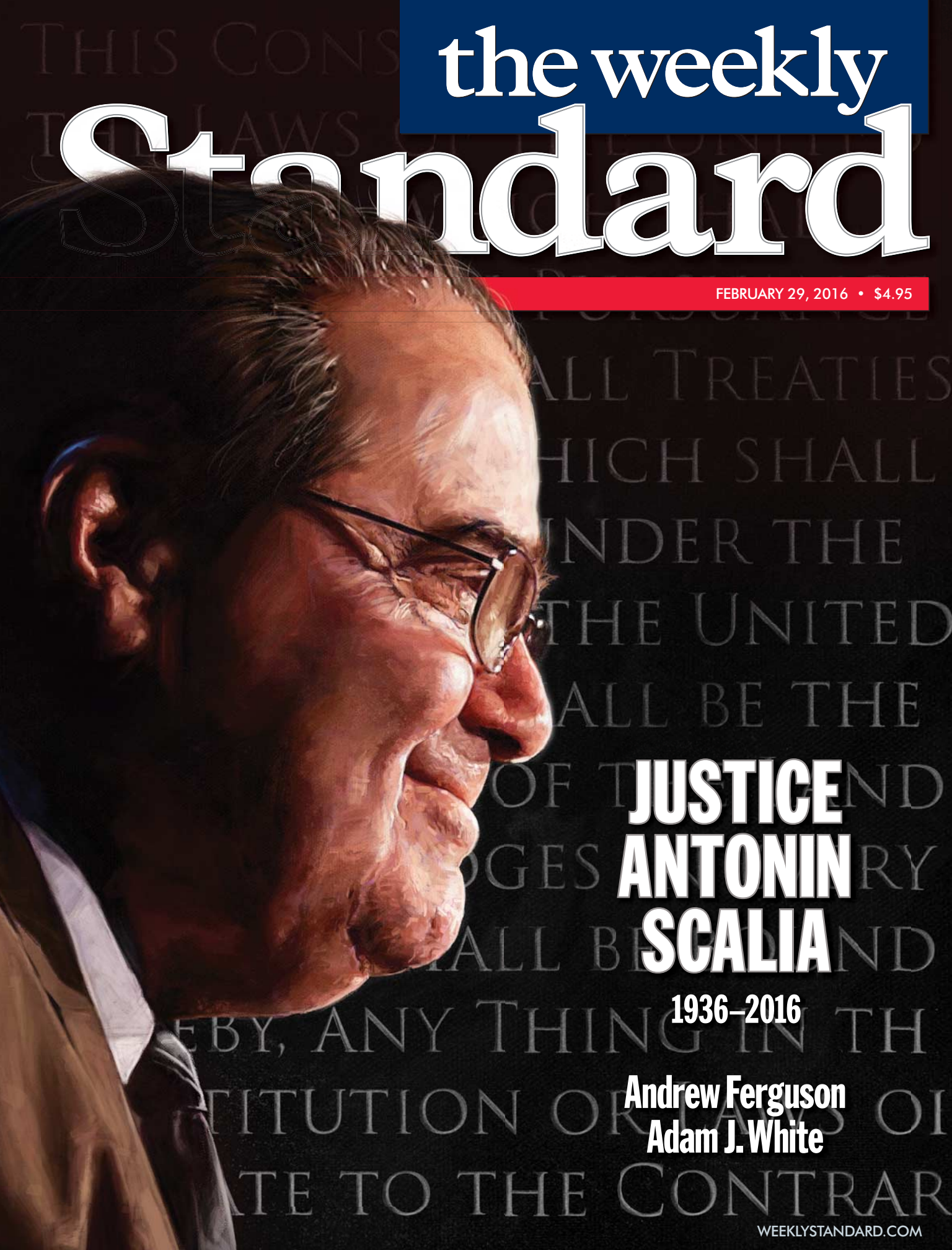
the weekly Standard

FEBRUARY 29, 2016 • $4.95



JUSTICE ANTONIN SCALIA

1936–2016

Andrew Ferguson
Adam J. White

WEEKLYSTANDARD.COM

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COVER BY JASON SEILER (AFTER ALEX WONG / GETTY)

Great Moments in Liberal Hypocrisy

If politics is the art of the possible, as Bismarck once said, then The Scrapbook's corollary is especially germane these days: Politics is the art of getting away with as much hypocrisy as possible. Both parties are prone to this annoying habit, of course; but in the week since the sudden death of Justice Antonin Scalia, the Democrats' hypocrisy has been especially impressive.

Consider, for example, the notion that Republicans, in a presidential election year, believe that Scalia's successor ought to be appointed by the winner in November. This is as much a political as a constitutional conviction, reflecting modern practice as well as the importance of the Supreme Court's composition. Nothing prevents President Obama from nominating somebody to Scalia's vacant seat, as he has announced he will do; but the power of "advice and consent" to his choice rests with the Senate, not the White House. This may strike Obama as unfair, but the unfairness derives from the art of the possible: In 1789, the Founders designed a constitutional system based on the separation of powers; in 2012, the voters elected a Republican Senate.

Needless to say, the reaction among Democrats—in politics, in the media, and elsewhere—has been passionate, even violent. President Obama, they declare, has every right to nominate a successor to Antonin Scalia, even in the final months of his presidency; and the Republican Senate has every obligation to confirm his appointment. If Senate Republicans should prolong the process past Election Day, or worse, reject Obama's appointment, they are (take your pick) racists, obstructionists, setting the stage for a constitutional crisis.

From The Scrapbook's perspective, this manufactured rage would be amusing if it were not so irritating. For as every schoolboy knows, the authors of the modern scorched-earth policy toward Supreme Court appointments are Senate Democrats, not Republicans. Just to give two examples from recent decades: In 1987, it was the then-chairman of the Judiciary Committee (now vice president) Joseph Biden who delayed Judge Robert Bork's confirmation hearings for months to allow his left-wing colleagues and partisan camp followers the opportunity to concoct their witches' brew of personal and professional abuse against Bork. And in 1991, it was not Republicans but Democrats who deliberately converted hearings on the Court's second African-American nominee (Clarence Thomas) into the spectacle that Thomas correctly characterized as "a high-tech lynching."

As for the fate of election-year nominees, it is useful to recall that when Chief Justice Earl Warren announced his retirement in early 1968, the Democratic-controlled Senate of the day failed to confirm the successor appointed by the incumbent Democratic president, Lyndon Johnson. In the year before the 1992 presidential election, then-Senate majority leader George Mitchell made good on his vow to block President George H. W. Bush's judicial nominations. And in the year-and-a-half before Barack Obama's election, Sen. Charles Schumer was similarly determined to reject the judicial appointments of President George W. Bush.

When reminded last week of this chapter in his career, Schumer dismissed it as an "apples and oranges comparison"—which, strictly speaking, is true: Schumer was obstructing a Republican president then; now he's dissembling on behalf of a Democratic president. Oranges and apples never looked so hypocritical. ♦

Scalia and His Enemies

In January, The Scrapbook was privileged to be in attendance at a speech Antonin Scalia gave to a small audience at Catholic University. We can't claim to have known the man or even to have met him for more than a handshake, but Scalia was such a presence that even being in the same room with him was a thrill. His written words were surpassingly impressive, but his boisterous and gregarious delivery only added to the impression that one was in the presence of greatness.

In his speech, Scalia told an amusing anecdote about how he approached the law and why he embraced originalism. When he was a much younger man, a student in one of his college classes kept questioning the internal logic of a text they were reading. Finally exasperated, the professor told the student, "Shakespeare is not on trial! You are."

One did not have to agree with Scalia to appreciate his personal qualities, to say nothing of his legal acumen. Nonetheless, as soon as Scalia died, the knives were drawn. After Georgetown Law School sent out a press release noting the school was mourning his death (he received his undergraduate degree from Georgetown and was the 1957 valedictorian and a champion debater there), two of the school's longtime professors, Gary Peller and Louis Michael Seidman, issued a public dissent saying that many at Georgetown's community "cringed at . . . the unmitigated praise with which the press release described a jurist that many of us believe was a defender of privilege, oppression and bigotry, one whose intellectual positions were not brilliant but simplistic and formalistic."

There's a great irony in Peller's

disdaining Scalia's prodigious intellect as "simplistic." Peller's own specialty is in critical race theory and critical legal studies, which are hardly summits of academic rigor. As the *Daily Caller* put it, a "major part of Peller's work is denying the very existence of objective knowledge or the value of concepts like rationality, on the grounds that knowledge is just 'a function of the ability of the powerful to impose their own views.'"

Fortunately, more than a few honest liberals testified to the truth of who Scalia was. Cass Sunstein, a former Obama administration official and respected legal scholar, wrote a glowing remembrance for *Bloomberg*. He recalled that in 1994 after Bill Clinton swore in his second liberal justice, Stephen Breyer, "Justice Antonin Scalia came up to me, put his arm around my shoulder, and said with a bright, mischievous smile, "First Ruth [Bader Ginsburg], and now Steve? Cass, it's *almost* enough to make me vote Democrat."

Still, the number of supposedly respectable liberal voices attacking Scalia is positively dispiriting. But we take comfort in the fact that Scalia was an indisputably great man. It's not his life and work that are on trial. Those taking the occasion of his death to attack the man's legacy are only indicting themselves. ♦

Happy Obama Day?

A quartet of Illinois lawmakers have put forward a bill to amend the State Commemorative Dates Act and declare President Barack Obama's birthday a legal holiday. Under the legislation, August 4 would not only be a day off for Illinois state employees, it would be an occasion "to hold appropriate exercises in commemoration of our illustrious president." The Scrapbook suspects that, however appropriate a commemorative exercise it might be, Bronx cheers are probably not what the Illinois legislators have in mind.

It's hardly unheard-of for states and cities to recognize in this fashion events and people they deem important. May 22 is Harvey Milk Day in West Hollywood, and the People's Republic of Berkeley within its jurisdiction substitutes Indigenous People's Day for the October holiday horrifically named after a certain genocidal 15th-century Italian sailor and explorer. There are various Southern states with lost-cause commemorations, including Confederate Memorial Day (a paid day off for those on the Alabama payroll) and Confederate Heroes Day (an "optional" state holiday in Texas, in which government agencies are obliged to maintain "skeleton crews").

It's even possible that Barack Obama's birthday would not be the most ridiculous public holiday in America. Another of Texas's state holidays, after all, is LBJ Day.

But let's look on the bright side of the possibility that Illinois will recognize Barack Obama's birthday. One of the most fevered events of the Obama years was the dreaded government shutdown, during which we were told a day without government was a day without all that is right and good and necessary. How delightful that the president who told us a shutdown was "completely irresponsible" should be recognized, in the birthplace of his political career, by a yearly one-day government shutdown.

Which is just one of the many reasons it seems to The Scrapbook that the honor may be more than a bit apropos. How better, after all, to recognize Mr. Obama and his achievements than by having Illinois government employees get paid a whole day for doing nothing?

When Mother's Day and Father's Day roll around each year, the kiddies always gripe that they're being left out: "When is Children's Day?" they ask. Parents invariably reply, "Every day is Children's Day." In the same way, if the leader of the Party of Government is to be honored by letting state employees kick back in idleness, one could say that every day is Obama Day. ♦

Big Cat Chow

In California news, activists are angling for a new "wildlife overpass" to allow mountain lions to cross L.A.'s busy 101 Freeway. This would help boost the population and health of the big cats by making them more mobile and thus diversifying the leonine gene pool. The cost is estimated to be $38 million, which given the inexorable inflation afflicting such projects means the final bill would more likely be somewhere north of $100 million.

Where's my overpass?

AP IMAGES / NATIONAL PARK SERVICE

Still, some will say that's a small price to pay for the joy of living with wildlife in one's backyard. But it isn't the only price. There's the cost—so far not yet quantified, as best The Scrapbook can tell—in swallowed-up terriers and tabbies, Scotties and Siamese. Though mountain lions are said to find deer particularly toothsome (and goodness knows there's plenty of venison on the hoof in California's hills and mountains), it seems pumas find dogs and housecats tastier (or at least easier) prey.

Mountain lions are "Specially Protected Mammals" and normally can't lawfully be killed. But if a mountain lion makes a nuisance of itself, ranchers or homeowners can petition for permission to have it hunted down. The California Department of Fish and Wildlife last year "necropsied" the mountain lions killed under these "depredation permits," and found the predators hadn't dined much on deer after all. Only 5 percent of the big cats bagged in California in 2015 were found to have had any deer in their stomachs. By contrast, 52 percent of the lions were found to have been feasting on "domestic animals," which is to say, they had been bellying up to the old Spot, Snowball, Babe, and Lamb Chop smorgasbord.

The fault, if there is one, is obviously with California pet-owners, who need to take appropriate precautions. Advice on how to coexist with the big cats is readily available. For example, the state's Fish and Wildlife folks suggest that, if you have livestock such as goats or sheep, you round them up every night in "sturdy, covered shelters." They also have this word to the wise: "Don't leave small children or pets outside unattended." Their advice for those who have an unlucky encounter with a lion: "Do not run; instead, face the animal, make noise and try to look bigger by waving your arms; throw rocks or other objects. Pick up small children." The guidance does not specify how one can wave one's arms, throw rocks, and pick up children all at the same time.

The most practical suggestion, though one of little use to unlucky poodles and Pekingese: "If attacked, fight back." Now, what was that about an overpass to help the mountain lions get around? ♦

Well, If You Say So

"The presidency is not some Jet Ski that you ride over the waves of partisanship." (Linda Overby, Hillary Clinton supporter, to the *Washington Post*, February 15, 2016.) ♦

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The Weekly Standard (ISSN 1083-3013), a division of Clarity Media Group, is published weekly (except the first week in January, third week in March, fourth week in June, and third week in August) at 1152 15th St., NW, Suite 200, Washington D.C. 20005. Periodicals postage paid at Washington, DC, and additional mailing offices. Postmaster: Send address changes to The Weekly Standard, P.O. Box 421203, Palm Coast, FL 32142-1203. For subscription customer service in the United States, call 1-800-274-7293. For new subscription orders, please call 1-800-274-7293. Subscribers: Please send new subscription orders and changes of address to The Weekly Standard, P.O. Box 421203, Palm Coast, FL 32142-1203. Please include your latest magazine mailing label. Allow 3 to 5 weeks for arrival of first copy and address changes. Canadian/foreign orders require additional postage and must be paid in full prior to commencement of service. Canadian/foreign subscribers may call 1-386-597-4378 for subscription inquiries. American Express, Visa/MasterCard payments accepted. Cover price, $4.95. Back issues, $4.95 (includes postage and handling). Send letters to the editor to The Weekly Standard, 1152 15th Street, NW, Suite 200, Washington, DC 20005-4617. For a copy of The Weekly Standard Privacy Policy, visit www.weeklystandard.com or write to Customer Service, The Weekly Standard, 1152 15th St., NW, Suite 200, Washington, D.C. 20005.

BPA WORLDWIDE

Same Shirt, Different Day

As I watched the last few Republican debates, I was distracted, not for the first time, by a most nonpolitical thought: Don't they feel silly all wearing blue suits, white shirts, and red ties?

It seems obvious to me that dressing exactly like your companions is absurd, unless you are 6 years old and the person who is dressed like you is a sibling and neither of you selected the outfit. But even then, it seems questionable. My dear mother used to dress me and my two brothers in homemade sailor's outfits—blue up to the neck, with a white collar and a red neckerchief, but no, we didn't look at all presidential.

We were thus outfitted, in the late '70s, for a family photo, which then sat in the dining room of the house I grew up in but, these days, is on exhibit at my mother's place on Long Island (admission free, appointment required). And even now, when I see that photo, I am embarrassed. It's like watching one of my own children make a fool of himself. My head gives a rueful shake, and I wonder, What in the world does he (my 5-year-old self) think he is smiling about? Doesn't he know how humiliating this is?

If I arrived at a dinner party and found myself dressed exactly like all the other men, I know what I would do. I would go home and change. Extreme, perhaps, but it would, in my mind, be a good bit less absurd than the alternative of joining the cast of clones and making tiresome jokes about "the memo," though in that case the cliché would, I grant, be especially apt. One thing I do respect about older men who think very little of clothing is that they do not even think to make that tiredest of jokes.

If only I could be so indifferent. When I am about to meet with friends, I rule out certain sartorial combinations based on the likelihood that they will be wearing something similar. No white-collar shirts when meeting Jeff for drinks. No bow ties if having lunch with William. I will wear a necktie on weekends and a turtleneck on a Monday just to avoid the dreaded possibility of seeing my mirror image across a table or desk.

DAVID CLARK

The problem is not limited to members of the same gender. More than a handful of times, I have been close to leaving the house when I noticed my wife Cynthia and I were dressed similarly in, say, jeans and gray shirts. Full stop. Here's what I do when this happens: To the sound of my wife laughing at me, I go quickly to my bedroom to change.

It's become a house rule, though I am the only one who cares about enforcing it. Cynthia and I cannot wear khakis at the same time. Or denim shirts. Or oatmeal sweaters. There is a uniform for the middle-class suburban male, and I can sometimes be found wearing it, but there is no way I am going to androgynize and twinify the appearance of my marriage.

Women, of course, are usually more sensitive to the possibility of running into a fashion doppelgänger, and celebrity mags make light of famous women photographed in the same or similar dress, asking, Who wore it best? Recently, while looking for a gift for Cynthia at her favorite dress shop, the owner, who knows me as a returning customer, gave me a brief seminar on how she shops for her store.

With her wholesale catalogs in hand, she indicated many outfits that she liked but would not stock because the product was too similar to something that could be purchased inexpensively at a lesser store. And her customers, though she did not come out and say this, pay a premium to distinguish themselves from all of the women who shop at discount.

Perhaps you think I should disapprove. I can't remember the source, but somewhere I read about a woman who got upset when she saw her maid wearing a hat identical to one that she owned. From the telling, it is obvious that we should judge this woman harshly.

