MY PIZZA WITH NINÓ*

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When Professor Rudenstine asked me to address you tonight, I told him rather bluntly he could have done better. What can I, a small cog in the great judicial machine, say about the giant flywheel that is Nino Scalia? Surely there are others—constitutional law scholars, Supreme Court observers, journalists—that could do better.

"No," Professor Rudenstine said, "we want you. As you know the Justice personally, you'll be able to tell us about Scalia, the man." "Oh, a fluff speech," I said; "no problem. Fluff is my middle name."

But when I got down to writing the speech, I realized that there wasn't all that much fluff I could come up with. The sad truth is, most of my contacts with Justice Scalia have been rather inauspicious. Mostly we've eaten pizza together. Now, mind you, we've had a *lot* of pizza. We've done dinner. We've done lunch. But, when you get right down to it, there's only so much dirt you can get out of a guy when there's food on the table.

So I thought I'd talk to you about Justice Scalia's approach to pizza. I mean, anyone with a decent legal education can read his opinions. But who among us here can recite which toppings he likes? Well, since I know I'm among friends and admirers of the Justice, I will let the cat out of the bag on this most sensitive of topics.

It all started out when I was Chief Judge of the United States Claims Court and he was still a circuit judge. We agreed to have lunch and he said he'd come over to my office, so long as I'd provide the pizza.

"One thing, though," Scalia said. "The pizza *has* to come from AV Ristorante."

Well, folks, I have eaten at AV Ristorante and it's not exactly a culinary oasis. In fact, it's more of a pit. But who am I to contradict a guy called Nino on what's good Italian food? Some poor extern got the job of trundling down to the combat zone where AV Ristorante is located to pick up the pizza.

When Nino arrived, no sooner had he spotted the pizza than his eyes lighted up. He approached it the way a wine connoisseur would approach a bottle of 1961 Lafite. He brought the slice up to his lips,

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but did not immediately taste it. First, he took in the aroma, half closing his eyes. I almost expected him to ask for the cork. Finally, he bit into it and let out a sigh.

"Now, Alex, *this* is what *I* call pizza."

Well, I happen to consider myself to be among the cognoscenti when it comes to pizza. We have very similar food in Romania, you know. It's usually made with cardboard since there's no flour, and ground styrofoam because there's no cheese. We call it a Domino's. In any event, while I consider myself an expert, I am always willing to expand my horizons when it comes to pizza, so I cut myself a hefty slice and took a bite.

And you know what? It wasn't that great. The cheese was thin, the tomato sauce a bit too tart, and the crust slightly on the soggy side. The pinnacle of pizzadom it was not.

About a month later, I got a call from a friend of mine, Nina Totenberg, who covers the Supreme Court for National Public Radio. She wanted to meet Scalia and asked if I would intermediate. Sure, I said. I'll set up lunch in my office—pizza, of course. And I thought to myself, this will be a chance for *me* to educate Scalia as to what pizza is all about. So this time, I sent the hapless extern down to DuPont circle, home of Vesuvio's, which regularly gets the *Washingtonian* award for the best pizza in town. To be candid, a side-by-side comparison of an AV Ristorante pizza and a Vesuvio's pizza would be like putting Peewee Herman into the ring with Mohammed Ali.

I should have known things were off to a bad start when I fumbled the introductions. "Nino meet Nina." Now, it takes a lot of talent to blow a line like that, but somehow I managed. I had hardly recovered my composure when Nino spotted the pizza.

"It's not from AV Ristorante," he said. His voice was grave.

"No it's not. It's from Vesuvio's," I said, a little unsure of myself. And then it sank in—I had totally blown it. If there is one thing near and dear to Scalia, it's plain language. He had said it must be from AV Ristorante. He didn't say it must be from AV Ristorante this time, but next time go ahead and surprise me; he didn't give me a green light to get something similar to or better than an AV Ristorante pizza. He had said it quite clearly. "It must be from AV Ristorante." And this wasn't.

So he applied the usual judicial remedy. Suppression. No, he didn't suppress the pizza. He suppressed his appetite. He looked me straight in the eye and said: "It's not from AV Ristorante. I *won't* eat it." And he didn't.

