . attorneys . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, 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.<sup>70</sup>

While here Scalia was in concurrence with the majority, he agreed solely with the outcome of the case.<sup>71</sup> He disagreed with the Court's reasoning, stating that he would "decline to apply *Lemon*"<sup>72</sup> and that he disagreed with the Court's inquiry as to whether the school district's practice signaled endorsement of religion.<sup>73</sup>

<sup>67</sup> Justice Scalia's use of metaphors traces back to his first published article, which predated his appointment to the Supreme Court. See Antonin Scalia, *Sovereign Immunity and Non-statutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 867 (1970). For example, he compared the Court to a tight-rope walker walking the line for the first time and carrying a balancing stick. See *id.* at 879.

<sup>68</sup> See, e.g., *infra* text accompanying notes 70–73.

<sup>69</sup> The *Lemon* test is a three-pronged test the Court sometimes uses to determine whether a statute violates the Establishment Clause of the First Amendment by having a purpose of establishing religion, having the effect of doing so, or requiring excessive entanglement between the government and religion. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>70</sup> *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

<sup>71</sup> See *id.* at 397–98 (agreeing with the Court's conclusion but disagreeing with the Court's application of the *Lemon* test and with the Court's inquiry as to whether the school district's practice signaled endorsement of religion in general).

<sup>72</sup> *Id.* at 399.

<sup>73</sup> See *id.* at 400.

Justice Scalia's ghoul metaphor is effective in injecting into the concept of the *Lemon* test qualities of terror and haunting persistence. However, the metaphor also conveys the notion of immortality, which is peculiar since Scalia wanted to irreversibly kill the ghoul. Thus, the audience is left with a feeling of helplessness that *Lemon* will persist, despite any of the Justices' actions. This seems contrary to Scalia's desire to abandon the *Lemon* test in Establishment Clause jurisprudence. His opinion does not seem to serve the usual purposes of a concurrence—to explain how the Court could have otherwise rationalized or to give a clear signal to lower courts as to what actions they should take in Establishment Clause cases.<sup>74</sup> However, the extensive ghoul analogy is effective in creating powerful imagery that causes an audience to remember this Scalia concurrence. It also may be effective in creating a bond between Scalia and his audience, since the public can share a laugh at the Court's expense. The metaphor likely did not gain favor with the Court, however. Instead, the metaphor pokes fun at the Court's inconsistency and thus could erode the public's respect for the judiciary. It seems, then, that this metaphor was constructed to persuade an audience other than Justice Scalia's colleagues.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>75</sup> Justice Scalia again used some powerful imagery—this time in his majority opinion that overruled the Court's earlier case of *Parden v. Terminal Railway*.<sup>76</sup> Justice Breyer had argued that *Parden* had been supported by more recent cases, or at least that the Court had carefully avoided overruling the case.<sup>77</sup> This would favor observing, rather than overruling, *Parden*. Vehemently disagreeing, Justice Scalia responded by arguing that

[c]alling what a prior case has flatly decided a 'question' in need of 'deciding,' and . . . making it clear that we 'intimat[e] no view' as to whether the answer given . . . was correct, surely was handwriting on the wall which even an inept cryptologist would recognize as spelling out the caption of today's opinion.<sup>78</sup>

In other words, Justice Scalia contended that it was obvious that *Parden* should be overruled. Similar to the ghoul analogy in *Lemon*, this vivid metaphor is a memorable one. Again, Scalia may have shared a laugh with the public here, as well as perhaps with the Justices who signed onto the majority opinion, but his metaphor came at the expense of fellow Justices. It did not act to safeguard their collegial relationship, nor was it likely to persuade them to join Scalia in future opinions.

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<sup>74</sup> See *supra* text accompanying notes 25–27.

<sup>75</sup> 527 U.S. 666 (1999), overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964).

<sup>76</sup> 377 U.S. 184 (1964), overruled by *Coll. Sav. Bank*, 527 U.S. 666.

<sup>77</sup> See *Coll. Sav. Bank*, 527 U.S. at 678 n.2.

<sup>78</sup> *Id.*

Some of Scalia's other famous metaphors—such as comparing the presentation of separation-of-powers issues to the Court to a wolf in sheep's clothing,<sup>79</sup> or analogizing the Court's implication that you can make one valid proposition out of two invalid ones to hopping back and forth between two vessels in trying to stay afloat<sup>80</sup>—appear in his dissents. Here, too, he was in substantial disagreement with the Court and used the metaphors to form a bond with the public instead of his colleagues. Although perhaps successful in causing the public to better identify with his view, Scalia's dissents serve to ridicule the Court.<sup>81</sup> While they demonstrate flaws in the majority's analysis as dissents should, they jeopardize collegiality and confidence in the judiciary, which is contrary to Justice Ginsburg's characterization of effective dissents.<sup>82</sup>

### B. Justice Scalia's Use of Colloquialisms

Justice Scalia has also regularly made use of colloquialisms, which have functioned to establish rapport with the public.<sup>83</sup> In his concurrence in *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*,<sup>84</sup> for example, Justice Scalia argued

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<sup>79</sup> See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing . . . . But this wolf comes as a wolf.”). For a detailed analysis of this metaphor, see Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 LEGAL WRITING J. 71, 74–76 (2003).