But remove the fact that the other woman is her housekeeper, and you have simply the awkwardness of an unintended repetition, an accidental rhyme, everything that is the opposite of elegant variation. You have an uncanny resemblance that makes both women seem less individual. A comedy of the self, like Shakespearean twins. You think you're one of a kind, but your clothing tells a different story.

Now, I can live with my wife making fun of me, but I will not be a punch line to my gold-button blazer. That's why I stopped wearing it years ago.

David Skinner

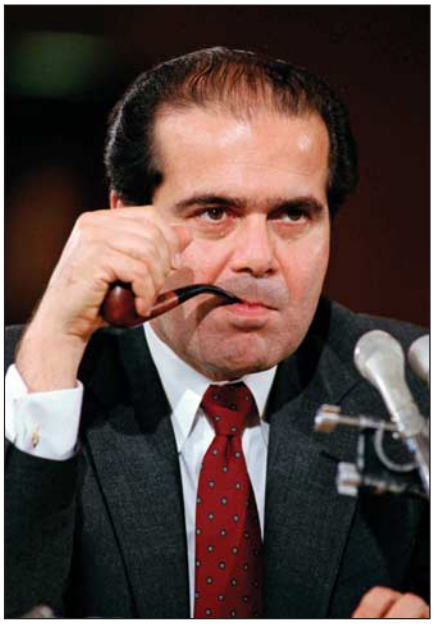
the weekly Standard

Of Scalia and Trump

"It is safer to try to understand the low in the light of the high than the high in the light of the low. In doing the latter one necessarily distorts the high, whereas in doing the former one does not deprive the low of the freedom to reveal itself fully as what it is."
—Leo Strauss, *Liberalism Ancient and Modern*

In accord with Strauss's helpful dictum, let us understand the low and demoralizing phenomenon of Donald Trump in light of the high and inspiring achievement of the late Antonin Scalia. After all, an appreciation of the life and work of Justice Scalia in no way deprives Mr. Trump of the freedom to reveal himself fully as what he is. Our respect for Scalia's elevated and demanding constitutionalism in no way distorts our understanding of Trump's irresponsible and demagogic populism.

Justice Scalia dedicated his very considerable talents to defending and continuing the work of the nation's Founders. Of course the Founders expected the great democratic and commercial republic they established to produce its share of Donald Trumps. Nino Scalia knew this as well as anyone. The rights that the Founders secured and that Scalia defended allow Americans to seek, even to worship, wealth. The free and open society that the Founders constituted and that Scalia protected liberates Americans to indulge in vulgar pursuits. The constitutional structure and the rule of law to which Scalia was dedicated are intended, after all, not for a mythical people of selfless virtue but for the real people of this boisterous nation. In his sustained critique of an imperial judiciary and the "living Constitution" that was its plaything, Scalia was a great defender of American democracy.



Scalia listens to questions during his confirmation hearings, August 6, 1986.

AP PHOTO / LANA HARRIS

But Nino Scalia, following the Founders, also understood that the preservation of this experiment in self-government requires leaders who can elevate their gaze above the horizon of a Trump and citizens who can, at least most of the time, resist the blandishments of Trumpism. The Founders and Scalia understood that the art of self-government is more than the art of the deal. The Founders and Scalia understood the difference between the enlightened self-interest of a free people and the narrow self-interest of a shortsighted one. The Founders and Scalia understood the difference between the "love of fame, the ruling passion of the noblest minds," and the "talents for low intrigue and the little arts of popularity" that are the ruling preoccupations of vulgar minds.

The Founders also knew that understanding something doesn't make it so. They did their best to make their understanding effectual. Their successors over two centuries have continued such efforts, sometimes more effectively, sometimes less. Justice Scalia's life work was an attempt to make the Founders' understanding effectual in our times.

No one was more aware than Nino Scalia that understanding something doesn't make it so. His greatest opinions were dissents. He stood unapologetically against many of the ruling opinions of our age; he was committed to the rule of law rather than the rule of lawyers; he made the case for a constitutional judiciary rather than an imperial one, and he demonstrated moral courage and intellectual probity rather than catering to the prejudices of the elites or flattering the passions of the people. That is why the name of Antonin Scalia will be remembered and honored long after that of Donald Trump is forgotten.

—William Kristol

Trumpism Corrupts

The February 13 debate in South Carolina provided a clarifying moment for this year's GOP presidential race. Donald Trump claimed that the administration of George W. Bush had engaged in a massive conspiracy to mislead the world about weapons of mass destruction in Iraq. "They lied," Trump thundered. "They said there were weapons of mass destruction, there were none. And they knew there were none." This was not a one-off flub. The line of questioning began with moderator John Dickerson pointing out that in a 2008 interview Trump had suggested that President Bush should have been impeached "for the war, for the war, he lied, he got us into the war with lies."

He tells them to jump; they ask, how high?

Donald Trump is neither conservative nor especially Republican. He is given to fits of pique. He has neither a coherent political philosophy nor intellectual curiosity, which makes him unreliable as a champion of anything other than his own interests. We knew this before the debate.

What was clarified at the debate was not the nature of Trump but of Trumpism.

For the last eight months, the sophisticated view of Trump and Trumpism has gone something like this: Donald Trump may be a huckster, but he has done a service to the Republican party by bringing new, nontraditional voters into the tent. He has shown his fellow candidates that they can flatly reject the demands of political correctness and need not drop into turtleguard whenever the *New York Times* takes a shot at them. And while Trump the man is not presidential material, Trump*ism*—that is, the collection of populist and nationalist concerns that have become wrapped up in the man's campaign—is potentially very helpful. Over the last 16 years, the Republican party *has* been largely ineffectual, both in power and in opposition. It *has* been hostage to a donor class that is almost completely at odds with Republican voters.

Trumpism, in other words, looked like a political movement that could—and possibly even should—be incorporated into the GOP.

There is some truth to much of this. But it turns out that Trumpism has corrosive effects, too. Witness how it has corrupted people in its orbit.

Nine months ago, if you had asked Sarah Palin, Scott Brown, Jerry Falwell Jr., or Ann Coulter whether they would endorse a figure who takes the Code Pink, Michael Moore, MoveOn.org view of Iraq ("Bush lied, people died"), one suspects they all would have recoiled at the prospect. Yet in the hours after Trump insisted that George W. Bush intentionally lied the country into war, not one of the major figures who have endorsed him was willing to contradict his claim.

Sarah Palin—John McCain's running mate—has been stonily silent on Trump's conspiracy theory. Contacted through his spokesman, Liberty University president Jerry Falwell Jr. declined to comment on it. Pressed by The Weekly Standard's Michael Warren, Scott Brown issued a mealy-mouthed non sequitur, saying, "I'm more focused on how we deal with terror challenges of today, not yesterday." And Coulter, who has reached the stage in life where she is capable of falling in love serially with Mitt Romney and then Donald Trump, actually tweeted out a quasi-defense of Trump: "Bush also said Harriet Miers=qualified & amnesty wasn't 'amnesty,' so he did lie." Five days later she changed course somewhat in a column where she allowed that "Trump is right about President Bush not keeping us safe—though not about his 'Bush lied' argument that makes me want to strangle him." But don't worry, Coulter insisted that Trump didn't actually mean what he said, that he was just a "scamp" just "doing wheelies" and "taunting" the rest of the Republican party. Like so many of the people in thrall to Trumpism, Coulter believes that Trump is fully committed to everything he says. Except for when he's just posturing.

One needn't be an admirer of George W. Bush, or a believer in his freedom agenda, or even a supporter of the Iraq war to understand how pernicious this is. Whatever your views on the wisdom of Iraq, no serious person believes that Bush masterminded a massive fraud, with the help of his cabinet and the entire national security apparatus; that his "lies" then managed to fool the governments and intelligence agencies of a dozen allies; and that, somehow, none of the evidence

SPENCER PLATT / GETTY IMAGES

of this scheme ever managed to leak into the open.

It is almost certain that none of Trump's endorsers *actually* believes this theory either. And yet these public figures refuse to contradict Trump's assertion because they *do* believe that acceptance of every one of Trump's utterances is the price of admission for Trumpism.

You see evidence of the ill-effects of Trumpism not just in Trump's endorsers, but among his enablers in conservative media, too. Rush Limbaugh, for instance, admitted that with his "Bush lied" line, "Trump sounded like the *Daily Kos* blog." "[O]n a Republican debate stage, defending Planned Parenthood in language used by the left, going after George W. Bush and Jeb Bush and the entire Bush family, for the most part, using the terminology of Democrats, people think that Trump was out of control, that he had emotional incontinence that night," Limbaugh said.

But Limbaugh then proceeded to construct an alibi for Trump. He floated the idea that, because South Carolina is an open primary, Trump was really just "strategically" "making a move on independents and Democrats."

People who ought to know better—who almost certainly *do* know better—seem to have embraced this article of faith: Trump is leading in the polls. Anyone leading in the polls is brilliant. So Trump is brilliant. Therefore everything Trump does or says must be brilliant, too.

This weird, unfalsifiable dogma winds up crowding out honest analysis among Trump's endorsers and enablers. They see their suspension of rationality as the cost of doing business in promoting Trumpism. If that truly is the price of Trumpism—if one can't be against illegal immigration and the donor class, yet also think that conspiracy theorists ought not be suffered in high office—then it is too high.

And so this is where we are, on the eve of South Carolina's vote: Trump remains a figure not well-suited to the presidency. And Trumpism has been revealed not as a path forward for a party desperately in need of reform, but a zombie virus that is making fools of the people who embrace it.

—Jonathan V. Last

Just Say No

President Obama says he soon will nominate someone to fill the vacancy opened by the unexpected death of Supreme Court associate justice Antonin Scalia. Senate majority leader Mitch McConnell says his chamber will block any nominee the president sends up.

If the Senate succeeds in that effort during what is, of course, a presidential election year, with Barack Obama ineligible (thanks to the Twenty-Second Amendment) to run for a third term, then the next president will nominate Scalia's successor. And the new president—a Democrat or a Republican—will send the nomination to a Senate controlled by either Republicans or Democrats, depending on the outcomes of the Senate races being held this year. Right now Senate Republicans, numbering 54, are in the majority. Provided they win the presidency, the Democrats will need to pick up four seats to take control of the Senate. As many as nine seats may be competitive.

Obama proposes, McConnell disposes.

The country thus seems headed toward an election-year battle over the courts and judicial philosophy. In the early skirmishing, the president has said the Senate would be acting irresponsibly if it blocks his nominee.

The criticism is unfounded. The relevant constitutional text is the appointments clause, found in Article II, Section 2. It says: "The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."

The clause "contemplates three sequential acts" for the appointment of justices, writes law professor John McGinnis. They are: the nomination by the president, the advice and consent of the Senate, and the appointment by the president. Citing the debates among the Framers and subsequent practice, McGinnis says the president has plenary power to nominate: He can choose entirely as he wishes. As for "the advice and consent of the Senate," it is not, he emphasizes, a pre-nomination but a post-nomination function.

Thus, when President George Washington sent the Senate a message making a nomination, he also requested "your advice on the propriety of appointing" the individual. The Senate confirmed the person and then notified the president of its "advice and consent" to the appointment, which Washington made. The Senate, however, could have rejected the nominee and thus not given its consent to the appointment. And why? Says McGinnis:

> The Senate has independent authority in that it may constitutionally refuse to confirm a nominee for any reason. . . .

IMAGES: NEWSCOM

> Nothing in the text of the clause appears to limit the kind of considerations the Senate can take up. It is thus reasonable to infer that the Framers located the process of advice and consent in the Senate as a check to prevent the president from appointing people who have unsound principles as well as blemished characters. . . . The Senate has complete and final discretion in whether to accept or approve a nomination.

President Obama says that he plans to "fulfill my constitutional responsibilities to nominate a successor" and that there is plenty of time "for the Senate to fulfill its responsibility to give that person a fair hearing and a timely vote." Obama is right to notice that nominating someone for the Court is *his* constitutional responsibility. Indeed, he is the only one who has that responsibility. But Obama gets much else wrong. The Senate has no constitutional duty to hold hearings or vote on Obama's nominee, whether in committee or on the floor. In fact, the Senate may do nothing upon receiving the nomination. And it would not be constitutionally irresponsible to do nothing.

This is not to say that the Senate's opposition should be categorical—against anyone Obama nominates—though, again, that position is constitutionally allowable, and a good case can be made for it. On the other hand, Senate Republicans may decide to hold hearings and even have a vote in committee. But, to repeat, the Constitution doesn't require those or any other actions, though of course voters can assess as they wish what the Republicans do or don't do. And they can assess, too, the substance of the Republican no-consent position.

Republicans have serious disagreements with Obama and the Democrats over judicial philosophy. Note, by the way, that Senator Obama voted against the nominations of John Roberts and Samuel Alito. Republicans also reason that an Obama pick will be to some, probably large, extent to Scalia's judicial left and would move the Court in that direction. Obama advisers are saying the president is looking for candidates who would use their "own ethics and moral bearings" to render decisions—precisely what Senate Republicans oppose. McConnell also contends, not unreasonably, that voters can factor into their decisions this November the question of who gets to nominate Scalia's successor.

The political fight already underway is one in which the president has an advantage over the Senate owing to the unitary nature of his office. He alone is vested with the executive power, while the 100 senators share in the legislative powers. His is one voice while theirs are many, and they are elected by states with varying interests and political demographics. They can fragment on an issue, and that is why Obama and the Democrats are now looking for Republican senators who might be persuaded to support hearings and a vote at least in committee.

The emerging White House strategy seems to be to nominate a "qualified" individual without much of a progressive paper trail whom the Republicans will finally agree to vote on and actually confirm. Obama thus would be asking Senate Republicans to trust him on judicial philosophy. But surely Republicans know better than to trust this president on a matter as important as a lifetime appointment to the Supreme Court. Indeed, for that reason, Republicans would be wise not to start up the confirmation process and schedule hearings on Obama's nominee. Given the ability of any likely nominee to evade and parry questions from senators, the only effect of a hearing would be to give the media an opportunity to publish stories about how "reasonable" the nominee is. At the end of the day, that nominee will be part of a Court majority that will accelerate the liberal judicial project.

So put everything on hold until Election Day, which holds four possible outcomes—a Republican president and a Republican Senate; a Republican president and a Democratic Senate; a Democratic president and a Republican Senate (as we have now); and a Democratic president and a Democratic Senate. It will be up to the voters to decide, and it will be hell for the rule of law, not to mention the Republican party, if the people pick the last of those four.

—Terry Eastland

Eight Is Enough (for Now)

To hear some on the left tell it, the Supreme Court would be hamstrung if it had to function for a year or more without a ninth justice. What to do in the event of a 4-4 tie? This would not have been viewed as a problem, however, by America's Founders, who created a Court with an even number of justices—six. In fact, *Marbury* v. *Madison*, arguably the most important case in the Court's 226-year history, was decided by a six-justice Court.

The Constitution, of course, leaves it up to Congress to decide how many justices will serve on the Supreme Court. In 1789, Congress passed, and President Washington signed, the Judiciary Act. That law determined that the number of Supreme Court justices should be six. The Congress of that day was full of men who had been at Independence Hall two years earlier and had participated in the writing of the Constitution, so they presumably knew what they were doing.

With a six-justice Court, a 3-3 opinion simply meant the Court wouldn't overturn a lower federal court ruling but instead would let it stand (or wouldn't alter the status quo in a case taken up by the Court as a matter

of original jurisdiction). One effect of a six-person Court was that it took two-thirds of the Court (4 votes to 2) to declare unconstitutional a law duly passed by Congress or a state legislature. With a nine-person Court, 5-4 rulings are commonplace: In modern times, the trajectory of the nation has changed repeatedly on the personal whims of an Anthony Kennedy or a Sandra Day O'Connor. An even-numbered Court seems to be more conducive to judicial restraint.

From February 1790, when the Court first convened in the original capital of New York City, until March 1807 (when Thomas Todd became an associate justice on the John Marshall Court after having been nominated by Thomas Jefferson), Congress didn't change the number of justices. *Marbury* v. *Madison* was a unanimous decision by the six justices in 1803. So much for not being able to get anything done with an even number.

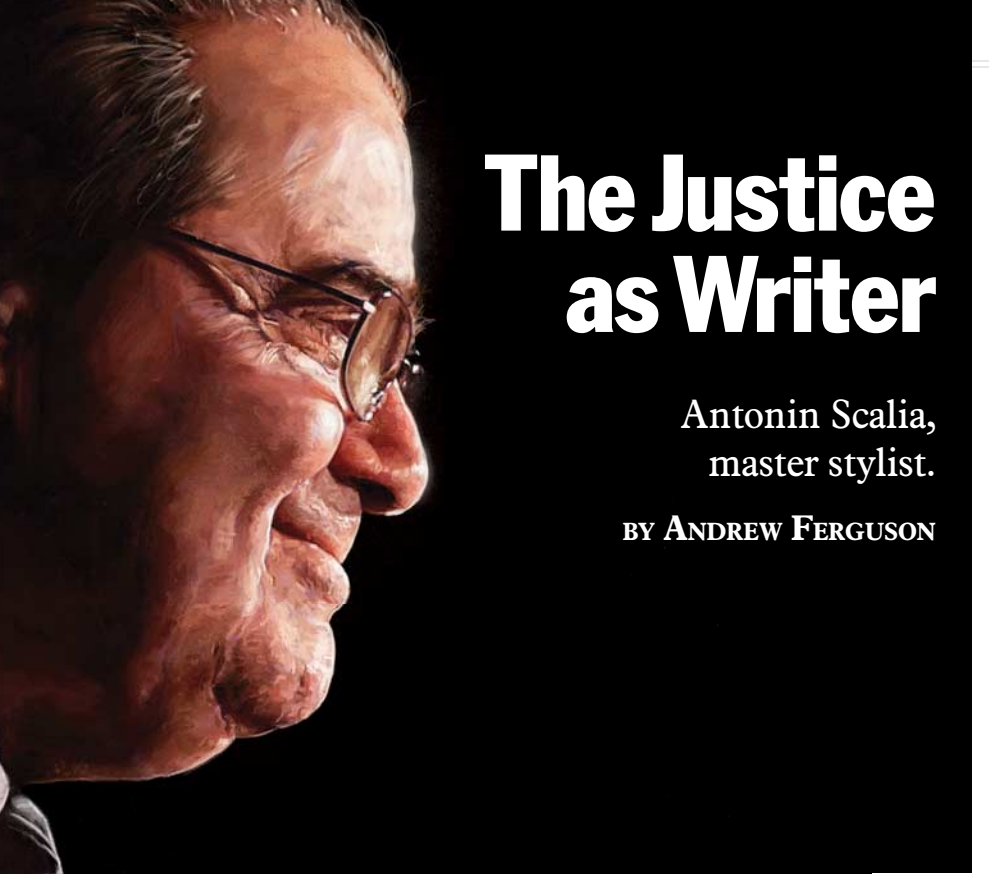
Indeed, when Congress increased the number of justices to seven in 1807, it doesn't seem that moving to an odd number had anything to do with it. In *The Supreme Court in United States History*, Charles Warren writes that the addition of a seventh justice was a function of an era when Supreme Court justices had to "ride circuit," serving on federal circuit courts. The need for an extra justice was "impelled by the increase of business and population in the Western Districts of Kentucky, Tennessee and Ohio, and by the necessity of bringing into the Court some lawyer versed in the peculiar land laws of those States."

