

# DIRITTI COMPARATI

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## LIBERAL LOVE FOR ANTONIN SCALIA

Posted on 18 Febbraio 2016 by [Jamal Greene](#)

**Fonte: [www.nytimes.com](http://www.nytimes.com) - 14 febbraio 2016**

[Antonin Scalia](#) was my hero. He was deeply conservative. He belittled lawyers. His opinions, especially in dissent, could be downright nasty. No justice in the [Supreme Court](#)'s history insulted his colleagues more, or more memorably. He was as aggressive and outspoken as I am reserved and cautious. He was a smoker. He was, in short, everything I am not. But I have looked up to him for years.

I am not alone among liberal legal scholars. We think we're right about the law, just as Justice Scalia did. We think we're right about legal method, just as Justice Scalia did. We are prepared to defend a "living" Constitution just as vigorously as he defended a "dead" one (his word, not mine). But when we talk, no one listens.

Justice Scalia's enormous influence was not on actual case outcomes, at least not directly. For someone who sat on the court for three decades, he wrote few significant majority opinions. What he did was change how we talk about the law.

Most Americans care about whether the Constitution protects abortion

rights or prohibits affirmative action, whether Obamacare is unconstitutional or what free speech means. But whether the Constitution should be interpreted according to its original meaning or according to precedent, whether we should take evolving values or Rawlsian philosophy or neither into account, how we should use legislative history when interpreting statutes — these used to be issues only lawyers, judges and scholars thought about.

Today, journalists, radio talk show hosts and regular news junkies all talk about constitutional theory. And when they do, there is originalism and then there is everything else. No one is more responsible for the originalism “movement” than Justice Scalia. He made constitutional theory sexy.

To liberal legal scholars, originalism looked dead by the middle of the 1980s. Academics had argued that there was just no reliable way to figure out the intentions of long dead people about matters they had never thought about. And in 1985, a [famous paper](#) by the constitutional historian H. Jefferson Powell showed that people like James Madison and Alexander Hamilton didn’t themselves believe that later interpreters should seek guidance in their intentions. Originalism seemed to be at war with itself.

Justice Scalia was among the first to argue that constitutional interpreters should not be interested in the intentions of the framers but in the original meaning of the words they used. Original meaning turned out to be a life vest for the theory, keeping it afloat among conservative legal scholars and even some liberal ones.

Meanwhile, Justice Scalia took to the streets and gained a following. He was unrelenting and always on message. He was a single-issue constitutional theorist, and his issue was originalism. For Justice Scalia and his fans, you viewed modern issues through an 18th-century quizzing glass or else you were an “activist.” There was no in between.

His laser-sharp dissents garnered a lot of attention, but he didn’t just talk through his opinions. He talked to lawyers and to legions of law students,

using his charisma and the simplicity of his message to recruit foot soldiers who could peddle his message through organizations like the Federalist Society.

Liberals, meanwhile, have struggled to rally around a coherent alternative language in which to talk about the Constitution. We have been Hillary Clinton to Justice Scalia's Bernie Sanders. Some of us promoted something called popular constitutionalism. (What's that, you say?) Others settled on "minimalism." Others simply gave up and have tried to argue that originalism actually supports progressive outcomes. Trying to coopt Justice Scalia's message is the highest compliment we have paid him.

Justice Scalia lost some panache in his later years. The elegies you will read over the coming days and weeks may not mention that, perhaps appropriately, but it was well known to close watchers of the court. His dissents were rarely witty, his jokes too many and not funny. More than occasionally, his questions at oral argument reflected inattention to the details of the record.

In other words, as we know too well now, he was a mere mortal. But he will live on in as many liberal echo chambers as conservative ones. We will study his opinions, yes, but we will also study his speeches, his sound bites, his turns of phrase and his travel schedule. And often, when our colleagues aren't listening, we will say to ourselves, "The guy was good." May he rest in peace.

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