

Lessons From Another Stinging Scalia Dissent

Law360, New York (June 6, 2011) -- If you are a fan of provocative and pointed legal writing, then there is perhaps nothing more promising than a U.S. Supreme Court decision that includes a dissenting opinion from Justice Antonin Scalia. Whether you agree with his conclusions or not, you never walk away from a Justice Scalia dissent feeling as if your time was wasted reading it. However, Justice Scalia has faced criticism recently regarding the force with which he confronts his colleagues and their positions.

There does appear to be a method to his madness, though, one that reveals a practical lesson that all litigators can follow — interesting, evocative writing resonates with the reader. Justice Scalia’s opinions are written, in no small part, so that they will be widely read. He accomplishes this goal by telling a story in a manner that draws readers in and keeps them engaged even if they are skeptical of his conclusions.

This is the goal of all litigators in their briefs. As a result, Justice Scalia’s opinions, and particularly his dissenting opinions, are a powerful model for more effective legal writing.

One of Justice Scalia’s recent opinions — as the lone dissenting justice to the court’s opinion in *Montana v. Wyoming* (No. 10-137) — offers a good example of the power of his rhetoric.

The *Montana v. Wyoming* case is actually an interesting tutorial on the jurisdiction and authority of the Supreme Court. First, it is unique because it arises under the court’s original jurisdiction to resolve disputes between states, rather than through the more common petition for writ of certiorari process. See U.S. Const., Art. III, Section 2, cl. 2 (“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction ...”).

Second, the issues in the case — the water rights of the residents of Montana and Wyoming under the Yellowstone River Compact — left the Supreme Court “immersed in state water law” — pun undoubtedly intended — about which the “highest court of each state ... remains the final arbiter ...” *Id.* at p. 8, n. 5.

As a result, the Supreme Court was compelled to acknowledge that its “assessment of the scope of these water rights [was] merely a federal court’s description of state law.” *Id.* The Supreme Court exerting its original jurisdiction, but then describing itself as just another federal court assessing state law, is a fairly remarkable act of humility even if it is an accurate statement of the law.

For all of its procedural quirks, however, the most interesting aspect of the decision is Justice Scalia’s dissent, which begins by renaming all residents of Wyoming as “Wyomans.” In an uncharacteristic break with the dictionary, Justice Scalia notes: “The dictionary-approved term [for a resident of Wyoming] is ‘Wyomingite,’ which is also the name of a type of lava ... I believe the people of Wyoming deserve better.”

It seems entirely subjective to conclude that sharing a name with a type of lava is some sort of slight, but it is this sort of linguistic aside and willingness to comment on a unique, albeit ancillary, aspect of the case that makes Justice Scalia’s writing both interesting and accessible to even a casual reader.

As cases interpreting statutes and contracts often do, both the majority and dissenting opinions in *Montana v. Wyoming* are devoted to a parsing of the language of the relevant document. After renaming the residents of Wyoming, Justice Scalia turns to this issue with his usual straightforward approach, noting that the majority “substitute[d] its none-too-confident reading of the common law” for the plain language of the Yellowstone River Compact.

The case ultimately turned on the meaning of the phrase “beneficial use” in the compact, and specifically, its use of the word “depleted” to describe permissible uses of water from the Yellowstone River by upstream users.

Briefly, the Supreme Court held that upstream users did not violate the Yellowstone River Compact by diverting the same volume of water that they historically took from the river, even if improved irrigation techniques meant that they depleted, or used up, more of this water than they used to.

Justice Scalia chastised the majority for substituting the word “divert” for the word that was actually used in the compact, “displace,” and thus failing to focus on the increased volume of water that was being removed from, and not returned to, the river by upstream users, which he argued was what the compact regulated.

The majority explicitly addressed and rejected Justice Scalia’s approach, suggesting that the word “depleted” lacked the “clarity” necessary to “drastically redefine the terms ‘beneficial use’ from its longstanding meaning,” but Justice Scalia was, to say the least, not convinced:

"Before making this statement, the court has spent some 10 pages conducting a 'sensitive ... inquiry that counsels caution'; into a field (state water law) where the answer of this court is not conclusive and hence not ipso facto correct ('it is not the court's role to guide'); resulting in the court's best guess concerning 'an unclear area of appropriation doctrine'; answering a question which "[n]o western state court [not even a lower court] appears to have conclusively answered."

What makes this stinging critique of the majority opinion memorable and effective, albeit a bit harsh, is that it recasts the majority's arguments in a manner that makes them appear untenable and almost absurd, without the vague and less effective color commentary that is so common in everyday briefs and motions (e.g., "defendant's argument strains credulity," "plaintiff's position is wholly without support in fact or in law").

In this manner, Justice Scalia's dissent is an example of a lesson that all legal writers learn early on in their careers, but often forget – showing the reader what you mean is more effective than telling them what to think.