The left would likely respond by saying that what worked in the Founding era wouldn't work today, but the truth is that the Court worked far better in 1790 or 1806 than it did in 1973 or 2015. Judicial review is meant only to void acts that violate, as Alexander Hamilton put it, the "manifest tenor" (obvious meaning) of the Constitution. Justices are supposed to adhere to the clear-violation standard, which holds that an act must be unconstitutional beyond a reasonable doubt for the Court to be justified in voiding it. Justice Antonin Scalia adhered to the clear-violation standard of constitutional review.

Returning to an even number of justices, if only for a year, would offer an additional level of protection against those justices who are inclined to eschew the clear-violation standard and impose their own wills. With an even number of justices, overturning the actions of the other, more representative branches of government would require at least a two-vote margin.

Not only will the Court survive just fine with an even number of justices for the next year or so, it may even do the Court some good.

—Jeffrey H. Anderson



The Justice as Writer

Antonin Scalia, master stylist.

BY ANDREW FERGUSON

The literary critic Edmund Wilson was ambivalent about the legacy of Abraham Lincoln, but he didn't doubt Lincoln's genius as a writing man. "Alone among American Presidents," Wilson wrote, "it is possible to imagine Lincoln, grown up in a different milieu, becoming a distinguished writer of a not merely political kind."

We writers of a political kind won't like that patronizing "merely," apt though it is, but Wilson's judgment is true and righteous altogether. The same point can be made about Antonin Scalia, alone among American public servants of recent memory. At his death (I wonder what he would make of the now-universal genteelism "passing" to avoid the plainer word?) even his detractors were happy to concede the largeness of his writerly gifts. Anyone who has spent pleasant hours with his judicial opinions will find it possible to imagine Scalia, in another milieu, becoming a distinguished writer of almost any kind.

Scalia's writing could swing in an instant from steely argument to wild lampoon and then combine the two and never lose its ease and gracefulness. Such a style can only be the product of exertions unseen by the reader. It requires unblinking attention and pitiless self-corrections made on the fly. The rest of us got a hint of what was involved in 2003, when William Safire, the language columnist for the *New York Times*—yes, my little ones, there once was such a person—asked the justice to explain a turn of phrase from a recent opinion.

The Supreme Court had issued a sweeping decision, and Scalia had written a stinging dissent. He was always doing this, according to the popular press. For thirty years the Court swept, Scalia stung. When a Scalia dissent wasn't "stinging," reporters and headline writers insisted it was "blistering," and if not "blistering" then "scathing." My best sources (thanks, Nexis!) tell me that Scalia had been a justice for scarcely a single term before the *Times* declared one of his opinions "blistering." It took another two years for him to work up to "stinging." The violence only accelerated. In the last five years alone the *Times* has noted (if not read) five "scathing" dissents—a pace of one a year. The violence of his dissents was wildly overstated, of course. I don't think journalists knew how else to approach them. Scalia could dismember an argument so quickly and thoroughly that a wide-eyed reporter, arriving late to the scene and finding the field littered with broken fallacies and red herrings, could only assume that violence had been done. We have delicate sensibilities.

In his "stinging dissent" from the sodomy case called *Lawrence* v. *Texas*, Safire noted that Scalia had erroneously neglected to use a possessive apostrophe after the word *homosexuals* in this sentence: "I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means." Among other things, the absence of the apostrophe allowed the Associated Press to shorten the sentence to make Scalia look condescending: "I have nothing against homosexuals."

Scalia pled guilty to the grammatical offense, but said it was committed with benevolence aforethought.

"When I composed the passage in question," Scalia wrote Safire, "I pondered for some time whether I should be perfectly grammatical and write 'I have nothing against homosexuals', or any other group's, promoting their agenda,' etc. The object of the preposition 'against,' after all, is not 'homosexuals who are promoting,' but rather 'the promoting of (in the sense of by) homosexuals.'"

But circumstances called for a different tack.

> I concluded that because of the intervening phrase "or any other group," writing "homosexuals'" (and hence "any other group's") [with the apostrophe indicating possession] would violate what is perhaps the first rule of English usage: that no construction should call attention to its own grammatical correctness. Finding no other formulation that could make the point in quite the way I wanted, I decided to be ungrammatical instead of pedantic.

That choice—favoring a familiar tone over pedantry—well shows what made Scalia a genuinely great stylist. Notice he doesn't abandon his belief that one usage is correct and the other

JASON SEILER (AFTER ALEX WONG / GETTY)

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isn't; he was a prescriptivist through and through. But when he put words on a page he had a feel for the occasion; a long history of careful writing had taught him what was appropriate to the purpose at hand. We can assume he wrote for the ear as well as the eye. A sense of appropriateness separates the stylist from the showoff. It's one way a writer meets his obligations to the reader, obligations that include clarity, simplicity, and (almost as difficult) vividness of expression.

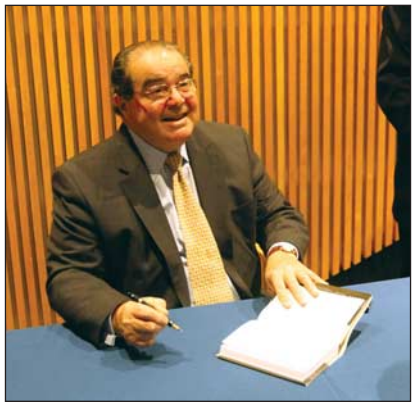
His writing was so vivid because it was, along with much else, picturesque. Not many of our country's working essayists (they hold guild meetings in a pantry at Joseph Epstein's apartment) and none of its judges could handle metaphor and simile so deftly. I dip at random into a collection of his opinions and find a rebuke to justices who assess the meaning of a law, not by what it says, but by its legislative history, the political circumstances that led to its enactment—a loosey-goosey method that allows judges to do a little legislating themselves. Scalia's images sharpened his point: "We do not judge statutes as if we are surveying the scene of an accident; each one is reviewed not on the basis of how much worse it could have been but on the basis of what it says."

And so did his gift for caricature, in the next sentence: "It matters not whether this enactment was the product of the most partisan alignment in history or whether, upon its passage, the Members all linked arms and sang, 'The more we get together, the happier we'll be.'" In the mind's eye a reader moves from a wreckage-strewn highway to a campfire singalong with Harry Reid and Mitch McConnell and somehow never loses track of the argument: good work for a single paragraph.

Even at its most grave, his writing was touched with humor. The greatest American prose stylists—Mark Twain or E.B. White, H.L. Mencken or A.J. Liebling—are at any moment a beat or two away from sounding a raspberry or cracking a wry or wicked smile; it's part of what makes them American. In Scalia you often found it in his casual use of a burlesque word. We will be a stronger, more confident nation for Scalia's having returned "argle-bargle" to the national discourse, along with "jiggery pokery" and many others.

The humor wasn't bitter. To Scalia's sympathizers, it was a natural response to absurdity. When a friend is in thrall to some misbegotten idea, often the better course is to jolly him out of it or, failing that, jollying friends into having fun at his expense. Argument doesn't work when the silly idea is a consequence of mere feeling, mixed with unction. Then again, sometimes a silly idea looks like a lunge for power, especially when offered by a Court from which there is no appeal. The most recent and far-reaching example is last year's Supreme Court decision in *Obergefell* v. *Hodges*. Scalia called it—no caricature required—"a judicial Putsch" that was "a threat to American democracy." The majority decision, written in deep purple by Justice Anthony Kennedy, proclaimed the justices were called to "explore the extent of freedom in all its dimensions."

In the *Obergefell* opinions, it was Scalia versus Kennedy, reason versus sentiment, plain-speaking versus argle-bargle, judicial modesty versus untethered self-aggrandizement. Kennedy's style was grandiose because the opinion was grandiose—'a style,' wrote Scalia, 'that is as pretentious as it is egotistic.'



THE DAILY PROGRESS / ANDREW SHURTLEFF / AP

Scalia signs copies of his book Making Your Case: The Art of Persuading Judges, *in Charlottesville, Virginia, April 16, 2010.*

For a writer like Scalia, who prized the precise and the particular (and seldom succumbed to soupy alliteration), a phrase like that would have set sirens blaring. "Dimensions" is one of those nonrepresentational words you can attach nearly any meaning to. Unless it refers to the height, length, and width of a physical object, *dimension* is a magic carpet for transporting us into a fairy world of abstractions. There's no end to the number of nonexistent things that can exist in those infinite dimensions—even an obligation to redefine a concrete word like "marriage." It is a briefer, less obviously ridiculous way of conjuring up the "penumbras, formed from emanations" in which earlier liberal justices imagined to find all kinds of fanciful creatures.

Sloppy writing makes it easier to have foolish thoughts, said Orwell. Vague writing makes it easier to disguise soppy sentiment as moral pronouncement. *Obergefell* seemed to offend Scalia not only as a judge but as a lover of language. *Obergefell* is usually described as having "legalized same-sex marriage." Scalia's dissent showed this is an incomplete, even misleading way of putting it. Who did the legalizing? It is truer to say the Court's majority, on no authority beyond its own feelings, assumed the power to nullify the give-and-take of self-government, even as the people, through their state legislatures, were busy arguing the issue. Instead our robed masters imposed a new, momentous, and unprecedented legal arrangement on all fifty states, whether we liked it or not.

In the battle of opinions it was Scalia versus Kennedy, reason versus sentiment, plain-speaking versus argle-bargle, judicial modesty versus untethered self-aggrandizement. Kennedy's style was grandiose because the opinion was grandiose—"a style," wrote Scalia, "that is as pretentious as it is egotistic."

One example: "The nature of marriage," Kennedy wrote, "is that, through its enduring bond, two

persons together can find other freedoms, such as expression, intimacy, and spirituality."

It's creepy when lawyers write like this.

"Really?" Scalia replied. "Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, is a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say."

And on and on and mercilessly on. The dissent in *Obergefell* is one of Scalia's enduring masterpieces. But perhaps my favorite passage from his writing came from the session before, in 2013. This was another gay marriage case, and as Scalia foresaw, its disingenuous purpose was to set up the ultimate power grab that was soon to come. As in *Obergefell*, Scalia's theme was modesty.

"In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide."

Maybe modesty is an odd theme for a man so comfortable with his own enormous gifts. But the dying fall of this last sentence, the wistful disappointment, suggests the far more important humility of a true democrat—the public man who, as Lincoln wrote, would not be a master of his fellow citizens for the same reason he would never be their slave. ♦

Not the Best of Campaigns

A few cavils.

BY FRED BARNES

Presidential campaigns are never perfect. Troubles occur. What is supposed to happen doesn't happen. There's an old saying that no one has ever become a better person for having run for president. That's about as close to a reliable expectation of presidential campaigns as there is.

A cavalcade of the ill-equipped

The 2016 race has had its own set of imperfections. Here are five that come to mind:

(1) Candidates without campaigns: The Republican race attracted 17 candidates, some without the faintest chance of winning the nomination. To name a few of the also-rans, there were George Pataki, Jim Gilmore, Lindsey Graham, and Carly Fiorina.

These candidates, who've now dropped out, had a few staffers, a contact or two in important states, but not much more. A number of others had only skeletal networks left over from earlier bids for the GOP nomination or based on old friendships and connections. But in neither case did they have national organizations, which are necessary to win a presidential nomination. And they lacked money and much chance of raising it.

Yet they fashioned scenarios that imagined their being crowned presidential nominee at the Republican convention in Cleveland in July. The basis for such dreams? Lightning would strike in nationally televised debates. They would perform superbly and generate a national wave of support. Fiorina actually did shine in debates, but that didn't create a national organization.

The problem is that candidates with no chance—often driven by no more than vanity—clogged the process. To accommodate them, two debates were required each time for months. These candidates made it difficult for more credible candidates to get their message across. To the extent major issues might have been clarified, they weren't.

(2) Likability: A candidate doesn't have to be liked by voters to win the presidency. Lyndon Johnson and Richard Nixon weren't. But being liked sure helps. Ronald Reagan's appealing personality took away the sharp edges of his ideology and strengthened his presidency. Had John F. Kennedy and Bill Clinton not been enormously likable, they might never have been elected president.

But who among the presidential candidates in 2016 is especially likable? One candidate: Ben Carson. John Kasich can be charming in a goofy kind of way, though his moralizing detracts from his appeal.

NEWSCOM

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The rest appear to misunderstand what they need to accomplish in debates, where most people see and hear them. They don't need to score points, as Ted Cruz often does, or prevail in arguments, which Marco Rubio is good at. Debates are personality contests. The idea is to persuade voters to like you and feel it would be nice to chat with you about issues, assuming you are up to speed on issues. Reagan fit that bill.

(3) Electability: When Republican activists gathered for a conference in New Hampshire last March, they were asked which mattered the most, a candidate's stand on issues or his or her chances of being elected president. By a large margin, electability won.

Given the importance of the 2016 election, I thought Republicans had gotten serious about winning the White House. It turns out I was wrong. As the *Washington Examiner*'s Michael Barone has noted, exit polls found that only 20 percent of Iowa caucus attendees and 12 percent of voters in the New Hampshire primary were motivated by "who can win in November."

Instead, Republican voters prefer Donald Trump and Ted Cruz, the two candidates that Democrats believe they can beat. Trump does well with Republican voters, but when the rest of the political universe is factored in, his negatives are as high as 60 percent. Cruz appeals to hardline conservatives and evangelicals, but it's questionable whether he can reach beyond that corner of the electorate.

To defeat the Democratic nominee, a Republican must win the political center. That means doing better among Hispanic and Asian-American voters, the fastest-growing voting blocs. Mitt Romney got 27 percent of the Hispanic vote in 2012. A Republican candidate this year needs about 40 percent, which George W. Bush got in 2004. Likewise, a Republican will have trouble winning while losing the Asian-American vote 3-to-1, as Romney did.

This points to Rubio. He leads in the *Real Clear Politics* average of polls by 48 to 43 percent over Hillary Clinton. Cruz leads by one point, 46 to 45 percent, and Trump trails her 46 to 42 percent. And "in polls going back to September, Rubio runs perceptibly better than others in most target states—better than Cruz in Florida, better than both Cruz and Trump in Virginia, Colorado, Pennsylvania, New Hampshire, and Iowa," according to Barone.

(4) Debates and polls: There are too many of both. When there are so many debates, they tend to dominate the presidential race. Issues are reduced to debating points rather than being fully explored. Trump is the master at this. He says he'll build a wall along the border and Mexico will pay for it. He doesn't have to say how he'd pull this off. In debates, evasion is easy.

Polls corrupt reporting. It's difficult to keep them from being the main influence on political analysis. A candidate whose poll numbers rise, even just a little, must be doing something right. That has become the rule of thumb, though polls are often misleading or fickle. Also, in the early stages of a presidential race, polls are meaningless. And polls leading up to caucuses and primaries are often not predictive.

(5) The joy deficit: Presidential races have always been serious, but they once had an element of fun. From time to time, candidates found it enjoyable to be running for the highest office in the land. While traveling in presidential motorcades in 1976, Gerald Ford would use a loudspeaker to address people in other cars or along the road. Those who heard him were often puzzled. But Ford found it enjoyable. I did too. ♦

Fear Is the Key

To keeping Britain in the EU.

BY ANDREW STUTTAFORD

Voters in the United Kingdom will be choosing—in a referendum to be held by the end of next year, and perhaps as early as June—whether or not to stay in the European Union. Barack Obama wants the U.K. to stay put and is reportedly planning "a big, public reach-out" to persuade Brits to stick with the EU.

It's not the first time the American president has weighed in on this most British (or European) of questions, but the timing was telling. It came immediately after EU "president" (it's complicated, but that designation will have to do) Donald Tusk unveiled the draft settlement intended to bring David Cameron's attempt to "renegotiate" Britain's position in the EU to a satisfactory conclusion. What was unveiled was underwhelming; the derision with which it was greeted was anything but. It's not hard to guess why Obama believes that Cameron could use a helping hand.

Britain's prime minister cannot be entirely surprised that it has come to this. An unimaginative politician without much feel for what truly matters, Cameron has never wanted Britain to exit ("Brexit," as such a departure is unattractively known) the European Union. He agreed to the planned referendum reluctantly and only as a device to head off the Euroskeptic challenge to his Conservative party ahead of the 2015 general election.

Cameron's idea was, when reelected, to recommend that Britain remain in the EU on the basis of a new deal negotiated with its European partners: a deal he must have realized would not—could not—amount to very much. The EU rests on a set of fundamental principles. These include "ever closer union" (the ratchet that

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provides that integration must forever move forward), the "four freedoms" (the free movement of goods, capital, services, and people within the union), and the primacy of EU law. Abandoning or even diluting any of those principles, even for just one country, would risk unraveling the whole European project: It was never going to happen.

