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Antonin Scalia, 1936–2016

On the passing of Justice Antonin Scalia.

In his 2003 book *Coercing Justice: The Worldwide Rule of Judges*, Robert Bork notes how frequently the institution of the law is overlooked in discussions of cultural warfare. This lacuna is a weakness, Bork points out, for law "is a key element of every Western nation's culture, particularly as we turn more to litigation than to moral consensus as the means of determining social control. Law is also more crucial today," he continues, "because courts have become more overtly cultural and political as well as legal institutions."

We thought of Judge Bork's observations when we got the sad news of Justice Antonin Scalia's unexpected death, at age seventy-nine, last month. For nearly thirty years—he had been appointed to the Court in September 1986 by Ronald Reagan—Antonin Scalia was a tireless advocate of judicial restraint, the idea that the primary function of the judiciary is to interpret the law, not to make it. He set himself staunchly against the trends Bork outlined, resisting both the politicization of the Court and the more amorphous but no less corrosive tendency to substitute litigation for those more gentlemanly modes of encouraging good behavior—habit, taste, manners, convention—what Bork summarized as "moral consensus" and the British jurist John Fletcher Moulton called "obedience to the unenforceable."

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Moulton's desideratum names a gentle form of obedience that Edmund Burke would have recognized and applauded. In a famous passage from "Letters on a Regicide Peace," Burke remarked that "Manners are of more importance than law," because while the law "touches us but here and there and now and then," "manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, and insensible operation like that of the air we breathe in." That's as it should be. Moulton's Burkean point—and it was a point

that Justice Scalia repeatedly if implicitly endorsed in his jurisprudence—was that this realm of manners was being eaten away by an increasing anarchy and libertinage from below and increasing instrusive regulation and legal rigorism from above.

All social life, Moulton saw, unfolds within a frame of rules and permissions. At one end, there are things that one must (or must not) do; that is the realm wherein positive law holds sway. At the other end, there is rule of whim: you are free to do as you like. The middle range, in which behavior is neither explicitly governed by rules but is not entirely free, is a place governed not by law or mere caprice, but by virtues such as duty, fairness, judgment, convention, and taste. In a word, it is the "domain of Manners," which "covers all cases of right doing where there is no one to make you do it but yourself." A good index of the health of any society is its allegiance to the strictures that define this middle realm, the realm of "obedience to the unenforceable." "In the changes that are taking place in the world around us," Moulton wrote, "one of those which is fraught with grave peril is the discredit into which this idea of the middle land is falling." One example was the abuse of free speech in political debate: "We have unrestricted freedom of debate," say the radicals: "We will use it so as to destroy debate." Moulton was writing in the 1920s. His admonition sounds strikingly contemporary.

The writings of Burke and an early twentieth-century British jurist may seem remote from the famously acerbic spirit of Antonin Scalia, the Supreme Court's most reliably contentious (and deliciously witty) conservative. But we believe that they bring us close to a central element in Scalia's thinking about the proper role of the judiciary in the American republic where power (at least in principle) is divided and decentralized.

On the one hand, as has been frequently noted in the abundant commentary sparked by his death, Scalia wanted the judiciary to leave lawmaking to the legislators. That is where the idea of "judicial restraint" comes in. On the other hand, he also saw that the sort of legal hypertrophy he opposed—the mind-numbing, prosperity-sapping multiplication of laws and regulations with which our society has festooned itself—was the product of a meddlesome and overactive legislature. We suspect Scalia would have appreciated the *mot* ascribed to Calvin Coolidge: "Don't just do something," the laconic president is supposed to have instructed an interfering busybody, "stand there!"

As the commentator Glenn Reynolds noted following Scalia's death, much of Scalia's most powerful legal reasoning is contained in his withering dissents. One needn't agree with Scalia's position on any given issue in order to appreciate the value of his objections. Dissenting from the majority in *Lawrence v. Texas*, for example, the case that made same-sex sexual activity legal throughout the United States, Scalia noted that "One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion." There are two things to be wary of. One concerns the sheer number of laws and the growing complexity of the principles that govern them. It has been proverbial since the time of the lawgiver Solon that a society is best served when laws are clear and

few. The more things you pack into a Constitution, the more statutes multiply, the more society is constrained by the proliferation of legal requirements and prohibitions.

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The second thing to be wary of is the shadow of totalitarian control cast by a triumphalist judiciary. It is a sobering irony that, throughout history, much of the energy devoted to advancing progressive causes has yielded distinctly illiberal results. Consider the preposterous incursions upon individual and institutional liberty enjoined by Title IX legislation, to take just one example, or the recent heavy-handed legal interference with such enterprises as Chick-fil-A, Hobby Lobby, Oregon cake makers, or the Catholic Church because, following their conscience, they have found themselves at loggerheads with a distant elite wielding the coercive power of the state.

