

TRIBUTE: THE JUSTICE WHO SAID HE HATED WRITING

by William Jay, Goodwin Procter LLP

“I don’t read footnotes,” Justice Antonin Scalia often said, and perhaps he didn’t, but oh, how he could write them. His comment really referred to footnotes in briefs the Justices receive, which tend to be packed with colorless detail meant more for the law clerks than the Justices. But for Justice Scalia the footnotes were often where the fun was.

In the weeks since his untimely death, many of Justice Scalia’s greatest hits have gotten renewed airplay—“[T]his wolf comes as a wolf,” for example, or “Pure applesauce.” But for every high-profile dissent or resonant majority opinion, there were many more humdrum cases that became memorable only because of Justice Scalia’s pen.

Take, for example, the pressing question of what to call people from Wyoming. Dissenting in a complex interstate water dispute, Justice Scalia took a moment to announce that he would have none of the “dictionary-approved” term “Wyomingite,” which he found too geological. Instead, he coined the term “Wyomans,” because (as he wrote in a footnote that should be posted all over the Cowboy State during this period of mourning) “the people of Wyoming deserve better.” (Footnote regarding that footnote: I was the government lawyer who had put the offending term “Wyomingite” into the United States’ amicus brief. I had no idea I was serving Justice Scalia up a softball.)

Sprightly moments like that were among the

real joys of clerking for Justice Scalia. He lived life gleefully, and some of that glee is captured in the margins of the U.S. Reports, in those impish footnotes that may not have been strictly necessary to the opinion, but were what

made it a Scalia opinion. (If you don’t read footnotes, for example, you will never learn that Cole Porter qualifies as “classical music.” That’s from *County of Sacramento v. Lewis* (<https://www.law.cornell.edu/supct/html/96-1337.ZO.html>), in the course of his calling the “shocks-the-conscience” test “the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity.”) Some would be added as he mercilessly revised a hapless law clerk’s draft on his computer, lopping away superfluous words, sentences, or (at least once in my experience) entire sections of the draft opinion, and substituting something shorter, analytically cleaner, and of course snappier. Some would be added as he edited on paper, red-penciling in his refinements while “booking” the opinion—rereading each original source before he would cite it in the opinion. Some might even be refined in the law clerks’ office after he had ambled in to discuss his latest inspired addition, belly-laughing



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"GOD ASSUMED FROM THE BEGINNING THAT THE WISE OF THE WORLD WOULD VIEW CHRISTIANS AS FOOLS . . . AND HE HAS NOT BEEN DISAPPOINTED IF I HAVE BROUGHT ANY MESSAGE TODAY, IT IS THIS: HAVE THE COURAGE TO HAVE YOUR WISDOM REGARDED AS STUPIDITY. BE FOOLS FOR CHRIST. AND HAVE THE COURAGE TO SUFFER THE CONTEMPT OF THE SOPHISTICATED WORLD."

—ANTONIN SCALIA

as he read it aloud.

Why bother with those little gems buried down there in the footnotes, where no one might notice? Because the craftsmanship mattered to him. He summoned up just as much literary force in forgettable statutory cases as in those destined for the constitutional-law casebooks—and often more, because he thought those cases reflected better and more rigorous application of the skills of a lawyer and a student of the English

language, as opposed to just "a democratic vote by nine lawyers." Those cases might have been narrow, but they didn't have to be dull.

"I hate writing," Justice Scalia often said; "I love *having written*." He meant that writing is hard when you won't settle for anything less than perfection—but having achieved it feels glorious.

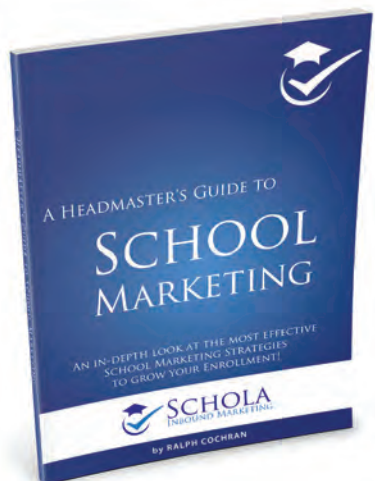
If only he were still writing. I can't believe he has written his last.

NOTES:

1. William Jay, *Tribute: The Justice Who Said He Hated Writing*, SCOTUSblog (Mar. 4, 2016, 2:16 PM), <http://www.scotusblog.com/2016/03/tribute-the-justice-who-said-he-hated-writing/>

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