<sup>80</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting). Justice Scalia 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.

*Id.*

<sup>81</sup> In *Morrison v. Olson*, Scalia accused the Court of not recognizing the importance of the separation-of-powers issue even though in this instance the “wolf comes as a wolf.” 487 U.S. at 699, 703–04. In *Austin v. Michigan Chamber of Commerce*, Scalia ridiculed his colleagues’ analysis in charging them with attempting “to make one valid proposition out of two invalid ones.” 494 U.S. at 685.

<sup>82</sup> See *supra* text accompanying note 30.

<sup>83</sup> Justice Scalia used similar tactics in appealing to a lay audience in his address before the Federal Communications Bar Association in 1972. He appealed to the familiar in kicking off his speech with a children’s rhyme:

Mother may I go out to swim?  
Yes, my darling daughter.  
Hang your clothes on the hickory limb,  
But don’t go near the water.

Antonin Scalia, *Don’t Go Near the Water*, 25 FED. COMM. L.J. 111, 112 (1972).

<sup>84</sup> 516 U.S. 264 (1996).

that the Court had created “a fiction of Jack-and-the-Beanstalk proportions” in relying, at least in part, on the drafting history of a statute.<sup>85</sup> Remaining true to his view that legislative history is useless,<sup>86</sup> Scalia argued that, even if the Court should inquire into the subjective intent of the legislature in passing the law, to presume the legislators were keenly aware of the statute’s drafting history is simply a fiction.<sup>87</sup>

Scalia has made use of colloquialisms in other contexts as well. His use of such phrases include: “balance-all-the-factors-and-who-knows-who-will-win litigation,”<sup>88</sup> “throw-in-the-towel approach,”<sup>89</sup> “we’ll-look-at-all-the-circumstances-and-see-if-it-looks-dangerous approach,”<sup>90</sup> “an I-told-you-so mood,”<sup>91</sup> “catch-as-catch-can approach,”<sup>92</sup> “whatever-it-takes proabortion jurisprudence,”<sup>93</sup> “give-it-a-try litigation,”<sup>94</sup> and “keep-what-you-want-and-throw-away-the-rest version.”<sup>95</sup> Additionally, Scalia invoked the common saying of “[g]ood fences make good neighbors” in his majority opinion of *Plaut v. Spendthrift Farm, Inc.*<sup>96</sup> These common phrases are understandable to lay audiences and represent a shared experience between the audience and a Supreme Court Justice. Scalia’s colleagues, however, likely did not appreciate this depreciation and simplification of the issues. While Scalia’s rhetoric is effective in dismissing his opponents’ arguments as unworthy, this did not aid Scalia in achieving an opinion that was sensitive to both his colleagues’ views and the litigants of

<sup>85</sup> *Bank One Chi., N.A.*, 516 U.S. at 279 (Scalia, J., concurring in part and concurring in the judgment).

<sup>86</sup> See, e.g., *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465, 480–81 (1997) (Scalia, J., concurring) (stating that he joined in all parts of the majority’s opinion “except those portions of the opinion [discussing legislative history], which achieve nothing useful and sow confusion in the law”); see also Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL’Y 401, 405 (1994) (“Justice Scalia’s most familiar and recurrent theme is that, in interpreting a statute, the Court should look first to the plain meaning of the statutory text rather than seeking guidance from legislative history.”); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206 (2000) (“Led by Justice Scalia, textualists fought reliance by the Court on legislative history . . .”).

<sup>87</sup> See *Bank One Chi., N.A.*, 516 U.S. at 279 (Scalia, J., concurring in part and concurring in the judgment).

<sup>88</sup> *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

<sup>89</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 n.9 (1990).

<sup>90</sup> *Crandon v. United States*, 494 U.S. 152, 180 (1990) (Scalia, J., concurring in the judgment).

<sup>91</sup> *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).

<sup>92</sup> *Crandon*, 494 U.S. at 180 (Scalia, J., concurring in the judgment).

<sup>93</sup> *Hill v. Colorado*, 530 U.S. 703, 762 (2000) (Scalia, J., dissenting).

<sup>94</sup> *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>95</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). For more examples of Scalia’s use of “adjectival catch phrase[s] connected by hyphens,” see Kagan, *supra* note 79, at 81–82.

<sup>96</sup> 514 U.S. 211, 240 (1995).

the case. Thus, again, Justice Scalia seemed to write primarily to the public, not his colleagues on the Court.

### C. Justice Scalia's Use of Humor

Justice Scalia was probably most famous for his wit. His comparison of the *Lemon* test to a ghoul<sup>97</sup> is indicative of the humor he thrust into his opinions.<sup>98</sup> In the ghoul description, Justice Scalia was successful in lightening the mood and enhancing his relationship with the public through shared laughter. He exploited humor's ability to set up alliances and oppositions by separating those who laughed from those who did not. He formed an alliance with the public and consequently directly opposed his colleagues. Although this may seem natural because he did not completely agree with the majority opinion, Justice Scalia broke Justice Ginsburg's rule of maintaining collegiality with his colleagues and maintaining respect for the judiciary.<sup>99</sup> He undermined his colleagues' credibility, as well as that of the Court, which made his argument more persuasive but damaged his own relationship with the Court and respect for the Court as an institution.