In a recent opinion piece for the New York Times, veteran Supreme Court reporter Linda Greenhouse criticized Justice Scalia for "bullying" his colleagues in dissent when he is unable to persuade a majority of them to adopt his position. In the decision that inspired Greenhouse's criticism, Justice Scalia derided a majority opinion authored by Justice Sotomayor as "utter nonsense" and "unprincipled."

Greenhouse questioned Justice Scalia's motivations for "such a public thrashing [of] a junior colleague," noting that she could not think of "one example of Justice Scalia's bomb-throwing opinions ever enticing a wavering colleague to come over to his corner." Having asked the question, Greenhouse offered an answer – Justice Scalia is frustrated that he has been unable to achieve his jurisprudential goals during his 25 years as a member of the Supreme Court and uses his dissenting opinions to take the other members of the court to task for standing in the way of these goals.

For his part, Justice Scalia has maintained that his dissenting opinions are intended to both advocate for his position in a particular case and instruct future generations on his views. Law students, lawyers, and judges read both majority and dissenting opinions, so his opinions may influence the way the law is taught in law school and the way it evolves in practice. In this sense, Justice Scalia implicitly acknowledges what would seem to be another motivation behind his "bomb-throwing" dissenting opinions – his desire to entertain readers.

To be clear, his opinions are not written to entertain in any commercial sense, but they are written so that they will be widely read. Justice Scalia is like any good professor who knows that the best lessons are ones that entertain as much as they inform. While it is fair to question whether his rhetoric goes too far at times, there is no doubt that his opinions, and particularly his dissenting opinions, attract more attention than others because they are a good read.

His dissent in *Montana v. Wyoming* is perhaps the best evidence of this, as a dissent in a rather narrow case about water rights under an interstate compact would not be required reading had it not included Justice Scalia's unique take on the underlying issue, not to mention his renaming of an entire citizenry in defense of their semantic honor.

One question that Justice Scalia's sharp dissenting opinions raise is whether the average practitioner could get away with writing a brief or motion in the same tone. The answer is probably no. Consider the following passage from his dissent in *Montana v. Wyoming*:

"I find it quite heroic that the court should expend such heroic efforts (imagine how many cases had to be read!) answering a state water law question that no court of any Western state has ever answered – a question that would cross a Rabbi's eyes — when the text in front of us provides the clear answer insofar as this compact is concerned: 'depleted.'"

The use of sarcasm and hyperbole like this rarely serves the arguments raised in a brief, and is more likely to inspire reprimand than appreciation. The reason that this approach works for Justice Scalia is obvious – he is not advocating for a particular result to a court, he is the court, and the court of final resort at that, which affords him liberties that counsel do not enjoy.

Nonetheless, litigators can emulate Justice Scalia's approach, if not all of his rhetoric, by crafting interesting briefs that both tell a compelling story and do so using language that challenges and engages readers in a way that keeps their interest. This will often require stretching beyond the comfortable confines of the turgid prose that often appear in briefs, but creating a brief that holds the reader's attention is worth the initial discomfort that this exercise might produce.

A less caustic example from one of Justice Scalia's older dissenting opinions offers a better example for practitioners of just how effective carefully crafted, descriptive prose can be in legal writing. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that executing "mentally retarded" defendants was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

Justice Scalia dissented, in an opinion that was joined by then-Chief Justice William Rehnquist and Justice Clarence Thomas. The legal issue in that case is less important for purposes of this article than the manner in which Justice John Paul Stevens described the underlying facts in the majority opinion and how Justice Scalia did so in dissent.

First, Justice Stevens:

"At approximately midnight on August 16, 1996, [Daryl] Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed."

Contrast this with how Justice Scalia described the very same underlying facts:

"After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs."

The different approach, and the drastically different image it creates in the reader's mind, is instructive. Justice Stevens chose one long sentence, and an almost matter-of-fact tone. Justice Scalia did the opposite. He personalized the characters: William Jones was Atkins's "partner in crime," and the victim was "an airman from Langley Air Force Base"; he described the scene of the crime as a "deserted area," where the defendant ignored the victim's pleas to leave him unharmed; he made Atkins the ringleader of the crime, noting that he "ordered Nesbitt out of the vehicle" before he shot him; and he described the killing, about which Justice Stevens wrote "he was shot eight times and killed," in an almost theatrical manner that counted off the shots.

This colorful, descriptive language, set out in several shorter sentences, gives Justice Scalia's recitation of the facts a strikingly different tone and pace, both of which are crucial to grabbing the reader's attention and not letting go. If you have any doubt about which approach is more effective, ask yourself which of the two versions of the Atkins story you are likely to remember after you finish this article.

While not all of the cases we handle lend themselves to the narrative of a criminal case like Atkins, or permit us to rename the citizens of an entire state as Justice Scalia did in *Montana v. Wyoming*, every case involves characters and conflict that practitioners should strive to describe like Justice Scalia does, using the most vivid and compelling narrative possible.

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