Cameron's problem was that many of the objections that the British have to the EU flow from those very same principles. "Ever closer union" means what it says: U.K. sovereignty is continuously being eroded, with its democracy going the same way. Britain's laws and its courts are subordinated to those of the European Union. And, most sensitively of all, Brits fear they have lost control of their borders: EU immigration into the U.K. is currently running at a net 180,000 per year, an issue made all the more toxic by the migrant crisis on the Continent.

All the prime minister could do was try to use his renegotiation to change the subject, focusing attention on sideshows, some significant and some not. Thus the proposed agreement would, among other less than glorious "victories," chip away at some "in-work" welfare benefits enjoyed by EU migrants, give the feeblest of boosts to the role of national parliaments, and win the U.K. a degree of protection from eurozone bullying. But, overall, the result is a sad, scaled-back little ragbag of half-measures and trivia that still has yet (as I write) to be finalized. Despite some flummery (it will be filed with the U.N.!), the eventual settlement may well, legally, be nothing more than an agreement to agree, which is to say very little indeed.

Cameron began his efforts to sell this crock on an upbeat note. It would pave the way for a "substantial change" in Britain's relationship with Brussels. (Well, no.) "Hand on heart," he had "delivered" on the "commitments" made in the Conservative manifesto. (Nope, not hardly.) The deal was so good that, if Britain were not already a member of the EU, he would have advised joining on these terms. (Words fail me.)

Online mockery of Cameron's 'Project Fear'

The reviews were savage. The press coverage that followed the disclosure of the deal's details was some of the worst that Cameron has ever known. And the grumbling in Conservative ranks didn't take long to get going. To one Tory MP, Cameron had been reduced to "polishing poo." Nor was the discontent confined to dissidents in Westminster (at least 20 percent of his parliamentary party at the latest count). Most Conservative activists are Euroskeptics; so too about half of Tory voters. Polls show a swing of support towards Brexit.

A nervous Cameron has turned (again) to "Project Fear" (the name comes from a strategy used successfully and rather more legitimately in the 2014 referendum on Scottish independence), spinning scare stories to frighten Brits away from the Brexit door. This plays on the understandable anxiety that many British voters have about life outside the EU.

Late last year I was discussing, with a leading Brexit advocate, the chances voters would choose to leave the EU. In his view, the country divided roughly into thirds: One-third would opt for Brexit come what may; one-third would always prefer to stay in the EU; the rest are somewhere in the middle and could go either way.

This last group, obviously, will decide the outcome, and its members are likely to be susceptible to bleak warnings of the catastrophes that divorce from Brussels could set in motion. They may not be enthusiastic about the EU, but they will not want to risk too much to escape it. Cameron's grim (and quickly discredited) prediction that, in the event of Brexit, migrant camps in Calais could be relocated to the U.K. was one example of Project Fear at work. There have been plenty of others in recent months (Mass unemployment! No more cheap flights abroad! Goldman Sachs to move an office!)—so many and so absurd that they have given birth to an Internet meme depicting fire-breathing dragons, giant waves, and other horrors that will follow in Brexit's wake.

Uncertainty is one of fear's most effective enablers. Euroskeptics need to paint a clearer picture of what sort of arrangements Britain might have with the EU after a divorce. But the Leave camp is badly divided, not least over what the country's options could include. One alternative would be to sign up for the European Economic Area and "do a Norway." This would give the U.K. access to the EU's single market, and there would be little in the way of immediate, visible change, something wavering voters

in the middle may find reassuring. For other Brexiteers, that's too modest: Britain, the fifth-largest economy in the world, ought, they argue, to be able to cut a better bargain. But what if its jilted European partners, angry and worried about the precedent being set, balk at agreeing to anything, Norwegian-style or otherwise, that makes leaving the EU look too easy? At this point, it's impossible to say: awkwardly for the Out crowd there are only so many questions that can be answered in advance.

The final version of the deal between Cameron and the rest of the EU has—as we go to press—yet to be settled. From what's already known, we can be sure that what's in it will not change the minds of the solidly Euroskeptical. But what of the wobbly center? The deal may contain enough to convince some of those who lean Brussels's way, and might even win over some of the genuinely undecided. But what those calling for Brexit should really fear is not Cameron's deal, but fear itself. And most of them aren't taking that threat seriously enough. Yes, the polls may have shown some encouraging signs of movement in Brexit's direction, but their overall message suggests that the dismal status quo will prevail.

These are politically volatile times, but, as things stand now, the best guess is that the British will vote against taking what is all too easily caricatured as a dangerous leap into the dark. ♦

The Elephant in the Room

Trump is right about political correctness.

BY DAVID GELERNTER

Donald Trump is succeeding, we're told, because he appeals to angry voters—but that's obvious; tell me more. Why are they angry, and how does he appeal to them? In 2016, Americans want to vote for a person and not a white paper. If you care about America's fate under Obama, naturally you are angry; voters *should* distrust a candidate who is *not* angry.

But there's more to it than mere anger. Chris Christie was angry, and he's gone. Trump has hit on important issues—immigration, the economy, appeasement unlimited—in ways that appeal to voters emotionally. There's nothing wrong with that; I trust someone who feels what I feel more than a person who merely thinks what I think. But though Rubio and Cruz are plainly capable of connecting with voters emotionally, Trump is way ahead—for many reasons, but the most important is obvious and virtually ignored.

Political correctness. Trump hasn't made it a campaign theme exactly, but he mentions it often with angry disgust. Reporters, pundits, and the other candidates treat it as a sideshow, a handy way for Trump (King Kong Jr.) to smack down the pitiful airplanes that attack him as he bestrides his mighty tower, roaring. But the analysts have it exactly backward. *Political correctness is the biggest issue facing America today*. Even Trump has just barely faced up to it. The ironic name disguises the real nature of this force, which ought to be called invasive leftism or thought-police liberalism or metastasized progressivism. The old-time American mainstream, working- and middle-class white males and their families, is mad as hell about political correctness and the havoc it has wreaked for 40 years—havoc made worse by the flat refusal of most serious Republicans to confront it. Republicans rarely even acknowledge its existence as the open wound it really is; a wound that will fester forever until someone has the nerve to heal it—or the patient succumbs. To watch young minorities protest their maltreatment on fancy campuses when your own working life has seen, from the very start, relentless discrimination in *favor* of minorities—such events can make people a little testy.

We are fighting Islamic terrorism, but the president won't even *say* "Islamic terrorism." It sounds like a joke—but it isn't funny. It connects straight to other problems that terrify America's nonelites, people who do not belong (or whose spouses or children don't belong) to the races or groups that are revered and protected under p.c. law and theology.

Political correctness means that when the Marines discover that combat units are less effective if they include women, a hack overrules them. *What's more important, guys, combat effectiveness or leftist dogma?* No contest! Nor is it hard to notice that putting women in combat is not exactly the kind of issue that most American women are losing sleep over. It matters only to a small, powerful clique of delusional ideologues. (The insinuation that our p.c. military is upholding the rights of women everywhere, that your average American woman values feminist dogma over the strongest-possible fighting force—as if women were just too ditzy to care about boring things like winning battles—is rage-making.)

The mainstream press largely ignored the Marines story. Mainstream reporters can't see the crucial importance of political correctness because they are wholly immersed in it, can't conceive of questioning it; it is the very stuff of their thinking, their heart's blood. Most have been raised in this faith and have no other. Can you blame them if they take it for granted?

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Why did the EPA try to issue a diktat designed to destroy the American coal industry in exchange for decreases in carbon emissions that were purely symbolic? Political correctness required this decree. It is not just a matter of infantile posing, like pretending to be offended by the name Washington Redskins. Bureaucrats have been ordered by those on high to put their p.c. principles into practice, *We* know what's best; *you* shut up.

It's a gigantic, terrifying problem—and no other candidate even *mentions* it! If Cruz and Rubio and Bush choose to be taken seriously by voters (versus analysts), they will follow Trump in attacking this deadly corrosion that weakens democracy from the inside, leaving a fragile shell that crumbles to powder in the first stiff breeze.

The State Department, naturally, is installing the same motto above its door—together with a flag emblazoned with a presidential phone and a presidential pen, the sacred instruments of invasive leftism. Christians are persecuted, enslaved, murdered in the Middle East, but the Obama regime is not interested. In a distant but related twist, Obama orders Christian organizations to dispense contraceptives whether they want to or not. This is political correctness in action—invasive leftism. Political correctness holds that Christians are a bygone force, reactionary, naïve, and irrelevant. If you don't believe it, go to the universities that trained Obama, Columbia and Harvard, and listen. We live in the Biblical Republic, founded by devout Christians with a Creed (liberty, equality, democracy) supported directly—each separate principle—by ancient Hebrew verses. Christianity *created* this nation. But p.c. people don't know history. Don't even know that there *is* any. Stalin forced the old Bolsheviks to confess to crimes they never committed, then had them shot. Today, boring-vanilla Americans are forced to atone for crimes committed before they were born. Radically different levels of violence; same underlying class-warfare principle.

Political correctness is stupid. You disagree? I couldn't care less. You're a clown.

MIC SMITH / AP

and the character of American government is changing.

The IRS attacks conservative groups—and not one IRS worker has the integrity or guts to resign on principle, *not one*. Political correctness is a creed, and the creed holds that American conservatives are ignorant, stupid, and evil. This has been the creed for a generation, but people are angry *now* because we see, for the first time, political correctness powering an administration and a federal bureaucracy the way a big V-8 powers a sports car. The Department of Justice contributes its opinion that the IRS was guilty of no crime—and has made other politically slanted decisions too; and those decisions all express the credo of thought-police liberalism, as captured by the motto soon to be mounted (we hear) above the main door at the White House, the IRS, and the DOJ:

And we still haven't come to the main point. Many white male jobseekers have faced aggressive state-enforced bigotry their whole lives. It doesn't matter much to a Washington wiseguy, left *or* right, if firemen in New Haven (whites *and* Hispanics) pass a test for promotion that is peremptorily thrown in the trash after the fact because no blacks scored high enough. Who cares? It hardly matters if a white child and a black child of equal intelligence study equally hard, get equally good grades and recommendations—and the black kid gets into college X but the white kid doesn't. Who would vote for a president based on *that* kind of trivia? This sort of corruption never bothers rich or well-educated families. There's always room at the top. But such things do matter to many citizens of this country, who are in the bad habit of expecting honesty and fairness from the institutions that define our society, and who don't have quite as many fancy, exciting opportunities as the elect families of the p.c. true believers. In analyzing Trump, Washington misses the point, is staggeringly wide of the point. Only Trump has the common sense to mention the elephant in the room. Naturally he is winning.

Why, by the way, was Trump alone honored by a proposal in the British Parliament that he be banned from the country? Something about Trump drives Europeans crazy. Not the things that drive *me* crazy: his slandering John McCain, mocking a disabled reporter, revealing no concept of American foreign policy, repeating that ugly lie about George W. Bush supposedly tricking us into war with Iraq. The British don't care about such things one way or the other—they are used to American vulgarians. But

a man who attacks political correctness is attacking the holy of holies, the whole basis of governance in Europe, where galloping p.c. is the established religion—and has been effective for half a century at keeping the masses quiet so their rulers can arrange everybody's life properly. Europe never has been comfortable with democracy.

The day Obama was inaugurated, he might have done a noble thing. He might have delivered an inaugural address in which he said: This nation used to be guilty of race prejudice, but today I can tell you that there is no speck of race prejudice in any corner of the government or the laws of this country, and that is an amazing achievement of which every American ought to be deeply proud. An individual American here or there is racist; but that's his right in a free country; if he commits no crime, let him think and say what he likes. But I know and you know, and the whole world knows, that the overwhelming majority of Americans has thoroughly, *from the heart*, renounced race prejudice *forever*. So let's have three cheers for our uniquely noble nation—and let's move on tomorrow to fresh woods and pastures new.

But he didn't.

Worst of all its crimes is what invasive leftism has done to our schools. Trump's unprivileged, unclassy supporters understand that their children are filled full of leftist bile every day at school and college. These parents don't always have the time or energy to set their children straight. But they are not stupid. They know what is going on.

Cruz, Rubio, Bush, and Carson—even Kasich—could slam thought-police liberalism in every speech. They'd concede that Trump was right to bring the issue forward. Their own records are perfectly consistent with despising political correctness. It's just that they lacked the wisdom or maybe the courage to acknowledge how deep this corruption reaches into America's soul. It's not too late for them to join him in exposing this cancer afflicting America's spirit, the malign and ferocious arrogance of p.c. ♦

A Deal over Climate Change

Why not a carbon tax? Both sides could do a lot worse. BY IRWIN M. STELZER

The science of climate change may or may not be the certain thing that the president claims it is, but surely certain is the fact that he can push the Constitution only so far before the Supreme Court pushes back. Which is what it has done by granting the request of 29 states and several business groups that it stay the hand of the EPA until the legality of its new rules governing carbon emissions from power plants, the so-called Clean Power Plan, can be fully tested in the courts. The administration is shocked, as it should be: The Court has never before granted a stay of a regulatory rule before it went into effect. The environmental movement is horrified; climate-change skeptics and those who favor limited government are overjoyed; conservatives who would rely on market-oriented solutions to environmental problems sense a new opportunity; and the climate-change debate is now entering a new round.

The state of play until recently was this: Democrats were counting on draconian regulations to lower the rate of increase in carbon emissions; Republicans were counting on their hold on the Senate and their prospects of taking the White House to reverse those regulations. Democrats were counting on the regulations the EPA crafted to underpin the commitments the president made at the Paris climate change conferences, and on those commitments to induce other nations to make similar reductions in the growth of their emissions. Republicans were counting on a new president to walk away from those commitments because they were not in the form of a binding treaty. Both sides believed they were riding a winner. No need to compromise on the one solution that almost every economist agrees would be a prudential, efficient way to reduce emissions—a carbon tax. Regulations, the Democrats were certain, would get them the climate-change program they favored, while a new president, reckoned the Republicans, would end all this climate-change nonsense.

Enter reality, exit certainty. Climate-change advocates face five new developments that make it less than certain they will get the emissions reductions they believe are needed. First, closer examination of the Paris deal reveals that even in the unlikely event that all parties honor their commitments, the reduction in the growth of emissions would be insufficient to satisfy scientists that a calamity is not soon to make an appearance. Besides, those commitments are nonbinding and nonenforceable. Second, as the prices of oil and natural gas continue their downward plunge in search of a bottom, renewables on which climate-change advocates are relying to replace fossil fuels become increasingly uncompetitive and in need of subsidies. That not only creates budget pressure but tempts developing nations that signed nonbinding statements of intent in Paris not to sacrifice economic growth in pursuit of lower emissions. Third, the Democrats' likely nominee has demonstrated what one columnist calls a lack of aptitude for her chosen profession and cannot with complete certainty

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be relied upon to be in a position to carry the Obama climate-change plan forward. Fourth, the EPA has demonstrated a combination of arrogance and ineptitude that makes relying on it to get the job of emissions reduction done a chancy business. Arrogance, by refusing to provide Congress or anyone else with the data underlying its policy determinations; ineptitude by polluting the Animas River in Colorado and San Juan River in New Mexico and fiddling while the drinking water in Flint poisoned its users. Finally, and most important, the Supreme Court has granted several states the stay requested to bar the EPA from enforcing its new Clean Power Plan until the courts have ruled on its legality, a ruling that its supporters cannot be sure will come down in their favor.

But neither can the rule's opponents. Those who feel that climate change is a plot to enlarge government, or a misreading of the scientific evidence, have four new worries of their own. First, they have to face the possibility that in the absence of some alternative method of reining in carbon emissions, the EPA will, in the end, be allowed by the courts to proceed with its draconian and expensive regulations, a possibility made more likely by the death of Justice Scalia, who voted with the majority in the Court's 5-4 decision to stay the application of EPA rules. Second, they have to face the prospect that the circular firing squad that is their nominating process will so wound all their potential presidential candidates, and/or produce one that is unelectable, that four-to-eight more years of a regulation-writing administration is in their near future. Third, it is not inconceivable that a Republican president, his top priority being to restore the credibility of the United States as an ally, will not want to renege on the deal made in Paris by his predecessor and would prefer to offer an alternative method of meeting the goals to which President Obama committed us at the Paris conclave. Finally, there is the political fact that a large majority of voters, rightly or wrongly, believe the earth is warming, that carbon emissions are the cause, and that something should be done. Younger voters have been indoctrinated with this view by their teachers, their elders, and by academics and media gatekeepers who deny dissenters access to learned journals and the press.

The rising uncertainty of most of the parties as to the impregnability of their positions comes at a time when an opportunity for a win-win solution presents itself. Both parties more-or-less agree on two things: The U.S. tax code is in need of reform, and middle-class workers could use a boost in take-home pay. When the pressure to prevent further flight of our corporations to the greener pastures of Ireland and other lower-tax jurisdictions becomes irresistible, when Speaker Paul Ryan and President Obama or his successor sit down to find common ground, a carbon tax will be on the table, if for no other reason than liberals like taxes, conservatives prefer market solutions to regulation, and both are eager to show the middle class that relief is at hand. Whether the parties consult conservative or liberal economists, they will be pointed towards a carbon tax. Whether they believe the planet is getting hotter, as the modelers contend, or is not, as the thermometers suggest, they will begin to see the virtues of such a tax.

See? There's some superfluous carbon right there.

Climate-change advocates will see it as a way to curb the consumption of fossil fuels, in part by narrowing the competitive gap with renewables; their opponents will see such a tax as meeting a long-held conservative view that it is more growth-friendly to tax consumption rather than the proceeds of work and risk-taking, to be paired with environmentalists' agreement to substitute the tax for the EPA's regulations. Both sides will recognize that a carbon tax, by leveling the competitive playing field, eliminates any need or support for subsidies for renewables. If necessary to protect America's competitiveness, reformers could also impose a tax on the carbon content of imports from countries that do not tax their own emissions.

Better still, the proceeds can be devoted to a simultaneous reduction in the payroll tax paid by workers below some reasonable income level. A $20 per ton carbon tax would increase pump prices by about 18-cents per gallon, estimate Roberton Williams and Casey Wichman of the University of Maryland, not a large burden in this day of $1.75 gasoline. And the impact on the lowest fifth of earners can be eliminated by devoting about 12 percent of the proceeds to such a purpose, according to Terry Dinan, senior adviser at the Congressional Budget Office.