And so Scalia taught me an important lesson that day. From AV

Ristorante means just that, from AV Ristorante. No more, no less. The question is whether he has managed to teach his colleagues on the Supreme Court any equally significant lessons. No, I don't mean, are they ordering their pizza from the right place—which I still think is Vesuvio's, not AV—but are they listening to Justice Scalia when he tells them that what a statute or the Constitution says is exactly what it means?

I think that this is a fair question to ask, given all the fanfare that surrounded his appointment to the Supreme Court. When Justice Scalia came on the Court in 1986, all the commentators said, "This is the guy who, through his charm and intellect, will forge a conservative consensus." It is a little known fact that Ronald Reagan had such high hopes for Scalia that when he named him to the Court, Reagan actually sang a little song about him. Now, it took me a long time to get my hands on this song; I won't explain the covert operations it took to get it. So if you promise not to tell anyone, I'll sing it for you. If I remember it right, it went something like this:

[To the tune of "Maria" from West Side Story]

Scalia, I just picked a judge named Scalia
And now the Court Supreme
Won't cause Ed Meese to scream, at me;

Scalia, I just picked a judge named Scalia
His writing is so fine,
He'll pull in 5 votes every time;

Scalia;
Say it loud,
'cause for life he's staying
Say it soft,
And you'll hear lib'rals praying;

Scalia, I'll never stop saying Scalia.
Scalia . . . .

We know for a fact that Reagan did not and could not sing the same song when he nominated Robert Bork. It just doesn't work.

Booooook, I just chose a judge named Booooook.

You see, it is important to have a lyrical name when seeking a major appointment.

And so when Scalia joined the court everyone expected a conservative consensus to develop around him. Well, it's been four years now, and it just hasn't happened. In major opinion after major opinion, Justice Scalia finds himself writing alone. The list is a long one—

it's not a pretty sight. On separation of powers in *Morrison v. Olson*,[1] Scalia wrote alone; again he was alone on the same issue in *Mistretta v. United States*;[2] and yet again in *Webster v. Doe*.[3] He was alone on whether to overrule *Roe v. Wade* in *Webster v. Reproductive Health Services*.[4] On the right to die in *Cruzan v. Director, Missouri Department of Health*[5]—alone. On the death penalty in *Walton v. Arizona*[6]—alone. One kind of expects that one of these days his dissents will start out "Hello!! Hello!! Is anybody listening?"

This might not seem significant if these were isolated instances, if most of the time he were in the majority and only occasionally writing alone. But when other Justices join him, very often he falls one or two votes short of a majority. For example, think about *Maryland v. Craig*.[7] There, the court examined a defendant's sixth amendment right to be confronted with the witnesses against him. At issue was a Maryland procedure that allows child molestation victims to testify via closed circuit TV so they don't come face to face with the accused.

For Justice Scalia it was an easy, although unfortunate case. Just as sure as AV's pizza means AV's pizza, confront means confront: "Look me in the eye and say that"—it was good enough for John Wayne and it is good enough for Nino Scalia. If the country wants to limit that right to protect children from trauma, it can—by amending the Constitution.

But Scalia found himself in dissent, joined by Justices Brennan, Marshall, and Blackmun, not exactly the ones he was sent there to lead, but okay. Except that he wasn't able to get the crucial fifth vote. Other Justices *are* listening. But not quite as many or as often as might have been expected.

So what's happening? Is it lack of energy or enthusiasm? Is he a boring writer? Does he threaten to put Sominex out of business as the antidote to sleeplessness? Hardly. Scalia's dissents have been labelled "verbal hand grenades" and rightfully so. They are explosive. And, like hand grenades, they throw shrapnel at anyone near the blast without attention to who they are—or how they might vote in the next case.

Thus, in *Craig*, Scalia sided with the Court's liberals—Brennan, Marshall and Blackmun—and accused the rest of the Court's con-

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1 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
2 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).
3 486 U.S. 592, 606 (1988) (Scalia, J., dissenting).
4 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring).
5 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring).
6 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring).
7 110 S. Ct. 3157 (1990).

servatives of bending the Constitution under public pressure: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion."[8] Well Nino, why not just go ahead and call them a bunch of lily-livered, yellow-bellied wimps?