Another example of Justice Scalia's good sense of humor occurred in his majority opinion in *College Savings Bank*.<sup>100</sup> There, in attacking the dissent's loose view of federalism—that legislative flexibility is the only counter needed to maintain the balance between federal and state powers—he quipped: “Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher.”<sup>101</sup> This humor, while lightening the mood somewhat, was again dripping with criticism. It served to further separate the majority and the public from the dissenters by mocking the dissenters' reasoning. In ridiculing his colleagues, Justice Scalia set up a situation where he was likely to be isolated on the Court in future opinions.

## IV. CRITICISM OF THE COURT

Justice Scalia did more than effectively employ rhetorical stratagems; he generally layered them with a veneer of criticism. As Professor Richard Brisbin, Jr. has explained, although Scalia was “[a]t times engaging and witty in his criticism,

<sup>97</sup> See *supra* text accompanying notes 70–74.

<sup>98</sup> It has been rumored that Justice Scalia's clerks initially drafted his opinions, but once Scalia was through with them, they had metamorphosed from a typical Justice's opinion to one laced with side-splitting humor. See Nina Totenberg, *Skip the Legalese and Keep It Short, Justices Say*, NPR (June 13, 2011, 12:01 AM), <http://www.npr.org/2011/06/13/137036622/skip-the-legalese-and-keep-it-short-justices-say> [<https://perma.cc/H85L-7TVS>].

<sup>99</sup> See *supra* text accompanying note 30.

<sup>100</sup> *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

<sup>101</sup> *Id.* at 690.

he has at other times been sarcastic, barbed, and demeaning in his comments about the legal analysis of his colleagues and the legal work of Congress and administrative agencies.<sup>102</sup> Indeed, Scalia was the best-known attacker of his Supreme Court colleagues;<sup>103</sup> he often expressed contempt for his judicial colleagues and insulted them, using sarcasm and name-calling.<sup>104</sup> As Professor Philip Cooper has suggested, Scalia did not seem constrained by the notion that the Justices should maintain a sense of civility on the Court.<sup>105</sup>

Justice Scalia's pervasive criticism can be seen with his uses of metaphors, colloquialisms, and humor. In *Planned Parenthood v. Casey*,<sup>106</sup> for example, the majority stated that "[l]iberty finds no refuge in a jurisprudence of doubt."<sup>107</sup> Justice Scalia played on these words in his dissent, stating that "[r]eason finds no refuge in this jurisprudence of confusion."<sup>108</sup> He mirrored the majority's language to achieve a humorous and persuasive effect but also undercut the merit of the majority's opinion. Regardless of the rhetorical device employed, Justice Scalia seemed to have the primary purpose of attacking the Court head-on.

More striking, in *Webster v. Reproductive Health Services*,<sup>109</sup> Scalia wrote a stinging concurrence, attacking Justice O'Connor personally.<sup>110</sup> He indicated that O'Connor had hypocritically contradicted herself by stating that judicial restraint prevents the Court from reconsidering and overruling *Roe v. Wade*<sup>111</sup> while she had written opinions reconsidering and overturning precedents in other areas of settled law.<sup>112</sup> Scalia also stated that O'Connor was "irrational" in introducing a concept of possible viability in *Roe*: "[s]ince '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."<sup>113</sup> Justice Scalia even went a step further by mockingly stating that "[p]erhaps our next opinion will expand [the concept] even further, by approving state action designed to take account of 'the chance of possible viability.'"<sup>114</sup> According to Cooper, the concurrence had little

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<sup>102</sup> RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 1 (1997).

<sup>103</sup> See PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 63 (1995).

<sup>104</sup> See Marie A. Failinger, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia*, 34 U. TOL. L. REV. 425, 475 (2003).

<sup>105</sup> See COOPER, *supra* note 103, at 124.

<sup>106</sup> 505 U.S. 833 (1992).

<sup>107</sup> *Id.* at 844.

<sup>108</sup> *Id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>109</sup> 492 U.S. 490 (1989).

<sup>110</sup> See COOPER, *supra* note 103, at 49.

<sup>111</sup> 410 U.S. 113 (1973).

<sup>112</sup> See *Webster*, 492 U.S. at 532-34 (Scalia, J., concurring).

<sup>113</sup> *Id.* at 536.

<sup>114</sup> *Id.*

purpose other than to ridicule Justice Scalia's colleague.<sup>115</sup> Not only would such an attack affect Scalia's relationship with Justice O'Connor in particular, but it could have jeopardized his relationship with the entire Court. Further, his criticism likely damaged both the Court's authority and his own.<sup>116</sup>

Justice Scalia's frequent resort to criticism is in contrast to other styles of persuasion employed by Justices known for their powers of persuasion. Justice Douglas, for example was "a real charmer" when appealing for modifications to proposed opinions.<sup>117</sup> Justice Frankfurter could be abrupt and irritating, but he tempered his criticisms by poking fun at his own academic proclivities.<sup>118</sup> Justice Scalia has instead distinguished himself by being extremely critical of his colleagues and the Court.<sup>119</sup> Although Scalia proved himself capable of constructing brilliant and elaborate metaphors and producing hearty chuckles, it is questionable whether his frequent use of these rhetorical stratagems worked to his advantage in persuading the Court. In contrast to his charming public personality,<sup>120</sup> Justice Scalia's judicial demeanor exhibited in his opinions was often quite caustic.