So carbon taxes give those who want to see emissions reduced just what they need—surely a more encompassing attack on the problem than the president's proposed tax on oil, which concentrates on one source of emissions and anyhow cannot pass. It gives conservatives a market-based tool to replace regulations and relieves them of a need to sign on to the climate-change thesis by providing a true, conservative rationale—consumption taxes that ease the burden of taxation on work are pro-growth. And all sides get a tool with which to relieve at least part of the squeeze on middle-class incomes.

Is all of this possible? I am certain that it probably is. ♦

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The American Constitutionalist

Antonin Scalia, 1936-2016

By Adam J. White

A few days before Justice Antonin Scalia passed away, I stumbled upon a monograph published in 1979 by the American Enterprise Institute, a debate titled "A Constitutional Convention: How Well Would It Work?" The subject matter, though interesting, paled in comparison to the names of the participants, some of the greatest constitutional thinkers of their generation: Paul Bator, a respected scholar who later served as President Reagan's deputy solicitor general; Walter Berns, author of fundamental works on the Constitution and democracy; and Gerald Gunther, a lion of liberal constitutionalism.

The fourth was Professor Antonin Scalia—not Justice Scalia, or even Judge Scalia, but Professor Scalia. Still three years from his appointment by President Ronald Reagan to the federal court of appeals, and seven years from the Supreme Court, Scalia was even then, at age 43, a widely esteemed constitutional mind. A veteran of the Gerald Ford Justice Department, Scalia was spending his Carter administration exile at the University of Chicago and AEI.

In that debate, Nino Scalia displayed the wit and acumen that would one day secure his place among America's greatest Supreme Court justices. Yet his most revealing comments spoke not to constitutional doctrine but, emphatically, to democratic constitutionalism. Arguing in favor of states convening a constitutional convention, Scalia rejected the notion that the Supreme Court should set ground rules for the process:

> Just put me down for objecting to the Court's entering into it. . . . I have talked about the need for a convention because somehow the federal legislature has gotten out of our control, and there is nothing we can do about it. One can say the same thing about the federal judiciary. And that is one reason I am willing to take the chance in having a convention despite some doubts that now exist. I am not sure how much longer we have. I am not sure how long a people can accommodate to directives from a legislature that it feels is no longer responsive, and to directives from a life-tenured judiciary that was never meant to be responsive, without ultimately losing the will to control its own destiny.

Then, turning rhetorically toward his fellow citizens, he urged them not to rely on the Court to singlehandedly erase the uncertainty and risks inherent in political and civic life. "It is foolish to sit, wringing one's hands, wondering what the Supreme Court is going to tell us the Constitution requires on an issue such as this. And that is what we are condemned to do unless we can screw up our courage and say, *Let's throw the dice*."

In that one exchange, a generation ago, we find the spirit that animated Justice Scalia's three decades on the Supreme Court. Though a constitutional scholar of unrivaled skill, his constitutionalism reflected a deeper view of republican self-government: that the Court, though powerful in its own proper sphere of action, was no deus ex machina for a democratic society. A nation that demands to be governed by the judiciary becomes a nation dominated by the judiciary—and, ultimately, degraded by it.

He would repeat this theme during his time on the Court, primarily in the dissenting opinions for which he will now be known, like Justice Oliver Wendell Holmes Jr. a century ago, as "the Great Dissenter." In his last significant dissent, rejecting the five-justice majority's creation of a constitutional right to same-sex marriage in *Obergefell* v. *Hodges* (2015), Scalia urged that "this practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."

He could be even blunter. "The Court must be living in another world," he wrote in 1996. "Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."

But the irony in all of this is that the Great Dissenter may ultimately win a majority more significant than a nine-justice court. Antonin Scalia may well prevail in the great

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intellectual battle of his lifetime: to displace "living constitutionalism" as the predominant theory of constitutional law and to supplant it with the actual words of the Constitution, as understood by the generation that wrote and ratified it. And similarly, when adjudicating cases arising from federal statutes, to read and interpret the actual words of the laws passed by Congress, rather than divining some supposed "legislative intent."

On those fundamental questions of law, democracy, and judicial power, Justice Scalia may gain decisive victories, leaving as his legacy an American constitutionalism that perhaps even he could not have hoped for, in that AEI debate, in 1979.

The success of Scalia's promotion of "originalist" constitutionalism and "textualist" statutory interpretation is perhaps best evidenced by the fact that modern lawyers can hardly imagine the world that preceded it. When today even significant liberal legal thinkers such as Yale's Jack Balkin attempt to recast liberal jurisprudence in originalist terms (hence Balkin's *Living Originalism*), it may never occur to young lawyers that just a generation ago constitutional argument proceeded with little or no attention paid to the actual text of the Constitution.

Ronald Reagan announces Scalia's appointment, June 17, 1986.

RON EDMONDS / AP

But decades later, Scalia himself remembered. In the foreword to the Federalist Society's triumphal *Originalism: A Quarter-Century of Debate* (2007), Scalia recalled that "twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers. By and large, counsel did not know I was an originalist—and indeed, probably did not know what an originalist was." Instead of premising their arguments on the Constitution's actual words, lawyers' briefs and oral arguments "generally discussed only the most recent Supreme Court cases and policy considerations; not a word about what the text was thought to mean when the people adopted it."

Today, by contrast, it would border on malpractice for lawyers to litigate a constitutional issue without focusing on the constitutional text, attempting to square their argument with the founding generation's understanding of the provision at issue. In *NFIB* v. *Sebelius* (2012), when the Obama administration needed to defend Obamacare's "individual mandate" as a lawful exercise of the federal government's constitutional power "to regulate Commerce . . . among the several States," the argument began with a quotation of those very words, and eventually went so far as to invoke Samuel Johnson's 1773 *Dictionary of the English Language* for a sufficiently expansive definition of "regulate."

Indeed, in *District of Columbia* v. *Heller* (2008), originalism's high-water mark, *both* sides of the divided Court justified their interpretations of the Second Amendment primarily in originalist terms—not only the Scalia-penned majority opinion, which held that the Second Amendment protected an individual's right to keep and bear arms, but also the dissent, penned by Justice John Paul Stevens, which argued that "when each word" of the Second Amendment "is given full effect," the amendment protects only the right to keep and bear arms in conjunction with military service.

Scalia relied upon originalism because he believed it indispensable to preserving the legitimacy of the courts, a counter-majoritarian force in our otherwise democratic republic. The Constitution itself does not expressly provide for judicial review of the laws; rather, he wrote in a 1989 article, it is "reasonably implicit" because, as Chief Justice John Marshall wrote in *Marbury* v. *Madison*, "it is emphatically the province and duty of the judicial department to say what the law is," and if a federal or state law conflicts with the "paramount" Constitution then the latter must prevail. "Central to that analysis," Scalia observed, "is the perception that the Constitution" is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law." In other words, we must treat the Constitution as *law*, with a meaning no more fungible than that of statutes and contracts.

The contrary struck Scalia (and now myriad other lawyers and citizens) as untenable: "If the Constitution were not that sort of a 'law,' but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?"

Of course, originalism is "not without its warts," as Scalia himself admitted in the same 1989 article. "Its greatest defect, in my view, is the difficulty of applying it correctly."

Moreover, Scalia recognized, there are practical limits to originalism. To apply it unflinchingly in all cases would require the courts to displace many long-settled precedents and thus risk demolishing longstanding institutions. And so he was willing to temper originalism with *stare decisis*, the principle of judicial deference to precedent. At his confirmation hearing, he observed, "Government even at the Supreme Court level is a practical exercise,"

and when prior judicial mistakes "are so woven into the fabric of law" that they become "too late to correct," they may need to be left intact. And so, he further noted in *A Matter of Interpretation* (1997), "*stare decisis* is not *part of* my originalist philosophy," but "a pragmatic *exception* to it." Or, as he sometimes joked, "I'm an originalist and a textualist, not a nut."

As with any other method of judicial interpretation of the Constitution and statutes, there is always the danger "that the judges will mistake their own predilections for the law," he wrote in his 1989 article. But originalism, anchored expressly in what he saw to be the more objective criterion of historical proof, seemed less susceptible to such confusion than a nonoriginalism that "plays precisely to this weakness."

That was the flaw that pervaded much of the Warren Court's mid-20th-century jurisprudence, the liberal judicial activism that Scalia and his colleagues rose up against. When he wrote in his 1997 book that "judges are *not* . . . naturally appropriate expositors of the aspirations of a particular age," he was speaking to that Court's work and the generation of "living constitutionalists" that followed in its wake. Originalism arose as a "movement to curb the pretensions of the Warren Court and return the meaning of the Constitution to what it said," he wrote in a 2013 remembrance of the late judge Robert Bork. To be sure, the modern Supreme Court continues to decide some of its most significant decisions with too much focus on a five-justice majority's sense of the good and too little focus on the original meaning of the constitutional terms at issue. But such decisions are today seen more clearly for what they are, by their defenders and critics alike.

Originalism and textualism are the first of Scalia's legacies. The second, no less important, is his dedication to reinforcing the Constitution's separation of powers. This, too, was a rebuke to the constitutional mindset that preceded his.

For generations, progressives and liberals sought to minimize the separation of powers, concentrating power instead in a single arm of government, often in administrative agencies insufficiently constrained by Congress or even by the president. Frustrated by the inefficiency of constitutional checks and balances, the left preferred unilateral administrative power. Midcentury, when the left reembraced judicial authority, it was to enforce the Bill of Rights against state governments.

Scalia showed that both of those tendencies obscured the Constitution's larger truth. "It is a mistake to think that the Bill of Rights is the defining, or even the most important, feature of American democracy," he wrote in 2008. The Constitution's structural features, its separation of powers and federalism, are the real guarantors of liberty—which is why so many foreign constitutions boast long lists of "rights," yet fail to protect any of them. "Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril."

His structural focus is best exemplified in *Morrison* v. *Olson* (1988), where he alone dissented from the Court's conclusion that the "independent counsel" statute did not violate the Constitution's separation of powers, despite the fact that the IC was neither appointed by the president with the advice and consent of the Senate nor removable at will by the president, and despite the significant powers that the IC wielded.

Scalia recently called the *Morrison* dissent his "most impressive opinion," and it surely is the first of his opinions that should be read by anyone interested in his work. After recounting the Constitution's tripartite structure and the arguments pressed by Hamilton and Madison in favor of that structure, Scalia quoted *Federalist* 51, warning:

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department" . . . can effectively be resisted.

He then added, with characteristic style:

> Frequently an issue of this sort will come to the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. *But this wolf comes as a wolf.*

Scalia ended his *Morrison* dissent by rejecting the seven-justice majority's approach, embracing instead the reasoning of another body of constitutional thinkers. "I prefer to rely upon the judgment of the wise men who constructed our system," Scalia wrote, "and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that '[t]he executive Power shall be vested in a President of the United States.'"

Scalia's faith in the founding generation and two centuries' experience would soon be vindicated. By the time the independent counsel statute expired in 1999, none would say with a straight face that it was anything other than the constitutional disaster that Scalia said it would be.

The separation of powers undergirded another of Scalia's major contributions: his reinvigoration of the doctrine of "standing." In *Lujan* v. *Defenders of Wildlife* (1992), his opinion for the Court held that plaintiffs could not invoke the jurisdiction of federal courts without demonstrating that they had suffered a concrete "injury" caused by the

defendant, for which the court could grant meaningful relief. This doctrine served to close the courthouse doors to lawsuits brought by activists seeking to use the courts to change federal law or policy even though they themselves had not been directly affected by it. And Scalia's opinion rooted the doctrine in Article III of the Constitution, which gives federal courts jurisdiction only for certain "cases" and "controversies"—and more generally in "the Constitution's central mechanism of separation of powers," which "depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."

A few years before *Lujan*, while Scalia was still a judge on the D.C. circuit, he spoke even more directly to the nature of standing as an "essential element" of the separation of powers. "The judicial doctrine of standing is a crucial and inseparable element of" the separation of powers "whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance." This was a crucial principle undergirding much of Scalia's constitutional approach. Originalism and the separation of powers were not ends in themselves, but means to the end of constitutional self-government. Courts must sometimes be a counter-majoritarian force in American government, Scalia saw. Yet the "remedy" they supply for the "diseases most incident to Republican Government" must be a "*Republican* remedy," in the words of *The Federalist*.

This was the point of his paean to self-government at the AEI discussion of constitutional conventions in 1979, and he reiterated it throughout his career, especially in the myriad cases in which he dissented from the Court's decisions conjuring new rights in the name of the Fourteenth Amendment's "due process" clause. To the extent that the Court departs from the amendment's originally understood meaning, choosing instead to recognize constitutional rights in light of the judges' own value judgments, the Court will ultimately undermine its own legitimacy. "The people know that their value judgments are quite as good as those taught in any law school—maybe better," Scalia wrote in *Planned Parenthood* v. *Casey* (1992), dissenting from the Court's reaffirmation of a constitutional right to abortion and scoffing at the Court's pretension to settling the national abortion debate. "If, indeed, the 'liberties' protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*."

He added one further thought of no small significance now, in the aftermath of his own passing: "Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward." That was the inevitable result of a "living constitution" jurisprudence in which values would become constitutionalized not by the people themselves but by the Court's imposing its will on the people.

But Scalia also recognized that the task of balancing the court-centric rule of law with the republican self-government of Congress, the president, and the states was easier said than done, a point he made eloquently in a short 1983 preface in the *Journal of Law & Politics*:

> Resolving the tension between the rule of law and the will of the people—between law and politics—is the supreme task of our government system. We sometimes tend to forget that it is more a matter of resolving tensions than of drawing lines, for there is no clear demarcation between the two. Laws are made, and even interpreted and applied (by administrative agencies), through a political process; and politics are conducted under the constitution and statutory constraints of the law.

And where no lines could be drawn, it might fall to Congress, the president, the states, and the people, not the courts, to resolve the tensions. This informs one of the more challenging aspects of his jurisprudence: those cases raising the very structural issues that he stressed, but which provided few or no bright-line rules and thus were less amenable to judicial decision.

Take for example the "nondelegation doctrine": the notion that if Congress delegates broad power to an agency, with no "intelligible principle" guiding or limiting the agency's exercise of discretion, then Congress has effectively delegated "legislative" power to that agency, legislative power that the Constitution vested in Congress and not the president or the departments. Scalia recognized the principle, but in cases like *Whitman* (a 2001 Clean Air Act case for which he wrote the Court's unanimous opinion) and *Mistretta* (a 1989 sentencing guidelines case in which he dissented), Scalia resolved that this was a question that the Court simply was not equipped to answer: "But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." Because "the limits of delegation 'must be fixed according to common sense and the inherent necessities of the governmental co-ordination,'" he found it a constitutional question best left to Congress, not the courts.

The tensions between the rule of law and republican self-government are also evident in what may be his most challenging opinion, *Employment Division* v. *Smith* (1990). Writing for the Court that the First Amendment did not entitle people to smoke peyote for religious purposes in violation of an Oregon statute, Scalia warned that the challengers' view of liberty, if taken to its logical end, would make

democratic self-government impossible. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense." The Court could draw no such line circumscribing democratic government so tightly; it would have to be drawn, if at all, by the legislatures. (Which Congress and many states did, with religious freedom restoration acts, such as the federal RFRA enforced by a majority of the Court, including Scalia, in the 2014 case *Burwell* v. *Hobby Lobby*.)

Such were the admitted limits of Scalia's originalism. His counterparts on the left respected no such limits: "As one cynic has said," Scalia once wrote in a thinly veiled reference to Justice William Brennan, "with five votes anything is possible." But without a "solid textual anchor or an established social norm from which to derive the general rule," even a five-justice majority is simply legislating—the emphatic province of the people in a democracy, not of the judiciary.

These limits were part of what made originalism, as Scalia put it, "the lesser evil." Those words were not lightly chosen; rather, they reflected the bedrock underlying Scalia's principles: his faith.

This is no small irony. Scalia often was criticized for importing his Catholic morality into Fourteenth Amendment cases regarding hot-button moral issues. This criticism was often made in the most superficial terms, and thus was easy for Scalia to rebut; judicial creation of a right to same-sex marriage contradicted his originalism no less than his Catholicism. But his superficial critics failed to grapple seriously with the true Catholic underpinnings of Scalia's jurisprudence: first, St. Paul's instruction to every Christian, including every judge, to "submit himself to the governing authorities, for there is no authority except that which God has established"; and second, the recognition that the city of man is not the city of God, and thus we must accept the fact that our institutions are necessarily imperfect.

Scalia explained the first point in 2002, in a widely read essay for *First Things* titled "God's Justice and Ours." There he explained why Catholic teaching on the death penalty's *morality* had no bearing on his evaluation of its *constitutionality*. "The choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases."

But Scalia explained the broader relationship between his faith, political principles, and legal methodology in a far less prominent essay published in 1987, in the *Christian Legal Society Quarterly*. There he stressed that, "in the last analysis, law is second best." While we aspire to "a government of laws, not of man," this is only "the most realistic of aspirations for a world that is not populated by angels." And even with the best of aspirations, "government by men and women is, of necessity, an imperfect exercise."

For that reason, Scalia did not pursue a notion of the law as earthly perfection; instead, he was comfortable with the imperfections of democracy within the broad limits set by the Constitution. And the Christian obligation to obey "lawful, civil authority" is "the first and most important Christian truth to be taught about the law, because it is a truth obscured in an age of democratic government."

One hesitates to complain that Justice Antonin Scalia's time came "too soon." As columnist Ross Douthat reacted to the news, "we should all die full of years," a father of 9 and grandfather of 36, "in our sleep after quail hunting." But in one narrow respect Scalia's time did come too soon, for it interrupted his late-career reconsideration of one of the cornerstones of his legal thought: the proper relationship between the courts and the administrative state.