And everyone knows about the barbed comments he directed at Justice O'Connor in *Webster v. Reproductive Health Services*. Certain parts of O'Connor's opinion, he wrote "cannot be taken seriously;"[9] other statements he labelled "irrational."[10] All things considered, one cannot accuse Justice Scalia of trying to curry favor with his colleagues by resort to false flattery.

So what's going on? Has Justice Scalia alienated the rest of the Court? Is he destined to be relegated to the position of perpetual dissenter, a thorn in the side of his colleagues, a Cassandra—ever-destined to make unheeded prophecies of doom, but largely irrelevant to the development of the law?

To any such suggestion, I have a thoughtful and cogent answer. HA!

To fault Scalia for having failed to garner a consensus on a lot of issues is like blaming a farmer because he has not yet collected a harvest while he's still busy sowing the seed. The fact is, a body of law cannot be changed overnight; doctrines established over decades of fuzzy thinking cannot be turned around through the stroke of a pen. It takes work, dedication and single-mindedness.

In Justice Scalia's office there is a plaque on the wall; it says "Nothing is easy.—Antonin Scalia, 1985." What does it mean? Apparently, his law clerks kept complaining that it was hard to come up with some grand theory in which to fit every case; it was much easier, they argued, to decide each case as it came—by the seat of the pants—like some other Justices. Scalia's answer to such complaints was "Nothing is easy," which I suppose is shorthand for "Nothing worthwhile is easy."

And that, it seems to me, is the Scalia philosophy; and that will be the source of his legacy. Whether one agrees with his views in particular cases or not, one thing can't be denied: He has ideas, grand ideas, about how the law and its institutions should operate, and he has a clear, crisp, and somewhat bemused way of expressing them. He may not make it entirely impossible for his colleagues to be fuzzy-headed—after all, life tenure means never having to say you're

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[8] *Id.* at 3171 (Scalia, J., dissenting).

[9] 109 S. Ct. at 3064 (Scalia, J., dissenting).

[10] *Id.* at 3066 n.* (Scalia, J., dissenting).

sorry—but he makes it more difficult. In opinion after opinion, he sets the terms of the debate, forcing his colleagues, and everyone else in the system, to deal with the force of his arguments.

Tonight is obviously not the time or place for an exhaustive review of Justice Scalia's jurisprudence, but I will offer a few examples. Scalia has already had a major impact on the way courts look at legislative history. As we all know, and as we will discuss further tomorrow morning, Scalia takes a rather extreme view of the matter—he refuses to look at it at all because he considers it irrelevant and unreliable: It is irrelevant because Congress passes laws, not legislative histories—the law is what is written, not what some congressman said on the stump; and it is unreliable because congressmen knowingly litter the record with comments saying one thing or another about the meaning of the bill in the hopes that some unwary Supreme Court Justice will glom on to their viewpoint, whether or not it truly represents an issue Congress had considered or decided.

Now, has Scalia managed to persuade his colleagues, or even most federal judges, to go cold turkey on legislative history? Have lawyers stopped citing it? Of course not. But the fact is, legislative history just ain't worth what it was a few years ago. It used to be that you would get briefs and opinions that started and ended their analyses with legislative history, never once mentioning the text of the statutes they were purporting to interpret. Such things are much rarer these days. Scalia's constant carping on the matter has simply made it more difficult for judges and lawyers to avoid such annoying technicalities as the statutory language.

Another example is Justice Scalia's quest to eliminate balancing as the prime form of resolving constitutional issues. I mean who isn't onto the shell game involved in balancing? There is an easy trick to it: If you favor the interest, make it sound big and glorious; if you disfavor it, make it sound narrow and trivial. If you want to permit cities to ban skateboards— excuse the example, but one does not sit in California for five years and remain unaffected—you would describe them as small wooden or fiberglass boards on wheels which frequently cause serious injuries on public streets and sidewalks. If you want to strike down an anti-skateboarding ordinance, you talk about a personal means of locomotion that is known to enhance the user's health and welfare, and which materially implicates the right to travel.