<sup>115</sup> See COOPER, *supra* note 103, at 50.

<sup>116</sup> See Failinger, *supra* note 104, at 493. Some have argued that the proliferation of individual opinions since the 1930s and 1940s has come at the cost of consensus on the Court's policymaking—that it has undercut the Court's rulings and policymaking abilities and has made the Court appear more fragmented and less predictable. See O'BRIEN, *supra* note 16, at 295, 302. Yet concurrences and dissents are justifiable as improving the majority opinion and augmenting the prestige of the Court since it is comforting to look back and see that at least some of the Justices got it right. See *id.* at 313. Concurring and dissenting opinions also keep the Court at the forefront of the intellectual development of the law. See *id.*

<sup>117</sup> SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* 396 (1994).

<sup>118</sup> See *id.* at 396–97.

<sup>119</sup> See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1291 (2009) ("Since joining the Court, Justice Scalia has regularly criticized his colleagues for relying on legislative history in their majority opinions."); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 928 ("Justice Antonin Scalia has famously issued opinions for years in which he criticizes his colleagues for their reliance on legislative history in statutory interpretation."); David S. Schwartz, *Justice Scalia's Jiggery-Pokery in Federal Arbitration Law*, 101 MINN. L. REV. HEADNOTES 75, 75 (2016) (noting Scalia's "penchant for criticizing his colleagues for judicial practices in which he frequently indulged himself"). But see Failinger, *supra* note 104, at 431–32 (stating that Scalia's colleagues have followed his example in "call[ing] each other out" in their opinions).

<sup>120</sup> See William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601, 1601 (2012) ("When President Reagan nominated D.C. Circuit Judge Antonin Scalia to the Supreme Court in 1986, commentators noted that his gregarious and charming personality was an important strength of the nomination, because the new Justice could be expected to charm his way to influence on the Court."); Nadine Strossen, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 1, 9 (2006) ("Nino Scalia's warm and ebullient personality has won him many friends, across the ideological spectrum.").



## V. WRITING FOR A DIFFERENT KIND OF AUDIENCE

Even though Justice Scalia was accomplished in employing rhetorical devices, his overt criticisms of the Court and his colleagues likely impaired his ability to persuade the Court to join his opinions. Thus it might appear that his attempts to persuade were all for naught. But perhaps Justice Scalia was directing his rhetoric at a different kind of audience. Instead of aiming his words at the Court, it appears that Scalia directed his persuasive tactics at the general public.

*A. Justice Scalia Was Ineffective in Persuading the Court*

Although Justice Scalia's views may not have been adopted by the Court because of their conservative nature,<sup>121</sup> Scalia's persuasive power also was likely ineffective because of his sharp criticisms of the Court and his colleagues.<sup>122</sup> These criticisms, and the stridency of Scalia's opinions, likely damaged Scalia's ability to directly persuade his colleagues.<sup>123</sup> While Scalia easily pointed out holes in his opponents' arguments, he did so with such fervor that the collegial relationship between other members of the Court and him may have subsequently eroded. Scalia's colleagues were understandably offended by his personal attacks and assaults on the Court.<sup>124</sup> For example, even though, politically, they were not far apart, Justice Powell found Scalia irritating because of his cheerful lack of deference, his dismissal of conventional wisdom, and also his wit.<sup>125</sup> It is likely that Justice O'Connor was even more deeply offended by Scalia's attack on her in *Webster*.<sup>126</sup> The Justices probably held this against Scalia when he attempted to persuade them to see cases from his point of view. Likely due to his hankering for criticism, Scalia's rhetoric was often ineffective in marshalling the Court.<sup>127</sup>

Justice Scalia's numerous attempts to persuade his Supreme Court colleagues seem to have failed.<sup>128</sup> Despite Scalia's employment of familiar rhetorical tools to draw in and persuade his audience, he has related being disappointed in not carrying

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<sup>121</sup> For example, Scalia was an avid originalist, taking a minority approach to constitutional interpretation. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (outlining and defending the originalist approach).

<sup>122</sup> See JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT 318 (2006). In addition to not effectively persuading the Court, Scalia's use of criticism jeopardized his chances of becoming Chief Justice because his opinions demonstrated that he had difficulty working with the other Justices—regardless of whether this was true in fact.

<sup>123</sup> See Horace E. Johns, *Nine Means to an End*, 39 TENN. B.J. 27, 33 (2003).

<sup>124</sup> See *id.* (noting that Scalia's fervent advocacy sometimes offended his colleagues).

<sup>125</sup> See COOPER, *supra* note 103, at 113.