This was one of the "tensions" between the rule of law and the will of the people to which he had alluded in his 1983 *Journal of Law & Politics* preface. For the vast majority of Scalia's public career, he was a strong proponent of judicial deference to administrative agencies' legal interpretations. And this was, by his own explanation, a response to both judicial micromanagement of administrative agencies by the 1970s courts and the broader micromanagement of democracy by the Supreme Court under Chief Justice Earl Warren.

In an important article published in the *Duke Law Journal* not long after he joined the Supreme Court, he argued that judges should defer to an agency's interpretation of a statute when Congress had written the statute without a clearly stated intent on the legal question at issue, because Congress meant (actually or presumably) "to leave its resolution to the agency." When Congress has left the matter to the agency's discretion, "the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—*i.e.*, whether its resolution of the ambiguity is reasonable." Better to have such matters decided by agencies that are democratically accountable (through the president) than by unelected judges.

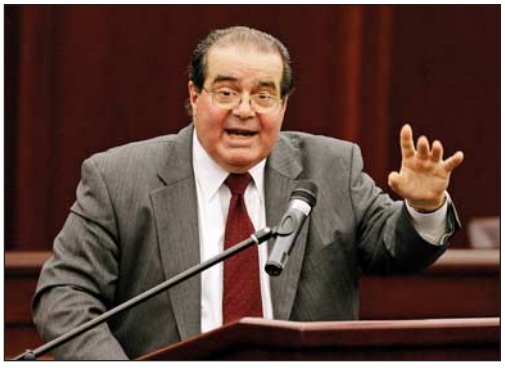
In short, Scalia emphatically approved the doctrine of "*Chevron* deference," as well as the related doctrine of "*Auer* deference," by which the courts give even more deference to an agency's interpretation of its own regulations. Throughout the 1990s and 2000s, through Republican and Democratic administrations alike, Scalia defended *Chevron* and

Auer deference against virtually all challenges. Even as late as 2013's *City of Arlington* v. *FCC*.

But in recent years, Scalia began to have a very public change of mind. Beginning with a concurring opinion in *Talk America* v. *Michigan Bell Telephone* (2011), Scalia criticized *Auer* deference because it effectively conceded the concentration of both lawmaking and law-interpreting powers in a single agency, in violation of the separation-of-powers principles underlying our Constitution.

And in recent months word began to spread quietly that Scalia was even reconsidering *Chevron* deference, admitting doubts about the doctrine that he more than anyone had defended throughout his career. News of such reconsiderations stunned proponents (including me) and critics alike.

But perhaps we should not have been so surprised. Looking back to his writings, including his pre-judicial writings, we see that Scalia's evaluation of the proper relationship between agencies, courts, Congress, and the rule of law was, from the very beginning, a practically minded effort to resolve a "tension" between law and politics.



Scalia speaks at the Roger Williams University law school in Bristol, Rhode Island, April 7, 2008.

In his 1989 *Duke Law Journal* article, he observed that the "presumption" of Congress committing such legal questions to agencies rather than courts was just that—a "presumption." True, he noted, it was "a more rational presumption today than it would have been thirty years ago—which explains the change in the law [in favor of judicial deference to agencies]." But implicit in that reasoning is the notion that this presumption might prove unsustainable if agencies ceased to concern themselves with treating Congress's statutes as laws limiting their own discretion.

Perhaps Scalia decided that we had reached the point of unsustainability. Some of his last, best opinions hinted at it. In *Utility Air Regulatory Group* v. *EPA* (2014), striking down the EPA's attempt to impose a permitting requirement on facilities emitting greenhouse gases, Scalia's opinion for the Court announced that "we are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." As administrative agencies (and the president overseeing them) grew ever bolder in their efforts to act in lieu of legislation, or even in defiance of longstanding laws, Scalia may have concluded that the balance between law and politics had been lost, and that courts needed to play a more vigorous role in holding agencies to the rule of law.

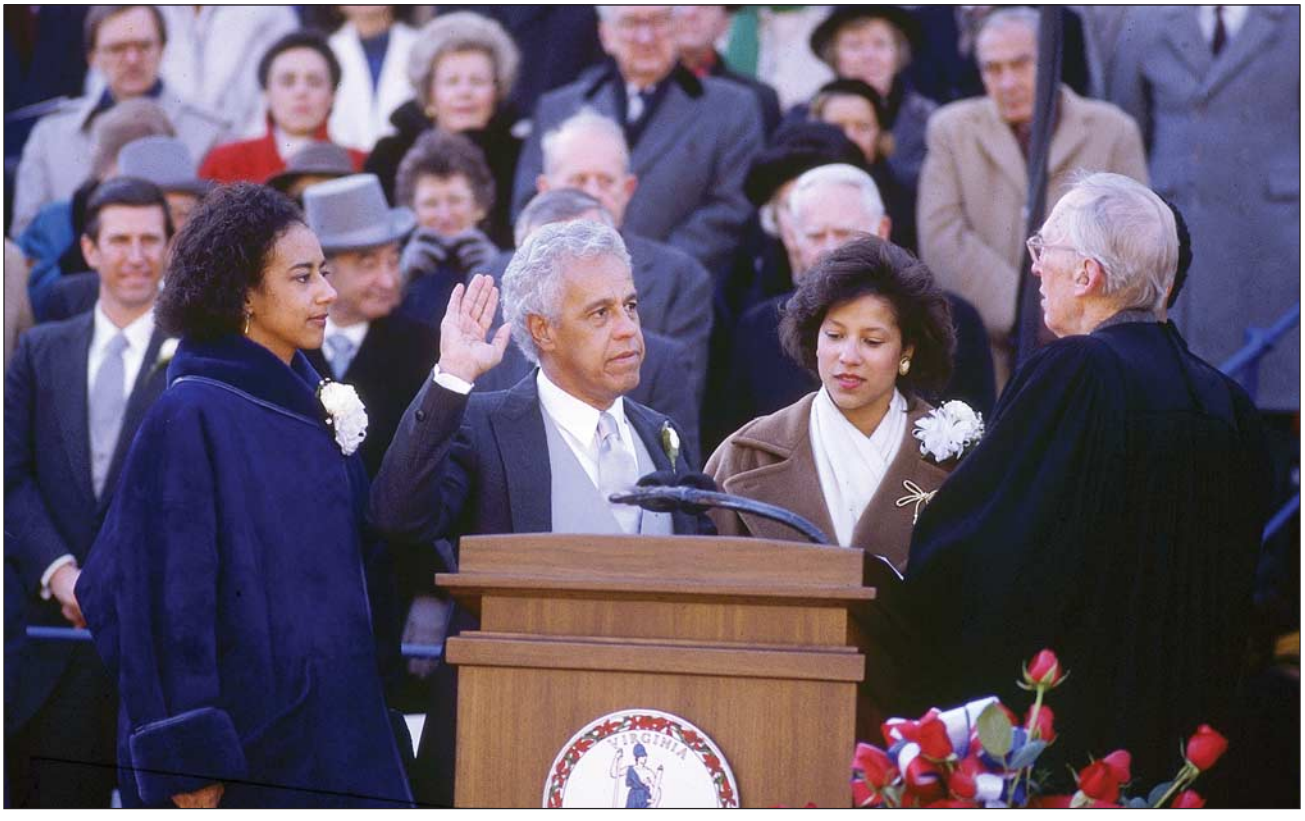
If Scalia were looking at striking a new practical balance between law and politics in administration, then the last years of his life brought him full circle. In the late 1970s and early 1980s, Professor Scalia edited and wrote for the American Enterprise Institute's *Regulation* magazine, and in those pages he urged his fellow conservatives not to bind themselves thoughtlessly to past proposals for reforming the administrative agencies, especially when tectonic shifts in American politics, which had brought President Reagan to office, suddenly offered an opportunity to achieve structural reform through the executive branch itself.

In *Regulation*'s January/February 1981 issue, for example, Professor Scalia urged conservatives not to race to impose on the new, deregulation-minded agencies the statutory restraints that they had long wanted to place on a regulation-minded administrative state, because such restraints would now thwart agencies' new deregulatory efforts. "The game has changed," he stressed, and those "who continue to support the unmodified proposals of the past as though the fundamental game had not been altered . . . will be scoring points for the other team."

Or, as he warned in a similar 1982 essay on federalism, there may well be "an understandable tactical reason" for adopting a particular compromise between competing structural interests. "Unfortunately, a tactic employed for half a century tends to develop into a philosophy." Scalia's final years seemed focused on precisely such reevaluation, in light of the administrative state's unprecedented new assertions of power and discretion.

"I do believe that every era raises its own peculiar threat to constitutional democracy," Scalia wrote for the *Cato Journal* in 1985. He came of age when "the distinctive threat of our times" was judicial enforcement of a so-called living constitution, with judges and activists using broad terms in the Bill of Rights and the Fourteenth Amendment to destroy the space that our Constitution left for republican self-government. And he feared that the result of such judicial domination would be the degradation of republican virtue itself, rendering the people incapable of self-government. If he did not succeed in defeating that threat singlehandedly in his own lifetime—and the Court's recent decisions make it impossible to say that he did—then he at least gave future generations an example of how victory might someday be won. ♦

STEPHAN SAVOIA / AP



Lewis Powell swears in L. Douglas Wilder as governor of Virginia, January 13, 1990.

FREDERICK WATKINS JR. / EBONY COLLECTION / AP

O Pioneer!

How Virginia's Douglas Wilder remains in the arena.

BY JEFF E. SCHAPIRO

A description of one of the characters in *Great Expectations* would apply to Doug Wilder, the nation's first elected black governor: "A sort of Hercules in strength, and also in weakness." Like the half-god, half-man, L. Douglas Wilder boldly goes about his many labors, consistently defying the odds and oddities of politics. He is admired for his conquests, respected for his intellect, adored for his charm, and feared for his fearlessness. Wilder is one of the few in politics entitled to believe his own clips.

That speaks to the human side of this Virginia deity. Like Hercules, Wilder is prone to hubris, angered by perceived slights and insistent of attention. These frailties can get him in trouble; he seems not to care. Over a half-century in politics—and to his delight—Wilder achieved mythic status among a generation of African Americans, white liberal malcontents, and reporters eager to promote an anti-Jesse Jackson. Warned by his mother against getting a big head, Wilder says in an end note to this slim, breezy memoir: "It was observed many times that I was not the retiring kind—and that was certainly true."

Son of Virginia
A Life in America's Political Arena
by L. Douglas Wilder
Lyons Press, 240 pp., $26.95

There was no doubting Wilder's indelible place in history on the bitter-cold Saturday in January 1990 when he was sworn in as the 66th governor of Virginia. More than 30,000 people swarmed onto the grounds of the state capitol to hear Wilder, the grandson of slaves, declare in his inaugural address that he was a "son of Virginia." The appellation was intended to convey that, the color of his skin notwithstanding, Wilder represented a continuum that reached back to Thomas Jefferson and Patrick Henry, men whose declamations on liberty did not always apply to him. Wilder was a Richmond native, a successful trial lawyer who had held elective office 20 years before achieving the governorship. In other words, he was a member of the club.

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Son of Virginia is intended to place Wilder where he has spent most of his professional and political life, even when he wasn't invited: at center stage. He remains there in the twilight of his career because he seems willing to say or do whatever is necessary to extend his viability. These days, that means Wilder is critical of Barack Obama, chiding him as timid: "Too often, he was a president whose main goal seemed to be not making anyone mad. As a result, he achieved the opposite." Never reluctant to infuriate others, Wilder was virtually alone in urging Obama to dump Joe Biden for vice president in 2012. And as if that weren't enough, he refused to endorse Obama for a second term. This gets Wilder the attention he demands: It may be negative attention, but it is attention nonetheless—and it can trivialize him.

There's nothing Cincinnatus-like about Doug Wilder. He would never voluntarily surrender power; instead, he finds new ways to exercise it. A decade after his governorship he became Richmond's first popularly elected mayor in a half-century, spending his single term in combat with the city council. Now Wilder teaches a class at a state university program that is named for him, and, as an occasional contributor to the *Richmond Times-Dispatch*, lobs criticism at those who attempt to ignore him, such as the incumbent Democratic governor, Terry McAuliffe. Wilder turned 85 last month, and the governor who should be venerated as a statesman has become a gadfly.

As a black politician emerging in the South of the late 1960s, Wilder had to rely almost entirely on himself, taking great risks that often yielded great rewards—including playing the race card. He has gone further than many white politicians who had the advantages of money and organization. A complex man with a gift for communicating in simple, evocative terms, Wilder has been well served by cunning and guile that he sheaths in poise, elegance, and wit. All that comes through in this little book—one, unfortunately, rife with sloppy errors and selective recollections. (Among other things, Wilder gives the incorrect date of his inauguration as governor, misspells the name of the advertising consultant for his historic 1989 campaign, and affixes the wrong title to one of Virginia's leading Republican politicians.)

Recalling his life as the seventh of eight children raised in "gentle poverty" by an insurance salesman and homemaker, Wilder pursued his goals—college and graduate school, the law, politics, and score-settling—with clearheadedness. He is not given to uncertainty: He knows exactly where he wants to go, how to get there, who he'll have to schmooze, and who he'll have to skewer. Mr. Dooley said that politics ain't beanbag; the real-life Mr. Wilder practices it as a knife fight.

Surprisingly, he is sympathetic toward one of his most frequent targets, Chuck Robb, the former governor and senator. The two battled for more than a decade, and their relationship hit rock bottom during Wilder's governorship when it was disclosed that Robb operatives had obtained a secret, illegal recording of Wilder chortling in a mobile-phone conversation over what everyone in Virginia politics knew to be true: that Robb's political career had been irrevocably damaged by his dalliance with a beauty queen. Within Robb's circle it was believed that voter distaste for Wilder's gamesmanship would trump disgust over Robb's conduct: The recording was a means for bringing Wilder to heel. But Wilder was correctly furious over the violation of his privacy, and a federal criminal investigation followed. Robb aides copped pleas to eavesdropping; a grand jury nearly indicted Robb himself.

And yet Chuck Robb emerges here as a charitable figure, keen on Virginia's shedding its intolerant past and doing so by giving minorities and women a full voice in its affairs. Wilder suggests that Robb's political skills are no match for his, but he praises him for engineering the appointment of Roger Gregory (Wilder's law partner) as the first African American on the Fourth U.S. Circuit Court of Appeals.

In 1982, Wilder threatened to stand for the U.S. Senate as an independent, a move likely to bleed black votes from the Democrat and ensure a Republican victory. The condition for his retreat: that the putative Democratic nominee withdraw, having offended Wilder for invoking the name of the ex-segregationist incumbent who was vacating the seat. Then-governor Robb had worried that a racially charged, multi-candidate campaign would revive black-white tensions in Virginia, reversing progress toward reconciliation. The episode established Wilder as the state's preeminent African-American politician and a force neither party could ignore.

"Now I was a politician with the stature to go toe-to-toe with the governor," he writes. "People were a little more cautious about saying no to me, and in many cases were looking for ways to work with me." What Lord Palmerston said of England might apply to L. Douglas Wilder: He has no permanent friends or allies, only his own permanent interests.

This is the great paradox of Wilder's success. Two decades before Barack Obama and the demographic shifts that helped lift him to the presidency, Wilder was forging coalitions that spanned race, ethnicity, gender, and ideology. But having achieved power, Wilder usually refused to share it and rarely hesitated to exercise it in ways that had more to do with distaste for some individual than disagreement over policy. One instructive example: Rather than approve the assignment of prized two- and three-digit license plates to his predecessor's allies, Wilder blocked their distribution. He wanted to make clear *he* was in charge and would brook no intrusion on his prerogatives as chief executive.

Wilder refused to raise taxes to balance the state budget in a recession, relying instead on deep cuts and fiscal sleight-of-hand. His Democratic base fumed but he won over conservatives who had voted against him for governor—and their favorable response emboldened Wilder to think bigger. Not halfway through his term, in 1991, he announced his candidacy for the Democratic nomination for president. The exercise spoke to the cynicism

with which he can view politics: Since Jesse Jackson was not running, Wilder guessed he would corner the black vote and appeal to large numbers of moderate white Southerners who might be considering another governor, Bill Clinton of Arkansas. Wilder's support of abortion rights, the marquee issue of his gubernatorial candidacy, would be a magnet for women, and, once nominated, his fiscal record would draw Republican voters angry with President George H.W. Bush.

Of course, the campaign was a disaster; even Wilder acknowledges as much. It also confirmed for Virginians that Wilder would put personal ambition ahead of public responsibility, and it further alienated the legislature, undercutting Wilder's ability to manage state business.

Wilder prefers to think of himself not as a black politician but as a politician who happens to be black. He is sensitive to the aspirations of the poor and working class, yet embodies upper-middle-class sensibilities, down to his baronial house on the James River, a gleaming Mercedes sedan, ducal tailoring, and fastidious housekeeping. These distinctions have ensured him an enduring flexibility that can simultaneously engender support and outrage. Wilder, the legislator who unsuccessfully fought to discard the state song, "Carry Me Back to Old Virginny," because of its bigoted lyrics, was also the Democratic nominee for lieutenant governor photographed in front of a Confederate battle flag. Wilder, the governor who won a first-of-its-kind law restricting handgun purchases to one a month, refused to support his party's candidate for the same office 16 years later because the rural Democrat had opposed the measure.

In the end, it's better to have Wilder as an enemy than a friend; you're not surprised when he turns on you. Or in the words of a veteran Virginia journalist: "Doug Wilder will always break your heart." Yet the fact that L. Douglas Wilder is emblematic of the grubbiness of politics is no less a reminder of his heroic standing. Hercules had his flaws, too. ♦

B&A

What Henry Knew

How the Master saw himself when he looked in the mirror.

BY THOMAS L. JEFFERS

"Why did we live? Was that all? Why was I not born in Central Africa and died young. Poor Henry James thinks it all real, I believe, and actually still lives in that dreamy, stuffy Newport and Cambridge, with papa James and Charles Norton—and me! Yet, why!" Thus, writing to a friend, Henry Adams reacted to the memoir, *Notes of a Son and Brother*, Henry James had sent him in 1914. Hearing of his friend's exasperation, James replied: "I still find my consciousness interesting. . . . Cultivate it *with* me, dear Henry—that's what I hoped to make you do."