Justice Scalia has made it painfully clear that as far as he's concerned, balancing is out. Instead, decisions should be based on or announce rules of general applicability. As he pointed out in *The*

Rule of Law as a Law of Rules,[11] rules have numerous advantages. They are predictable; they constrain future decisionmakers so they cannot introduce their own personal preferences into the decision; they enhance the legitimacy of decisions because they make it clear to the litigants that their case was decided through neutral application of a rule rather than on the basis of a judge's personal preference; and lastly, they embolden the decisionmaker to resist the will of a hostile majority.

To fully appreciate the force of Scalia's reasoning, it's worth quoting the last paragraph of his dissenting opinion in *Maryland v. Craig*, the confrontation clause case in which he accused the majority of yielding to public pressure:

> The Court today has applied "interest balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is *virtually* constitutional. Since it is not, however, *actually* constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.[12]

Scalia has managed to spin equally coherent theories in numerous other areas of the law, and to set them forth in an equally clear and persuasive way. Take, for example, his concurring opinion last term in *Walton v. Arizona*.[13] His opinion starts out:

> Today a petitioner before this Court says that a State sentencing court (1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and* (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right.[14]

He drives this last point home during the course of the concurrence:

> To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from *Furman* . . . is

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[11] Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[12] 110 S. Ct. 3157, 3176 (Scalia, J., dissenting) (emphasis added).

[13] 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring).

[14] *Id.* (emphasis in original).

> rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives" . . . is rather like referring to the twin objectives of good and evil. They cannot be reconciled.[15]

How can one ignore arguments like these?

In politics, it has been said, you can't beat somebody with nobody. In the law, you can't beat an idea with no idea. And what Scalia has plenty of are ideas. Is he right every time? I don't think so; at least he doesn't always persuade me. Will he eventually prevail as to his entire agenda? Probably not. But in the long run, he will win far more than his share of victories, because he has a coherent theory and he is able to express his views so clearly and persuasively. If, as I believe is true, ideas have consequences, Scalia's influence will grow and continue to be felt for a very long time because of the sheer volume and force of the ideas he puts out, term in and term out.

It is for that reason that it really doesn't matter very much that Scalia's ideas are frequently expressed in dissents or concurrences. These are seeds placed in the intellectual soil of the law, and many, perhaps most of them, will take root and grow.

There is, after all, a time-honored tradition in the Supreme Court of the powerful idea, expressed in an eloquent dissent or concurrence, eventually being vindicated, sometimes long after the departure of the author.

Justice Brandeis was in dissent when he referred to the "right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men" in *Olmstead v. United States*.[16] I cannot help but wonder whether Justice Brandeis would have dreamed that those few words would be quoted so often, or that the right to be left alone—the right to privacy—would someday form the basis of our jurisprudence regarding birth control and abortion.

Justice Holmes was in dissent when he wrote "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" in *Lochner v. New York*.[17] I am not sure he would have contemplated the extensive regulation that has followed the demise of economic due process.

And Justice Harlan (the elder) was in dissent when he wrote "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

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[15] *Id.* at 3063 (citations omitted).

[16] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[17] 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens."[18] I don't need to name the case; and I don't need to tell you that it took fifty-eight years before the Supreme Court listened to Justice Harlan's sage dissent and ordered a disgraceful system of apartheid dismantled.

Will Scalia take his place with Brandeis, Holmes, and Harlan? Only time will tell, but my bet is that he will. He knows what he wants to accomplish and how to accomplish it. "When the dealin's done," as Kenny Rogers would say, my guess is that Scalia will take his place among the Court's giants.

But there are issues on which Justice Scalia will never, ever prevail. There are some issues on which even I draw the line. Pizza is one of them. He may be Antonin Scalia, and I may be Alex Kozinski from Romania, but Vesuvio's was, is, and always will be a better pizza than AV's.

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[18] Plessy v. Ferguson, 163 U.S. 535, 559 (1896) (Harlan, J., dissenting).