<sup>126</sup> See *supra* text accompanying notes 109–16.

<sup>127</sup> See Johns, *supra* note 123, at 31.

<sup>128</sup> *But see* Failinger, *supra* note 104, at 468 (stating that the Court is not the most important audience of judicial opinions).

the majority in a number of important cases, and a significant number of his opinions are in dissent.<sup>129</sup> Further, not only did Scalia's views remain unpopular with his liberal colleagues, but his conservative colleagues on the Court were often similarly unpersuaded by Scalia.<sup>130</sup> According to scholars, conservatives' hopes that Scalia's appointment to the Court would solidify a conservative coalition were dashed.<sup>131</sup> With this lack of persuasive power, Justice Scalia was not generally effective in sending the Court in directions he would have liked it to take. His "personal crusade to persuade his colleagues to abandon . . . legislative history,"<sup>132</sup> for example, was not realized during his time on the Court.<sup>133</sup> In terms of persuading his colleagues, his utilization of criticism and rhetorical stratagems seems to have been ineffective.

### *B. Justice Scalia Directed His Rhetoric at the General Public*

Instead of directing his rhetorical efforts at the Court, Justice Scalia appears to have been aiming his efforts at the general public.<sup>134</sup> His use of metaphors, colloquialisms, and humor all serve to create rapport with his audience. While they probably were not effective in creating rapport with his colleagues, they likely still serve this purpose with respect to his alternative audience. Since metaphors and colloquialisms are useful in simplifying complex issues, they are especially useful in communicating legal concepts to non-lawyers.<sup>135</sup> Thus, these rhetorical stratagems would have been particularly useful if Scalia was attempting to persuade the general public instead of his colleagues on the Court. Further, those who are not well-versed in the law are likely more easily distracted by Scalia's rhetorical maneuvering, causing them to focus not so much on his reasoning, but instead on his brilliant way with words. This allowed Scalia to gloss over precedent and avoid addressing any deficits that might have existed in his own legal reasoning. Finally, Scalia's use of metaphors, colloquialisms, and humor made his opinions memorable and easy to read for

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<sup>129</sup> According to the Supreme Court Database, approximately 255 of Scalia's 734 opinions were in dissent. See *The Supreme Court Database*, WASH. U. L., <http://scdb.wustl.edu/analysis.php> [<https://perma.cc/JL42-HGX6>].

<sup>130</sup> See Kapgan, *supra* note 79, at 97–98.

<sup>131</sup> See BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 219 (2014); Kristi Kress Wilhelmy, Comment, *Breaking Scalia's Silence: The Dissent Justice Scalia Might Have Written in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 U. TOL. L. REV. 611, 636 & n.236 (2003).

<sup>132</sup> See CHRISTOPHER E. SMITH, *JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOVEMENT* 37 (1993).

<sup>133</sup> See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (indicating that reliance on legislative history is sometimes appropriate); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2669 (2015) (relying in part on legislative history); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (discerning congressional intent from a statute's text and legislative history).

<sup>134</sup> Professor Failinger stated that Justice Scalia's most important audience was the public. See Failinger, *supra* note 104, at 472.

<sup>135</sup> See *generally id.* (discussing Scalia's use of metaphors).

those who do not consume Supreme Court opinions on a daily basis. Their lack of legal jargon and amusing quips make it easier for audiences to drudge through legal opinions that, if written by other judges, might otherwise be dry and unentertaining.

Justice Scalia was successful in drawing in the general public. His colorful language in his judicial opinions seem to be more often quoted by the popular press than any of his colleagues.<sup>136</sup> Further, while few members of the public who are not judges, attorneys, or law school students, regularly read actual judicial opinions,<sup>137</sup> Scalia's opinions are so popular that they have been the subject of several books, one of which is completely filled with his most famous dissents.<sup>138</sup> From the plentiful media attention these books have received, they appear to be popular among the general public, not just legal scholars.<sup>139</sup> Even President Obama, who sits at the opposite end of the political spectrum, has spoken well of Justice Scalia and his judicial opinions, describing Scalia as a "brilliant legal mind with an energetic style, incisive wit, and colorful opinions."<sup>140</sup> Finally, Scalia's opinions have generated more law review articles than any of his colleagues because they are so provocative and employ such colorful language.<sup>141</sup> Thus it seems that Justice Scalia has been effective in reaching, and perhaps even persuading, the general public.

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<sup>136</sup> See, e.g., Joan Biskupic, *Religious Access to Schools Widened*, WASH. POST, June 8, 1993, at A01 (quoting Justice Scalia's language in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring), which compares the *Lemon* test to a ghoul).

<sup>137</sup> See Kaplan, *supra* note 79, at 100 ("The general populace surely never read court opinions, except for what quotes they glean from a newspaper.").

<sup>138</sup> See generally KEVIN A. RING, *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE* (2004) (boasting some of Scalia's most colorful language from his dissents in cases such as *United States v. Virginia*, 518 U.S. 515, 569 (1996) (Scalia, J., dissenting), where he argued that the majority's assertion that the traditions of having government-funded military schools for men and sending only men into military combat was unconstitutional, was "politics-smuggled-into-law").