Cultivating his consciousness—identifying its origins—seemed not just interesting but imperative to an author approaching his seventieth year. "You see," he continued to Adams, "I still, in presence of life (or what you deny to be such), have reactions—as many as possible—and the book I sent you is a proof of them." Reactions, also, in the presence of death—for his brother William having died in 1910, he shared Adams's feeling that all the lights of their generation were being put out. It was time to record one's past.

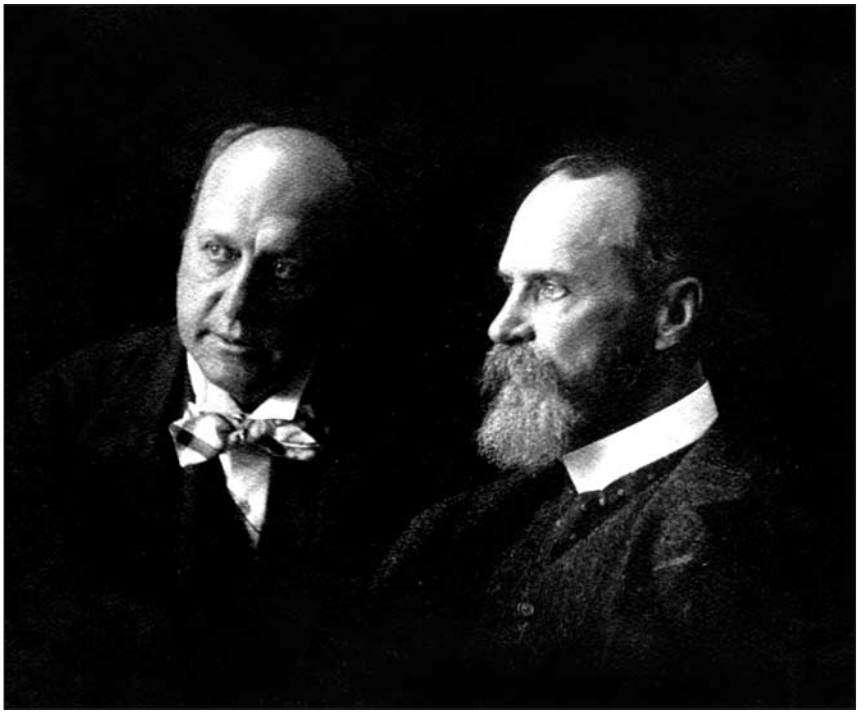
Hence *A Small Boy and Others* (1913), *Notes of a Son and Brother*, and *The Middle Years*, which James left unfinished at his death exactly 100 years ago this month: books tracing the growth of his own imagination, certainly, but also containing piquant drawings of the paterfamilias Henry Senior, the siblings (especially William), friends of youth (including the painter John La Farge), English luminaries like Dickens, George Eliot, and Tennyson, and the Albany cousinage (most poignantly Mary Temple, who died of tuberculosis at 24).

Autobiographies
by Henry James
edited by Philip Horne
Library of America, 850 pp., $37.50

Having, since 1983, published all of James's novels, tales, travel writings, and most of his criticism of fiction and poetry, the Library of America now offers the autobiographies, combining the aforesaid trilogy and eight sketches of reminiscence. In 2011, the University of Virginia Press published a two-volume critical edition, masterfully edited by Peter Collister; but critical editions are for specialists. Philip Horne's notes in this Library of America edition, full but not fulsome, are for the common reader.

But who, exactly, was the author of these autobiographies? There's an old jest about the Three Jameses—James the First, James the Second, and James the Pretender—indicating the development of his prose style from tolerably straightforward ("Daisy Miller") to increasingly nuanced and difficult (*The Turn of the Screw*) to challengingly and sometimes intolerably roundabout, ambiguous, and metaphorically expansive. This late manner marks the "major phase" novels—*The Wings of the Dove*, *The Ambassadors*, and *The Golden Bowl* (1902-04)—the latter especially inviting not just echoes of Samuel Johnson's remark about *Paradise Lost* ("None ever wished it longer than it is") but a strong disinclination to ever again read it.

Thomas L. Jeffers, who teaches English at Marquette, is the author of Norman Podhoretz: A Biography.



Henry and William James (1908)

APIC / GETTY

You should start at the beginning, with novels such as *The Europeans*, *Washington Square* (compressed and witty, the most Jane Austen-like of his works), and *The Portrait of a Lady* (his best all-round), and tales such as "Daisy" and "The Aspern Papers." Certainly read *The Bostonians*, not being scared off by the allegedly incorrect picture it offers of 1870s emancipated women; *Turn of the Screw*, taking it straight as a ghost story but recognizing how James raised that Victorian subgenre to its highest moral and psychological level; and seeing what he could do with the children of *Turn*, try the matchless *What Maisie Knew*, in which a girl grows up surrounded by sex-addicted adults whose infidelities to one another are exceeded only by their callousness, at last, toward her. Finally, if all three "major phase" novels seem too daunting, take on *Wings*.

What, strictly within the completed *Small Boy* and *Notes*, will you find? Two discoveries stand out: of Henry James's Americanness and of his vocation as an artist. The latter is classically portrayed in *Small Boy*, in which he recalls his and William's many visits to the Louvre, where the massed collection "arched over us in the wonder of their endless golden riot and relief . . . breaking into great high-hung circles and symmetries of squandered picture," punctuated by deep windows through which he could glimpse "the rest of monumental Paris somehow as a told story." Indoors was art, outdoors—the "told story"—was history.

Young James liked best the works of art that were patently *connected* with history—canvases with a story on them like Thomas Couture's *Romans of the Decadence* or, allegorically, Eugene Delacroix's *Apollo Slays Python*, which in 1850-51 became the central panel of the ceiling of the Galerie d'Apollon (dedicated to the Sun King, Louis XIV), which the Second Republic was renovating. Delacroix depicts the sun god overcoming darkness, civilization defeating barbarism; it was a *conquest* that would have many reprises (and reversals) and that the artist, in an order-out-of-chaos conquest of his own, beautifully replicates. No wonder Henry's "intense young fancy," taking in so much history and art, was struck by "a general sense of *glory*," the "fame" to be won by the artist or man of action who possessed "power."

What he calls "the most appalling yet most admirable nightmare of my life," presumably dreamt as a boy but spontaneously recovered "many years later," took place in the Galerie d'Apollon.

> The climax of this extraordinary experience—which stands alone for me as a dream-adventure founded in the deepest, quickest, clearest act of cogitation and comparison, act indeed of life-saving energy, as well as in unutterable fear—was the sudden pursuit, through an open door, along a huge high saloon, of a just dimly-descried figure that retreated in terror before my rush and dash (a glare of inspired reaction from irresistible but shameful dread), out of the room I had a moment before been desperately, and all the more abjectly, defending by the push of my shoulder against hard pressure on lock and bar from the other side.

The cowering boy mounts a Napoleonic counterattack against this "dimly-descried" bogey—"the awful agent, creature or presence, whatever he was, whom I had guessed, in the suddenest wild start from sleep, the sleep within my sleep, to be making for my place of rest."

All very uncanny, this creature rising out of "the sleep within my sleep," but in the context of *Small Boy*, it's clear that the "appalling" intruder is what we might label the everyday world, with its insistence that a boy should grow up and get a job. He should go into business or into a profession like law, medicine, the army, or the church—those spheres of endeavor from which the elder Henry James, with his inherited wealth, may have held aloof but which the younger Henry's three brothers would variously enter. Not Henry himself, however. The "immense hallucination" of hot pursuit in the renowned gallery was nothing less than an affirmation of his own desire to become an artist. "Routed, dismayed, the tables turned upon [the creature] by my so surpassing him for straight aggression and dire intention, my visitant was already but a diminished spot in the long perspective," down which "he sped for *his* life, while a great storm of thunder and lightning played through the deep embrasures of high windows at the right."

That thunder and lightning render this a melodramatic "scene," no question, an "intellectual experience" unequaled in its "educative, formative, fertilising" impact. In Apollo's hall, the would-be artist proves himself more "appalling," more puissant, than the agent of normative expectations.

The elder James's experiment in character-formation—treating all of childhood and adolescence as a sort of *Wanderjahr*, touring in place of formal schooling—may not have helped either the scientifically oriented William or the other siblings who didn't happen to have an artistic vocation. But it did succeed for the "really fortunate" Henry. He had a genius for discriminating the gold and silver "threads" among the "straggling clues"—the tangled sensibilia—noticed during his wanderings. And soon, while pretending to study law for a year at Harvard, he began finding the verbal forms—the "Style"—in which, through reviews and short stories, he could display those precious threads.

So much for the self-portrait of the artist as a young man. In *Notes* James depicts another crucial discovery, the one having to do with a cosmopolite's understanding that he belongs to a particular *polis* after all. Yes, he had spent precious periods of his boyhood in Europe, and he found the "ancientry" of its multilayered civilization so rewarding to his aesthetic sense and so fructifying to his storytelling impulse (all those culture-clash plots about Americans in Europe and, occasionally, Europeans in America) that he spent most of his adult years there.

What his homecoming trip in 1904-05 revealed to him, however—his deep Americanness—had, in fact, been evident from the earliest years in Albany and Manhattan and, subsequently, from the Boston years of the Civil War. His younger brothers enlisted, and Henry would have *liked* to serve. But why couldn't he?

He blames an "obscure hurt" that he incurred operating a pump while fighting a fire in Newport, and that has given psychoanalytic critics plenty to speculate about. In the years between the world wars, some of them, noting James's lifelong celibacy and apparent evasiveness, wondered if he hadn't somehow "castrated" himself—or at least, like Jake Barnes, suffered a wound that made him impotent. Following F.O. Matthiessen, Leon Edel sensibly inferred that the hurt was simply a back injury, whether "a slipped disc, a sacroiliac or muscular strain." The injury occurred just after the Confederate attack on Fort Sumter, but James, unmanned by this accidental physical debility, was confined to the sidelines, where, sharply observant and cheering on the great and the good, he was effectually to spend the rest of his life.

He remembers his noncombatant's compensatory effort to identify with the combatants: "measuring wounds against wounds . . . one was no less exaltedly than wastefully engaged in the common fact of endurance." For weren't he and his cousins, as "the huge battle of Gettysburg" began, in "a Newport garden . . . actually listen[ing] together, in their almost ignobly safe stillness, as to the boom of far-away guns"? And didn't he visit the wounded in a nearby army hospital, finding "that the American soldier in his multitude was the most attaching and affecting and withal the most amusing figure of romance conceivable"? The soldiers told him plaintive tales of camp and combat "in what seemed to me the very poetry of the esoteric vernacular," while he "sealed the beautiful tie, the responsive sympathy, by an earnest offer, in no instance waved away, of such pecuniary solace as I might at brief notice draw on my poor pocket for."

Handouts for the boys in blue: It will seem embarrassingly hapless to most of us, but James was at least *trying* and could, retrospectively, "a little rejoice in having to such an extent coincided with, not to say perhaps positively anticipated, dear old Walt." Walt Whitman would famously write some superb poems relating his experiences as a nurse in the hospitals near Washington, and James admits to lacking "the familiar note and shared sound" Whitman had with the ordinary soldier. But for the Brahmin novelist-to-be, who had never lived or worked in such company, there were "gulfs of dissociation" that made the army tents seem like "the glazed halls of some school of natural history." Were these specimens, he asked, his *countrymen*? Absolutely, he grasped.

At the beginning of the new century, however, he was less sure about "the common Americanism" recognized and cherished during the Civil War years. As he notes in *The American Scene* (1907), the waves of new immigrants, notably Jews from Eastern Europe, were flooding cities like New York. It wasn't the American language being spoken in the streets of the Lower East Side; it was Yiddish. Thus his shocked "recognition," in *Notes*, "of the point where our national theory of absorption, assimilation and conversion appallingly breaks down." It was so different from "the old, the comparatively brothering, conditions" of the war, when he had known "what an American at least *was*." We realize now that all those immigrants needed was time: They would, over the next two generations, assimilate as much as any scion of old-money New York might have wished, and by midcentury, Jewish intellectuals like Edel and Philip Rahv were explaining to other Americans why the almost-forgotten novelist was important.

Rahv once interrupted Alfred Kazin enthusing about the mountains, prairies, rivers, and forests of our "native grounds" with an abrupt "*Our* forests, Alfred?"—meaning, were Jews really at home in America? Hasn't an affirmative, "comparatively brothering," answer to that challenge been long evident?

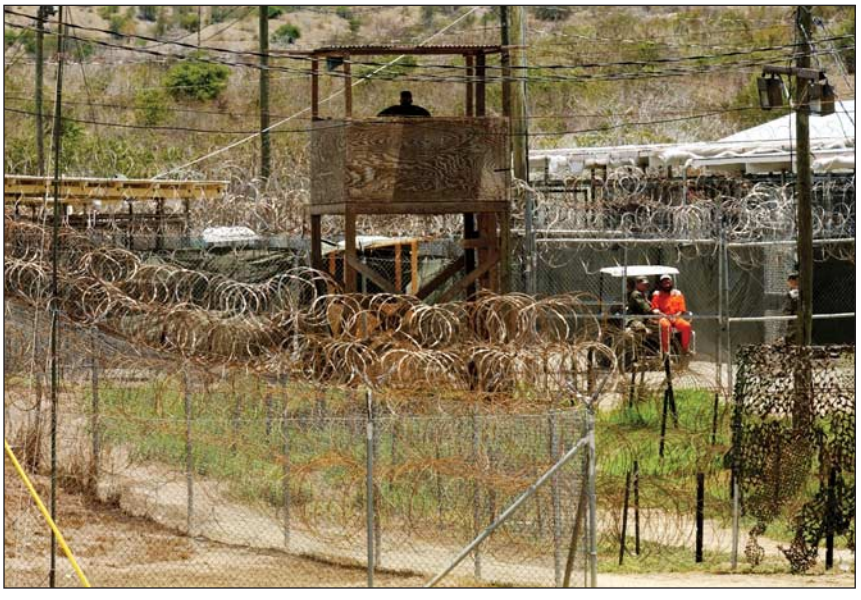
The stammering style of Henry James's autobiographies may prompt the question whether this "son and brother" hadn't, for all practical purposes, written himself *off* his "native grounds." Not at all. If, as he said, "the house of fiction has . . . not one window, but a million," so does American culture; and James occupied and handsomely furnished whole suites of rooms in that house. ♦

B&A

Obama's War

Promises have been easier to make than to keep.

BY GABRIEL SCHOENFELD



Transporting a prisoner at Camp X-Ray, Guantánamo (2002)

Striking the right balance between justice and security remains the most neuralgic point in American politics. Campaigning for the White House in 2008, Barack Obama insisted that George W. Bush and Dick Cheney had gotten it badly wrong: They were trampling on civil liberties with torture, warrantless surveillance, and blanket secrecy, while at the same time violating duly enacted statutes, even the Constitution. Obama was determined to set things right.

How well has he succeeded? That is the question the *New York Times* reporter Charlie Savage attempts to answer in this comprehensive account of the fierce legal battles within the Obama administration over counterterrorism policy and matters of war and peace. As Savage tells the story, Obama began his presidential tenure with grand promises: He vowed to end two wars, ban torture, close Guantánamo within a year, and run the most transparent administration in American history. But as the new president was soon to discover, talking about change was easier than bringing it about.

Power Wars
Inside Obama's Post-9/11 Presidency
by Charlie Savage
Little, Brown, 784 pp., $30

Within weeks of assuming office, writes Savage, Obama "had already started to assemble an ambiguous record" in dismantling policies of his predecessor that he had declared illegal, immoral, and unwise. Though he banned torture, his new CIA chief was defending the practice of "extraordinary rendition," shipping captives off to countries where, despite diplomatic assurances, they might be subjected to less-than-tender methods of interrogation. He retained military commissions for trying terror suspects, promising only to review their rules. His Justice Department was invoking the state secrets privilege to toss lawsuits out of court, including those involving torture and warrantless surveillance.

Writing for the *Times* early in Obama's first term, Savage reported that "the Obama administration is quietly signaling continued support for . . . major elements of its predecessor's approach to fighting al Qaeda." Thanks to that story and a flurry of others like it, civil libertarians and liberal pundits began to squawk about backsliding and betrayal. On the other side of the political divide, supporters of George W. Bush's counterterrorism measures began to crow, charging hypocrisy and claiming vindication. Whether the incoming fire was launched from left or right, it plainly hit its target in the White House: "We are charting a new way forward," insisted a top Obama aide to Savage. But the reality suggested otherwise.

A foiled terror attack on Christmas Day 2009 made jettisoning Bush's counterterrorism toolkit a dangerous proposition. Flying aboard an airliner into Detroit, a Nigerian follower of al Qaeda attempted to set off a bomb hidden in his underwear. When it fizzled instead of detonating, passengers were spared a calamity—but the White House was not. Janet Napolitano, in charge of the Department of Homeland Security, elicited derision with her nonreassuring assurance to the public that the "system worked." It plainly had not worked; only dumb luck and the quick action of Abdulmutallab's seatmates had saved the day. But Obama did not allow the episode to interrupt his Hawaii vacation. Instead of heading back to Washington, he set off to the Kaneohe oceanfront to play golf. Conservatives were outraged. The public was alarmed.

Under the pressure of politics at home and terror threats abroad, writes Savage, "the reformist side of Obama's national security legal policy

SPENCER PLATT / GETTY

Gabriel Schoenfeld, a senior adviser to the Mitt Romney for President campaign in 2012, is the author of Necessary Secrets: National Security, the Media, and the Rule of Law.

was starting to crack." Out was transparency about counterterrorism surveillance. Out was the plan to try 9/11 architect Khalid Sheikh Mohammed in a Manhattan courtroom. Out was the promised closure of Guantánamo within a year. In was intensified drone warfare. In were more secrets about key decisions. In were leak prosecutions when state secrets got out.

