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February 14, 2016: Was Scalia a Great Justice?

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Title: Was Scalia a Great Justice?

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2/14/2016—Such is the poverty of foundation in American Law that I don't have any standard—standard of the craft, I mean—to judge whether Justice Scalia should be regarded as a great Justice. Obviously, he was a great intellect and writer, whose opinions on textualism were persuasive to many. He gave coherence to a school of legal interpretation. But that approach—textualism—is silly—maybe I should say radically incomplete—and Justice Scalia did not consistently follow it. On at least one occasion, he admitted that he would not render a textualist opinion if the result were really unconscionable. On some occasions, Scalia ignored textual arguments. On many more occasions, textual arguments that could have been made, never even came up. The world in which campaign contributions and advertising are given first amendment protection and it is unconstitutional to pay a fee to a union, is not in any sense a textualist world. [nor is one in which women are given equal protection]. These were all positions he supported. It is probably fairer to say that Justice Scalia was the usual result driven Justice, who could act out of constitutional principle on certain occasions—as in the flag burning cases when he stood up for the first amendment. But even that decision was not in the least textual. Indeed, it is just as hard to say today how text and history should be used to interpret the Constitution as it was when Justice Scalia first joined the Court. All you can say in his behalf is that upon his death, I would think to ask that question, whereas before, no one would have asked. So, let's celebrate Justice Scalia as a great writer in law, who raised the issues of text and history to be a question in legal interpretation, even if he himself did not embody any consistent approach to text and history.