<sup>139</sup> See, e.g., Interview by Renee Giachino with Kevin Ring, author of *Scalia Dissents*, CTR. FOR INDIVIDUAL FREEDOM (Dec. 1, 2004), [http://www.cfif.org/htdocs/freedomline/current/in\\_our\\_opinion/scalia-dissents.htm](http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/scalia-dissents.htm) [<https://perma.cc/WJ4B-46F7>]; Interview by Jamie Glazov with Kevin Ring, author of *Scalia Dissents*, FRONT PAGE MAGAZINE (Dec. 1, 2004), <http://frontpagemag.com/Articles/Printable.asp?ID=16012> [<https://perma.cc/L25H-7HMA>]; see also RING, *supra* note 138, at Back Flap (featuring a statement by Tom DeLay).

<sup>140</sup> See Krishnadev Calamur, *Obama's Views on Antonin Scalia—and the Justice's Successor*, ATLANTIC (Feb. 13, 2016), <http://www.theatlantic.com/politics/archive/2016/02/justice-scalia-obama/462747/> [<http://perma.cc/5R5R-D52M>]; see also RING, *supra* note 138, at Back Flap (stating that "Scalia [was] the most principled conservative jurist" of his time and that a great service has been done in compiling his extraordinary judicial opinions).

<sup>141</sup> See Alice Koskela, *Scalia Shows Textualists Have a Sense of Humor*, 43 *ADVOC.* 31, 31 (2000); see also JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 276 (2009) (stating that, at least in 2004, Scalia was "the subject of academic law review articles" more frequently than his fellow Justices on the Supreme Court).

## VI. WRITING A LEGACY

The question remains of why Justice Scalia focused his persuasive efforts on the general public instead of his Supreme Court colleagues. It is possible that Scalia's rhetorical flourishes were designed merely to flaunt his own intelligence. Justice Scalia's language, however, seems more directed. While his intent appears to have been leaving an impact on the law, it seems not to have been the simple intent of leaving a legacy of brilliant language. It appears that Scalia had grander plans of shaping the law through a bottom-up approach instead of through the traditional manner of molding the law in a trickle-down fashion.

*A. Writing to Parade His Rhetorical Might?*

It seems that Justice Scalia may have been trying to leave his legacy with his language. Professor Marie Failinger has asserted that Scalia wrote to illustrate his "intellectual superiority" and his "contempt for others."<sup>142</sup> According to Failinger, Scalia arduously searched for the language that would most infuriate his opponents, causing controversy and throwing him into the spotlight.<sup>143</sup> Further, it sometimes seems that Scalia may have authored a dissent just for the sake of publishing his work of metaphors, colloquialisms, and humor. Perhaps Scalia hoped to follow Justice Holmes's path to becoming a great dissenter, eventually changing the minds of his colleagues or future Supreme Court Justices.<sup>144</sup> According to Judge Posner, Holmes's reputation as a great dissenter was primarily due to his effective use of rhetoric, not his sound reasoning.<sup>145</sup> Scalia indeed mirrored Justice Holmes in his rhetoric, making similar use of both the metaphor and colloquialisms.<sup>146</sup> But Scalia departed from Holmes's example in vehemently attacking the Court and personally attacking his colleagues.<sup>147</sup>

Justice Scalia's surplusage of rhetoric might be attributed to his own arrogance. He may have been just showing off his verbal agility to his general public audience. If this was his goal, then Scalia was successful, being touted as "[v]ery bright,"<sup>148</sup> "brilliant yet opinionated,"<sup>149</sup> having "impressive intellect,"<sup>150</sup> and being "an articulate

<sup>142</sup> Failinger, *supra* note 104, at 426.

<sup>143</sup> *See id.*

<sup>144</sup> The dissents that Holmes wrote during his time on the bench have since become doctrine in many instances. *See* THE ESSENTIAL HOLMES xiii (Richard A. Posner ed., 1992).

<sup>145</sup> *See id.* at xvii.

<sup>146</sup> *See id.* at xiii.

<sup>147</sup> *See supra* Part IV.

<sup>148</sup> BRISBIN, *supra* note 102, at 1.

<sup>149</sup> DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA xvii (1996).

<sup>150</sup> *Id.* at xiii.

spokesperson.”<sup>151</sup> Senate minority leader Harry Reid has even noted that Scalia was “one smart guy” with well-written and well-reasoned opinions.<sup>152</sup> It appears that Scalia recognized his success, for in his defense of filing dissenting opinions, Scalia seemed to applaud himself:

When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least *some* of the Justices saw the danger clearly, and gave voice, often *eloquent* voice, to their concern.<sup>153</sup>

If displaying his brilliance was his only goal, Scalia turned out to be quite successful in this regard.