Men and women who had been among George W. Bush's shrillest critics were now busily defending counterterrorism measures they had only recently condemned. The human rights advocate Harold Koh had ceaselessly excoriated Bush from his post at Yale Law School. Now, as the top lawyer at the State Department, he explained his reversals to his former academic colleagues by noting that it was "easier to take purist stances from the faculty lounge than from a position of responsibility."

Koh and others like him found themselves perched painfully on the horns of an irresolvable dilemma. On the one hand was the pressing need to avert another underwear bomber or worse. On the other hand was the equally pressing need to be seen doing something other than continuing the counterterrorism measures put in place by George W. Bush.

If most of Bush's counterterrorism policies could not be altered without jeopardizing security, at least the bureaucratic machinery could be better oiled. "There were real, severe process failures in the Bush administration that led to poor decisions," Tom Donilon, then Obama's deputy national security adviser, explained to Savage. "I was determined to make it better in this administration. . . . I insisted on bringing the consideration of legal issues into the [National Security Council] process."

To that end, Savage reports, Donilon revived the interagency national security lawyers group that had been "essentially dismantled" by Bush. This elite body of attorneys began to meet regularly in the White House Situation Room. Its deliberations soon became critical. At every step of the way it set "the framework within which a decision could be made," effectively giving "the lawyers the first shot at many decisions." With the president, vice president, and national security adviser—all attorneys—and with phalanxes of attorneys staffing national security positions up, down, and across the hierarchy, instead of easing the decision-making process, the process got gummed up.

"Lawyerliness," writes Savage, "suffused the administration. . . . Government by lawyer" was the Obama administration's distinctive *modus operandi*. Deliberation was consistently "methodical and precise—sometimes to a fault." Meetings on burning foreign policy issues focused not on overarching strategy but on parsing legal minutiae. Instead of leadership, observes Savage, "the Obama administration sometimes seemed paralyzed, grappling with a problem from all sides, and then putting it off to be taken up again at the next meeting."

Extending to nearly 800 pages, *Power Wars* delves deeply into the nooks and crannies of every significant national security debate touching on the intersection of national security and law. The product of prodigious research and interviews with seemingly every player, Savage's book provides a revealing picture of the inner workings of the Obama presidency.

From the wealth of material assembled here, one could readily construct a withering indictment of Barack Obama's handling of national security matters. But constructing such an indictment is hardly Savage's purpose. Quite the contrary: If Savage hangs out a great deal of team Obama's dirty laundry, he does so not to disparage the administration but as part of a cleansing process. Time and again, Savage presents a bill of particulars, and time and again he proceeds to defend the president and his men from the charge sheet. To be sure, he is unsparing in acknowledging abundant shortcomings of Obama and his aides, but by offering arguments and counterarguments, and often tracing failings to spurious Republican attacks and reflexive congressional resistance, he constructs the best possible case for them nonetheless.

Savage's effort to be scrupulously fair to the Obama administration is both impressive and admirable. It also stands in sharp contrast to his consistently uncharitable assessment of the Bush administration in his previous book, *Takeover* (2007), which warned of "an emerging threat to the checks and balances devised by our Founding Fathers" and decried the "subversion of American democracy." Whatever political predispositions explain the discrepancy between the prosecutorial tone of Savage's first book and the excusatory stance of the second, *Power Wars* definitely deserves commendation for its candor, even if it is not consistently convincing.

Thus, at one juncture, Savage examines team Obama's preference for combating terrorism with law enforcement measures rather than military power. Defending this choice as something rooted in prudence rather than ideology, Savage informs readers that Obama "was no dove and never had been." He fills in this description by noting that Obama had, on any number of occasions, "managed to make clear he was not a pacifist." But Savage is here engaging in crude sleight-of-hand. As he surely knows, being a pacifist—that is, holding an absolute objection to all war—is scarcely the same thing as being a dove, which means having an aversion to the use of American power in the world. Obviously, Barack Obama is not and has never been a pacifist; but *pace* Savage, just as obviously he is and always has been a quintessential dove. Indeed, if Obama is not a dove, then that particular species of political pigeon does not exist.

A more central problem flows from Savage's evaluation of Obama's lawyerliness. Having laid out its features and the fecklessness it often causes, Savage turns around and enumerates the various advantages of Obama's "lawyerly mind-set." For one thing, he writes, "it meant that the administration, though it made its share of mistakes, was cautious and deliberate." For another thing, "It was willing to revisit a previous decision in light of new evidence." And for yet another thing, "it ensured that a full range of views was thoroughly aired."

Overall, Savage suggests, government-by-lawyer—with "rigorous adherence to process"—despite its drawbacks, stands in favorable contrast to the "reckless" style of George W. Bush, whose administration was "notorious for violating norms of the decision-making process."

This is rich in several ways. For one thing, despite being surrounded by hordes of lawyers, not all of Obama's key decisions exactly reflect "rigorous adherence to process." The president's drawing of a red line promising to strike Syria if it employed chemical weapons, and his abrupt decision—taken after a 45-minute stroll around the White House grounds with a top aide—not to stand by his own red line after Syria employed nerve gas against its own citizens, can be characterized as "notorious for violating the norms of the decision-making process." The consequences for American credibility of this truly "reckless" act reverberate to this day, including in locations distant from Syria. Savage recounts this sorry episode without voicing his own opinion but leaves the last word on the subject to the ultra-dovish Georgetown law professor David Cole, who tells us that Obama did the right thing and that the president's action was "brave."

Similarly, it is disingenuous to suggest that the Bush administration's shortcomings flowed from an absence of lawyers or insufficient lawyerliness. There were lawyers aplenty around George W. Bush and Dick Cheney, but they were not the left-liberals who, when out of office, waged ceaseless war on the war on terrorism. Nor could the Bush administration afford to embrace the dilatory style of decision-making that Obama prefers—particularly in the immediate aftermath of 9/11, when it was confronted with innumerable urgent and novel questions. Moreover, the interagency lawyers group that Savage tells us the Bush administration "essentially dismantled" in fact met regularly throughout Bush's two terms. Unlike the practice during the Obama administration, however, it was not the body that framed all issues for the president—and that is almost certainly a good, not a bad, thing. The Bush administration made its share of mistakes, but their genesis lay in factors far more complex than Savage allows here.

In the final analysis, we must judge national security policies not by how they are made but by their consequences. Savage has a great deal to say about Obama's effort to ensure that his policies remain within the confines of law and the Constitution. But curiously, across his hundreds of pages, he has very little to say about a question every bit as important: Have those same policies made the country more or less secure? *Power Wars* went on sale in early November, just days before the carnage in Paris and San Bernardino. It did not require those terrorist attacks to know that Barack Obama's national security policies, including very much his counterterrorism policies, are a shambles.

Power Wars is a book with many virtues, but one puts it down asking the obvious question: If everything has been as good as its author suggests—with all of his important qualifications duly noted—how come things are so terrifyingly bad? ♦

B&A

Monkeys Seen

Japanese primatology, up close and personal.

BY TARA BARNETT

Kyoto

Even in Kyoto, we long for Kyoto. The city is overstuffed with national treasures from across time, juxtaposed within the city limits. It begs you to ask: How is it possible to have made all of this? From observers of primates washing yams, to builders of great wooden temples and constructors of colossal glass hangars like Kyoto Station, Kyoto is a testament to the accomplishments of humanity. It is more than a Japanese treasure; it is a human treasure—which, in fact, saved the city from destruction in World War II. How could one day be long enough to see this city? It's barely enough time to see the station.

Unfortunately, one must make choices when enduring the limits on vacation time. So we spend the morning on classics: the endless tunnels of vermilion gates (*torii*) at Fushimi Inari, where we ogle stray cats perched on Shinto shrines begging for breakfast and lament the fate of the shivering toy poodle dragged up a mountain on its pink leash. Next: The grand Buddhist temple Kiyomizu-dera, with its wish-granting water, also high above the city. Amazed travelers cascade down the hill of souvenir shops like ants returning with their bounty of wants.

But our next stop is less of a sure hit. Having been disgusted by animal parks in the past, we are not inclined towards optimism on our adventure to a place called Monkey Park Iwatayama. We have thrown ginger snaps to desperately craning ostriches at drive-through safaris; we know the horror stories of drugged-out tigers mercilessly cuddled. These are not happy places, these "animal parks." But we can't leave Kyoto without seeing monkeys, and it's very close to lovely Tenryu-ji. Orange *torii* and temples may be the more traditional treasures of human heritage, but the monkeys are a hidden wonder of Japan.

Starting in the 1950s, Japanese primatology provided an influential counterpoint to Western methodologies. While the West endeavored to neutrally observe and scientifically calculate the meaning of primates, Japanese primatologists adopted an approach more akin to anthropology than a hard science. Early on, they began giving their subjects names. By reputation, they

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Monkey Park Iwatayama resident in repose

work *with* empathy rather than running from it. They interact with their subjects, studying their social patterns. They embrace the specificity of their situation and are less obsessed with critical distance. But like all primatologists, they seek to understand humanity. And the study of the macaque, the major native monkey of Japan, is a big component of that project.

What a relief it is to find that the Monkey Park is, if not quite the unspoiled habitat of Japanese macaques, certainly not a bad place for a monkey to be. It is, as the sign claims, a 20-minute walk to the monkeys from the entrance to the park. We pay our fees and make the climb, growing increasingly distressed by the warning signs posted everywhere: Do not look the monkeys in the eye, do not touch. By the time we reach the summit, we're a bit unnerved by the monkey battle royale scene we are sure will be there to greet us.

At the top of the path, a building walled with metal fencing dominates the hill. Big, curious eyes stare out from behind the rusted grate, hands timidly outstretched to the creatures peering in. The caged primates squeal and shriek, excited to the point of fervor. And the monkeys, clinging to the fence outside, reach in calmly for their prize.

There are macaques everywhere: On the ground, on the building, on the fences, on the mountain. They are grooming, playing, screeching, sleeping. They are ganging up on each other, waging little incomprehensible wars. Though they are a small troop, there is no shortage of monkeys. On the edge of the cliff overlooking Kyoto, monkeys perch on fenceposts, looking at the visitors rather than the view. They mingle with us—a prescribed distance away, and monitored by vigilant guardians, but still disturbingly close.

On the edges of the park, beyond where visitors are permitted, researchers crouch in observation. While the park is successful as a tourist attraction, it also serves as a research site for fledgling primatologists. The behaviors of the troop, along with a comprehensive genealogy, are methodically recorded in view of awestruck tourists.

Of course, most people do not come to the monkey park to watch the slow gears of science turn. We come to see the monkeys. And for a primate enthusiast, the kind of interaction offered by the park is worth the climb. The fenced building is for feeding the monkeys, the main attraction. On this day there are peanuts, grapes, or bananas. Girls screaming "*Kawaii*!" (Cute!) and children crying in terror line the perimeter. We battle our way to a wall where a grown monkey has pushed a baby monkey out of its way. An American lectures her husband (and half the park) on the social ranking system of the macaques. The monkey waits, patient or bored, to be fed.

I hold out my hand flat, as instructed; the macaque opens his. When his small hand, black and crusty, gently scrapes a grape from my open palm, I am horrified and elated. The monkey looks bored and shoves his greedy arm back through the fence for more. He hangs there, as if he's seen it all before. And he has.

If we had a week, we would venture to the Japan Monkey Centre in Inuyama, where the oldest English-language primatology journal is published. Later in the year we might visit Jigokudani Monkey Park in Nagano Prefecture to see the macaques bathing in their hot springs or warming themselves by bonfires. But for a hurried afternoon, Monkey Park Iwatayama is the perfect glimpse of the monkeys of Japan.

One warning: If you follow in our footsteps, the "20-minute walk" to the top means a 20-minute vertical scramble up a mountain. That's the "yama" in Iwatayama. On our way out we wanted to warn the troop pondering the sign: "No, chain-smoking Germans! You will not make it!" But we hope that they did. That moment, with the Kyoto skyline juxtaposed against the silhouette of a Japanese macaque, is thoroughly surreal. ♦

COURTESY OF TARA BARNETT

B&A

Medium Cool

Marvel/Disney corners the tattooed teen market.

BY JOHN PODHORETZ

Deadpool
Directed by Tim Miller

The stunning success of the giggly, extremely violent, and incredibly foul-mouthed comic book movie *Deadpool*—it earned $152 million in a single weekend when its studio expected half that—is nothing less than a pivot point in the history of popular culture. It marks the moment when the Hollywood motion-picture business has finally ceased being the "dream factory" of cliché and has, instead, become a group of vertically integrated conglomerates in the manner of boomtown Detroit—with The Walt Disney Company, the most successful and most corporate of them all, playing the role of General Motors.

Recumbent Deadpool

Deadpool was an experiment for Marvel, the comic book movie line now owned and run by Disney. For one thing, as the first-person narrator tells us, its superhero is no hero. He's a wisecracking enforcer-for-hire. He meets the girl of his dreams, a tough broad who works at a strip club, and they have rough sex and charming banter straight out of a public-access TV porn show of the 1970s—until he is diagnosed with terminal cancer. Seduced by the promise of an unorthodox cure, he finds himself in a torture chamber run by a maniac who believes extreme pain will force people to mutate and develop special powers.

He does mutate and turns into Deadpool, an invulnerable killing machine whose only flaw is that he looks like a mummy after the bandages have been taken off. He won't go back to his girlfriend because he's so hideous, so he spends the rest of the movie killing people in order to find his tormentor and do him in as well.

Deadpool doesn't help anyone, he doesn't do right by anyone, and he doesn't care about anyone. But he's funny in a fast-talking guest-of-Howard-Stern sort of way, and he's played by Ryan Reynolds, the extremely likable and very good-looking light comedian who has been flirting with superstardom for 15 years now and has finally secured his breakout part.

Audiences flocked to *Deadpool* because it was both something familiar and something new—a Marvel comic book movie that's flat-out filthy. The defining quality of the Marvel superhero pictures is that they are all comedies at heart (the DC comic book movies, the *Batman*s and *Superman*s, are all Westerns at heart). Thus, *Iron Man* was a 1930s screwball comedy in superhero form. *Deadpool* is the superhero *Porky's*.

It's a movie you can't take your 9-year-old to see, and that's the point. The notion of making a superhero picture children cannot see was the experimental aspect of *Deadpool* in a commercial sense. The reason these movies have taken over Hollywood is that they appeal to "four quadrants"—men and women, and people both over and under 25—and by limiting *Deadpool*'s audience by age, Marvel cut those four quadrants down to three-and-a-half. What it would lose in market share it could only gain in the intensity of interest on the part of its narrower audience. And it did.

The bet paid off, but the meaning of the payoff goes far beyond this one picture. *Deadpool* suggests that Marvel is now going to be able to make all kinds of different movies for its enormous fan base as they grow up and shift their focus and broaden their interests. The worst possible thing would be for these pictures to seem as though they are more for little kids than for tattooed teens and parent-basement-dwelling postcollegians. Marvel cannot afford to be uncool. *Deadpool* makes it, or keeps it, cool.

One can no longer look at the Marvel movies as individual pictures; and indeed, Disney doesn't. The studio got into a huge fight with the fan-beloved writer-director Joss Whedon when he was making *Avengers 2: The Rise of Ultron* because it insisted Whedon insert characters and plot points that would be of use to Marvel in *Avenger*-related movies not yet made (or even written). He didn't want to mess up his plotlines, but messed-up they got, because no matter how much money Whedon made for them with the first *Avengers*, Disney/Marvel is looking down the line.

The line is terrifying. It has 15 Marvel pictures lined up through the end of this decade. And in its second major product line, the *Star Wars* franchise, Disney has 5. One can imagine a similar experiment with *Star Wars*: something hyperviolent, maybe, or even a full-scale romantic melodrama that's light on the action—Nicholas Sparks in a galaxy far, far away. This is a new way of thinking about and making movies. Who knows? Given how lousy the past 15 years of mainstream Hollywood releases have been, maybe the change will do us good.

Probably not, though. ♦

20TH CENTURY FOX

John Podhoretz, editor of Commentary, *is* The Weekly Standard*'s movie critic.*

"China warned the United States on Tuesday that it will face 'serious consequences' if it renames a stretch of street in front of the Chinese Embassy in Washington after a jailed Chinese dissident and Nobel Peace Prize winner."

—Washington Post, *February 16, 2016*

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U.S. Embassy's new address: 1 Donald Trump Drive

NEON SIGN IN BEIJING ATTRACTS THE CURIOUS

State Dept. condemns 'brutal retaliation'

BY JACK MOORE

BEIJING — Following the unanimous vote in the Senate to rename the street in front of the Chinese Embassy in Washington after human rights activist Liu Xiaobo, the Ministry of Foreign Affairs announced it had done its own renaming: The street address of the U.S. Embassy, formerly No. 55 An Jia Lou Road, has been changed to 1 Donald Trump Drive. The sign is in orange neon, and it's huge.

At first, American diplomats thought the change in signs was a joke. "Who is going to take that seriously?" asked Ambassador Max Baucus. But as the day went on, the sign remained in place. A crowd gathered. Traffic was snarled. Donald Trump Drive is one-way, but the direction shifts depending on the time of day. "Sometimes you're turning right and sometimes you're turning left," complained the ambassador, who nevertheless conceded that "while I find the glowing sign garish and offensive, I can't stop staring—it's almost… hypnotic."

ED JONES / AFP / GETTY IMAGES

The new U.S. Embassy sign: to some, offensive; to others, refreshing.

Back in Washington, Secretary of State John Kerry condemned "in the strongest possible terms" the renaming incident. "It's one thing if they called it Romney Alley or even Gergen Street, but to dedicate it to this billionaire buffoon, well, they've just crossed a red line." Thus, Kerry warned, his Chinese counterparts should brace for a counterattack or, at the very least, a gently worded letter.

Meanwhile, a spokesman for the Beijing government said the United States ought to consider itself fortunate it settled on Donald Trump Drive—the alternative names included Bieber Boulevard and Nickelback Road. This is also not the first time the Chinese have engaged in this type of retaliation. During previous disputes, the regime renamed a pontoon bridge after Senator Edward M. Kennedy and an STD clinic after President Bill

CROOKED CONTINUED ON A7