Or think again of Burke. It is sometimes forgotten that when Burke published *Reflections on the Revolution in France* in November 1790, the Terror was still several years in the future. Marie Antoinette did not encounter Dr. Guillotin's favored labor-saving appliance until October 1793. "Bliss was it in that dawn to be alive," said Wordsworth of the early days of the Revolution. But Burke saw from the beginning that the intoxications of the Revolution's assaults upon tradition, fueled by a rootless and unanchored rationalism, were headed for a gruesome hangover. "In the groves of their academy," Burke warned, "at the end of every vista, you see nothing but the gallows." Such language may have seemed hyperbolic in 1790—gallows were not yet dotting the landscape and boulevards of Paris—but within a few years Burke's description seemed understated, not to say prescient.

Burke foresaw the pitiless consequences of law emancipated from the nurturing springs of habit, tradition, convention, and local practice. Its strictures were pedantic, remorseless, unloveable. "Nothing," Burke wrote, "is left which engages the affections on the part of the commonwealth."

> On the principles of this mechanic philosophy, our institutions can never be embodied, if I may use the expression, in persons; so as to create in us love, veneration, admiration, or attachment. But that sort of reason which banishes the affections is incapable of filling their place. These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law.

Much of the tsunami of commentary that has followed the death of Antonin Scalia has naturally centered on the identity of his successor. President Obama lost no time in declaring that he intended to fulfill his "Constitutional duty" and promptly nominate a candidate for the Court. Senate Majority Leader Mitch McConnell countered that the task of nominating a

successor would be left to the next President. This battle has been the occasion of some inadvertently comic exhortation on the Left. Brent Staples, an editorial writer for *The New York Times*, tweeted that "In a nation built on slavery, white men propose denying the first black president his Constitutional right to name Supreme Court nominee." Meanwhile, his employer thundered that "blindly ideological . . . Republicans in the Senate are, after nearly eight years of doing little besides trying to thwart Mr. Obama, [attempting to keep] Justice Scalia's seat open, and the highest court in the land essentially paralyzed, in the hope that one of the hard-right Republicans running for the presidency will win." Perhaps the most amusing part of the *Times*'s editorial was its peroration, which employs a rhetorical device Robert Bork once described as a one-way left-oriented ratchet. It is a two-step process. First, usurp tradition and precedent in order to fabricate a novel right or regulation. Then if the novelty should ever be challenged, wrap yourself in the conservative mantle of precedent. Thus: "The question now," quoth the *Times*,"is whether the Senate will honor Justice Scalia's originalist view of the Constitution by allowing President Obama to appoint a successor, and providing its advice and consent in good faith. Or will the Republicans be willing to create a constitutional crisis and usurp the authority of the president to ensure that the Supreme Court functions as one branch of this government?" The spectacle of *The New York Times* appealing to Antonin Scalia's "originalist view" of the Constitution would be funny were it not so transparently hypocritical. Senate Minority Leader Harry Reid offered a similarly entertaining tableau when, in an op-ed appearing over his name in *The Washington Post*, he pleaded that, "for the good of the country," the GOP abandon its "nakedly partisan obstruction." What a card. We don't remember Senator Reid lamenting "naked partisan obstruction" when the Democrats held a majority in the Senate.

It is already clear that the partisan tussle over Antonin Scalia's vacant seat on the Supreme Court will be nasty and unedifying. We suppose that it was ever thus. So far as the Constitutional issues are concerned, we believe that the legal scholar John Yoo summarized the lineaments of the situation. "The Senate has no constitutional obligation to fill any vacancies on the courts or in the executive branch," Yoo wrote in *National Review.*

> Article II of the Constitution gives the president the power to appoint justices, but only with "the advice and consent" of the Senate. It does not require that the Senate give the president's nomination approval, or a rejection, any more than it requires the Senate to quickly give its advice and consent to a treaty negotiated by the president. President Obama can nominate anyone he likes, or he can leave it to the results of the November election. The Senate can confirm, reject, or just sit on the nominee, just as it can with any other proposal from the executive branch.

Yoo also notes that the size of the Supreme Court has varied in the course of our history. "The Constitution itself," he writes, "requires only that the Court have a chief justice and reserves to Congress the choice over its size." We very much doubt that such observations will mollify *The New York Times*, Harry Reid, or others who look upon Antonin Scalia's passing as an opportunity to upset the balance of the Supreme Court and hasten the advent of utopia. It is some consolation, however, to reflect that Scalia's spirit must be enjoying the discomfiture of those who, so having

despised him in life, should continue to be frustrated by his liberty-loving principles in death.

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