### *B. Shaping the Law Through a Bottom-Up Approach*

Justice Scalia may have had grander aspirations in mind. His rhetoric appears to have been more targeted than to merely flex his verbal muscles. While filled with colorful metaphors, catchy colloquialisms, and side-splitting humor, Scalia’s opinions go beyond entertaining and fascinating his audiences. His calculated criticisms of the Court and his colleagues indicate that beyond writing well, he hoped to make an impact on the law. It seems that Scalia was attempting to persuade his select audience—the general public—to agree with his judicial reasoning. Since he probably realized that he was unlikely to persuade his colleagues, Justice Scalia turned his back on them and instead aimed his rhetoric at the general public in hope of changing the law using a bottom-up approach.<sup>154</sup>

The traditional view of the Supreme Court is that of nine unbiased judges who are insulated from political pressure in handing down the law.<sup>155</sup> This law is derived either from the Constitution or the U.S. Code, or it is judge-created common law. The Justices interpret the law and record their interpretations in judicial opinions. Lower courts then follow Supreme Court precedent in determining how cases in each jurisdiction should be decided. Thus, Supreme Court Justices are powerful characters; they are integral to shaping the law.

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<sup>151</sup> *Id.* at xiv. Indeed, Justice Scalia has been “lavishly praised (by friends and foes alike) for [his] intellectual talents and abilities.” STAAB, *supra* note 122, at 310.

<sup>152</sup> *See Dems’ New Senate Leader Criticizes Justice Thomas*, CNN.COM (Dec. 6, 2004, 3:48 AM), <http://www.cnn.com/2004/ALLPOLITICS/12/05/judges.reid.frist/index.html> [<http://perma.cc/RY3P-YTGW>].

<sup>153</sup> O’BRIEN, *supra* note 16, at 313 (emphasis added) (quoting Justice Scalia).

<sup>154</sup> *See supra* Part V.

<sup>155</sup> *See* O’BRIEN, *supra* note 16, at 29. This is of course an overly simplified view of the Court, and many have argued that the Justices are biased and also affected by political pressure.

Under this trickle-down approach, Justice Scalia could frequently not get his way because he was unable to persuade his colleagues to vote in his favor. Understandably, then, he was often frustrated with the Court for regularly not agreeing with him.<sup>156</sup> In 1999, *Fortune Magazine* reported that the Court risked losing Scalia due to this frustration.<sup>157</sup> Apparently Scalia had told his associates that he was “underchallenged” by the light workload of the Court and that he was tired of always dissenting.<sup>158</sup> His friends described him as “frustrated” and reported that he had indicated that press accounts speculating about the next Justices to retire were wrong to omit him.<sup>159</sup> Other observers similarly noted that Scalia had become increasingly caustic and dissatisfied.<sup>160</sup> And his frustration from not getting his way on the bench built increasingly throughout the years.<sup>161</sup>

It seems that Scalia understood that he would often not be persuasive to his colleagues, so perhaps he believed the bottom-up approach was his best opportunity to make an impact. Justice Scalia bucked the trend of attempting to persuade his colleagues. Perhaps he felt he could not directly persuade such experienced judges who were likely set in their ways. Maybe he realized that some of his views were so far from where the Court stood during Scalia’s time on the bench that the probability of successfully persuading the Court to make a 180-degree turn in its jurisprudence was small. Instead, Justice Scalia may have felt that he had a better chance of persuading the general public, which could in turn shift the Court’s direction.

Contrary to the traditional trickle-down approach, the law may be shaped in a bottom-up manner. The general public influences legislatures to codify the public’s will. Indeed, legislators look to the polls in determining how to vote on a number of items.<sup>162</sup> Further, the general public can have an effect on how constitutions and statutes are interpreted, and how the common law is shaped. There is evidence that the Court, at least to some extent, follows public opinion.<sup>163</sup> The decision in *Roe v. Wade*,<sup>164</sup> for

<sup>156</sup> See Jeffrey H. Birnbaum, *Is Justice Antonin Scalia Frustrated Enough to Retire in 2001?*, FORTUNE MAG. (Nov. 22, 1999), [http://archive.fortune.com/magazines/fortune/fortune\\_archive/1999/11/22/269114/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/1999/11/22/269114/index.htm) [<https://perma.cc/HME6-WGL4>].

<sup>157</sup> See *id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See Joan Biskupic, *No Shades of Gray for Scalia*, USA TODAY (Sept. 18, 2002, 11:31 PM), [http://usatoday30.usatoday.com/news/washington/2002-09-17-scalia-1acover\\_x.htm](http://usatoday30.usatoday.com/news/washington/2002-09-17-scalia-1acover_x.htm) [<https://perma.cc/JK4X-ZFQM>].

<sup>161</sup> See *id.*

<sup>162</sup> See *How a Member Decides to Vote*, CTR. ON CONGRESS, <http://centeroncongress.org/how-member-decides-vote> [<https://perma.cc/V5TA-4NGS>].

<sup>163</sup> See MORRIS P. FIORINA & PAUL E. PETERSON, *THE NEW AMERICAN DEMOCRACY* 501, 503 (2d ed. 2002) (noting that “Supreme Court decisions have fluctuated with changes in public opinion” and that the Supreme Court declared certain restrictions on abortion constitutional in response to political pressures).

