Joseph D. Kearney

Justice Antonin Scalia—*Ave Atque Vale*

After the death of Justice Antonin Scalia on February 13, 2016, the *Milwaukee Journal Sentinel* invited Dean Joseph D. Kearney to write a reflection. It appeared in the newspaper on February 21, 2016, and is reprinted here.

I was an unlikely law clerk to the late Justice Antonin Scalia. At the time of my interview in 1994, I was already more than five years out of law school and practicing law in Chicago. I told him the truth about my primary reason for wanting the clerkship: It would help me in other things that I hoped to do in the law—in particular, becoming a law professor. We all had learned in 1987 from Judge Robert Bork not to tell the other truth: It would be an intellectual feast. Justice Scalia's own reasoning in hiring me was less clear, but it was evident that my study of Latin and Greek at a Jesuit high school and subsequently in college appealed to him.

I almost lost the clerkship before it began. On a trip to Washington, I went out for pizza with Justice Scalia and his then-clerks. He was dismayed when I declined any wine, stage-whispering, "Did anyone screen this guy?" His mood quickly brightened when he realized that this meant one less person with whom to divide the wine. Indeed, he openly mulled whether thereafter he should hire only beer drinkers such as me.

My clerkship itself came in Justice Scalia's tenth year on the Court. He had worked out his views of constitutional and statutory interpretation, doing much of that as a law professor at such places as the University of Chicago. And he was the justice who least needed law clerks. Anyone who has ever read more than one of his opinions knows that Justice Scalia had an inimitable style. Any law clerk seeking to emulate it would no doubt fall on his face. Yet we could be helpful, making suggestions, combing through the record, seeking to persuade him that some phrases were amusing, yes, but nonetheless should be omitted.

Justice Scalia's extraordinary flair as a rhetorician—he is widely regarded as the greatest ever on the Court—was in stark contrast to his jurisprudence. He held a deeply modest view of the role of unelected judges in our democratic society.

To be sure, Justice Scalia believed in enforcing constitutional guarantees. People unhappy with his jurisprudence concerning the Second Amendment (the right to bear arms) must contend with the implication of their views for his similarly strong dedication to the principles of the Fourth Amendment, barring unreasonable searches and seizures, and the Sixth Amendment, involving the

"Justice Scalia's extraordinary flair as a rhetorician—he is widely regarded as the greatest ever on the Court—was in stark contrast to his jurisprudence. He held a deeply modest view of the role of unelected judges in our democratic society."

Archbishop Timothy M. Dolan of the Archdiocese of New York (now cardinal); Shirley S. Abrahamson, then chief justice of the Wisconsin Supreme Court; Justice Antonin Scalia; and Joseph D. Kearney, dean of the Law School, gather on September 8, 2010, for the dedication of Marquette University Law School's Ray and Kay Eckstein Hall.

jury right in federal criminal trials. Many a defendant did or will receive the benefit of Justice Scalia's work—often prevailing over other "conservative" members on the Court—in recognizing individual rights. He twice provided the fifth vote to strike down under the First Amendment laws criminalizing flag-burning. This son of an immigrant was no proponent of flag-burning, but he saw it as protected speech.

At the same time, the open-ended clauses of the Constitution had been the source of much mischief, in his estimation. It was not merely the excesses of the 1960s and 1970s, where in a variety of cases the Court found rights not in constitutional text but in "emanations" and "penumbras." In those cases, it often had been social policy that the Court was finding prescribed by the Constitution. It was also the *prior* excesses: In the decades before the New Deal, the Court wrote into the Constitution rights involving *economic* policy. This so-called "*Lochner* era" had pleased many Republicans because it obstructed much progressive legislation. The Court eventually yielded, sustaining most of Congress's and President Franklin D. Roosevelt's efforts to lead the nation out of the Great Depression. But well-educated lawyers know that it is a challenge to applaud the later set of cases (e.g., *Roe v. Wade*) while booing the earlier era. Judicial activism can run in either direction.

Justice Scalia wanted neither. He had a more circumscribed view of the role of the courts than the view generally prevailing in elite legal circles when he joined the Court.

He moved the law but often, too, did not prevail. An illustrative example was his dissent in 1996 from a decision that the government violates First Amendment rights when it rejects contracts because of the contractor's political statements. There was a long American tradition in which politicians rewarded only their friends with government contracts. Many thought it a bad tradition, and all sorts of federal and state laws, enacted through the democratic process, regulated or banned it. We may leave aside Justice Scalia's *policy* view concerning the extension or refusal of contracts (or employment) on the grounds of political patronage: For him the fact that for 200 years no one had thought the practice *unconstitutional* meant that the First Amendment challenge should fail.

Consider his words: "If that long and unbroken tradition of our people does not decide these cases, then what does? The constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion. Why are not libel laws such an 'abridgment'? The only satisfactory answer is that they never were." This was just a warm-up to the general point: "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices ▸▸

of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional?" This would be his basis also for dissenting in the Court's same-sex marriage case. He decried the myth of "the Perfect Constitution": the belief that if something is undesirable public policy, it is necessarily for the courts through judicial review to ban it—as opposed to its being left to the people to address through democratic processes.

Among those who knew him and enjoyed his magnificent zest for life, any disagreement with Justice Scalia was focused on his reading of the law. And for the legal community at large, he was in important respects a teacher. This he will remain: As one former colleague, with a different jurisprudence, remarked to me, Justice Scalia is the one modern judge whose opinions we can say confidently will still be read 50 and 100 years hence.

As for me, I already learned a great deal from him, including generally of the law and life. For example, I will always recall his telling a group of Marquette law students in 2001, "He who is careless in small things is presumed to be careless in large things." While I thus kept up with him over the years, I especially recall one of the last exchanges that I had with him as a law clerk. The Supreme Court library called me because I had its only unabridged Latin dictionary checked out, and Justice Scalia wanted it. When I brought it to him, he wanted to confirm the grammar of a Latin phrase that he had inserted into a dissent—the same reason that I had borrowed the book. He purported to be offended that I did not trust his Latin grammar, but I was unbothered. Hadn't he hired me for that reason? ■

Donald W. Layden, L'82

The Holocaust Education Research Center Honors Don Layden

The Nathan and Esther Pelz Holocaust Education Research Center (HERC) in Milwaukee, a program of the Milwaukee Jewish Federation, honored Donald W. Layden, L'82, this past fall for his dedication to HERC's work. These are Mr. Layden's remarks on that occasion.

Don Layden

Let me tell you some stories about why I am involved with the Nathan and Esther Pelz Holocaust Education Research Center. I am not the son or grandson of a Holocaust survivor. My story is a bit simpler.

My parents grew up in Park Slope in Brooklyn, New York. While they lived in the same neighborhood, they also lived worlds apart. They went to different schools, had different religions, and were from different social standing. My grandfathers were both in the fur business: my maternal grandfather owned a retail store on the Lower East Side, and my paternal grandfather hauled the hides and dipped them in the lye chemical compound, which cured them for creating fur coats and hats that my maternal grandfather sold. They both died of industrial cancers from the industry they shared.

My parents met by chance and started to date and got married. Neither family was too happy with the arrangement, but each of my grandmothers embraced her new in-law as her own. Even as a child, it was easy for me to learn the lesson of the love of a parent overcoming intolerance and bigotry.

Growing up in Brooklyn, we saw my grandmothers regularly. Indeed, they both lived with us for a time.