<sup>164</sup> 410 U.S. 113 (1973).

example, has been attributed to this force.<sup>165</sup> Particular segments of the public may have an influence on the Court even if the public at large does not have a strong opinion on a matter. For example, the Justices occasionally turn to legal scholars, whose work may have an effect on jurisprudence.<sup>166</sup> From the beginning of Justice Scalia's career, he recognized that legal scholars play a role in this bottom-up approach to shaping the law.<sup>167</sup> In his first scholarly publication as an associate professor of law at the University of Virginia, Scalia stated: "It is the inherited wisdom of the American bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law."<sup>168</sup> Thus, Scalia indicated that legal scholars have influence in the development of common law. Even when the public lacks expertise in an area, though, it may have an effect on Supreme Court decisionmaking.<sup>169</sup>

Justice Scalia seems to have taken a bottom-up approach to persuasion, focusing his rhetoric on the general public, which could in turn affect legislation and legal interpretation. By harnessing the power of metaphors, colloquialisms, and humor, Scalia could easily communicate with and persuade even persons without legal training. This general public—which also includes legislators,<sup>170</sup> practicing lawyers, legal scholars, and other influential persons—could then impact the Court's interpretation of law.

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<sup>165</sup> See FIORINA & PETERSON, *supra* note 163, at 503.

<sup>166</sup> See, e.g., *United States v. Kebodeaux*, 133 S. Ct. 2496, 2504 (2013) (citing WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* (2009)); *Chaidez v. United States*, 133 S. Ct. 1103, 1109 (2013) (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002)); *Baze v. Rees*, 553 U.S. 35, 41–42 (2008) (citing Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 364 (1997)). *But see Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACSBLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship> [<https://perma.cc/F2UV-WW8D>] (noting Chief Justice Roberts's statement suggesting that law review articles are often useless).

<sup>167</sup> See Scalia, *supra* note 67, at 867.

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* text accompanying note 163.

<sup>170</sup> While today many U.S. Senators and Congresspersons have legal backgrounds, many do not, and certainly many members of state legislatures do not have legal training. See Debra Cassens Weiss, *Lawyers No Longer Dominate Congress; Is Commercialization of Profession to Blame?*, ABA J. (Jan. 20, 2016, 8:06 AM), [http://www.abajournal.com/news/article/lawyers\\_no\\_longer\\_dominate\\_congress\\_is\\_commercialization\\_of\\_profession\\_to\\_b](http://www.abajournal.com/news/article/lawyers_no_longer_dominate_congress_is_commercialization_of_profession_to_b) [<https://perma.cc/A2SJ-RGCA>]; Jen Fifield, *State Legislatures Have Fewer Farmers, Lawyers; But Higher Education Level*, STATELINE (Dec. 10, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/12/10/state-legislatures-have-fewer-farmers-lawyers-but-higher-education-level> [<https://perma.cc/92HH-2J9J>].

The consequences of employing this bottom-up approach are uncertain since such an approach is *sui generis*. This uncertainty is one disadvantage of trying to shape the law in this fashion. Currently, it is difficult to determine whether Justice Scalia was effective in shaping the law from the bottom-up. Perhaps this is because another disadvantage to the bottom-up approach is that any effect on the law will likely take longer since popular opinion must work its way up from the masses to the legislature and the courts. Further, it may take much more rhetorical power in terms of quantity to effectively reach the general public. Supreme Court Justices are often isolated in their "marble temple,"<sup>171</sup> but Scalia's approach requires significant publicity. To be effective, he had to regularly get quoted in newspapers and inspire others to compile volumes of his most famous opinions. The popular press is integral to the bottom-up approach's success. Quality legal reasoning, on the other hand, may have been less important than the publicity and rhetorical strength of Scalia's opinions. Thus, while employing the bottom-up approach has the disadvantage of requiring greater exposure to the public, it likely has the advantage that the reasoning need not be as superb as it would otherwise have to be if Scalia were attempting to persuade his careful colleagues. This is merely because Scalia's new audience was less well versed in the law, allowing him to gloss over precedent and certain consequences of his judicial reasoning.

#### CONCLUSION

During the course of his life, Justice Scalia seems to have mastered his use of rhetorical devices. His metaphors were colorful and memorable, his colloquialisms were understandable to lay audiences, and his use of humor was effective in dismissing his opponents' arguments.<sup>172</sup> In employing each of these stratagems, Justice Scalia directed his opinions primarily at the general public, including legislators, practicing lawyers, legal scholars, and other influential persons. Based on Scalia's criticisms, which overlaid his use of rhetorical stratagems, however, it seems that his colleagues on the Court were not an audience Scalia hoped to persuade, at least in the first instance. By appearing inflexible and disrespectful in his opinions, Justice Scalia risked isolating himself from the rest of the Court and often finding himself alone in his reasoning. His rhetorical skills were thus ineffective in directly commanding the Court in a direction more to his liking. It appears Scalia dismissed this opportunity to persuade the Court and thus shape the law. He instead employed a unique bottom-up approach in attempting to accomplish this objective. Through the power of public opinion, Justice Scalia hoped to leave his impression on the law. Only time will tell whether this bottom-up approach to shaping the law was ultimately effective.

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<sup>171</sup> O'BRIEN, *supra* note 16, at 120.

<sup>172</sup> See *supra* Part III.



