

Scalia Visits Jersey, Slams Washington

David Gialanella, New Jersey Law Journal

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U.S. Supreme Court Justice Antonin Scalia was on friendly ground when he appeared to speak at a Federalist Society event in Morristown recently—both as a native of the state and a longtime supporter of the organization—but his remarks aimed at the legislative branch and others in Washington, D.C., were less chummy.

“They get elected by doing nothing”—namely by avoiding controversial positions that would threaten reelection, Scalia said of members of Congress during the event, which was held at the Morris Museum on May 8 and was at least in part intended as a promotion for a book co-authored by him and published in 2012, “Reading Law: The Interpretation of Legal Texts.”

“It may well be that the framers never contemplated a society mostly run by bureaucrats,” he said, but “we’ve crossed that bridge, and we’re never coming back.”

Later he added, “I don’t think the framers contemplated career legislators,” adding, “And when they leave Congress, they end up being lobbyists.”

Lawmakers, according to Scalia, “would be more responsive” to citizens if there were term limits.

“I think we can stumble along for another 100 years, anyway,” he mused—one of the numerous quips by Scalia, who lived up to his reputation for humor.

With the Federalist Society, a politically conservative organization that views the U.S. Constitution as preserving liberties, Scalia—a textualist and literalist bent on getting to the bottom of the framers’ intent when considering legal quandaries—was in his natural element.

“There are some necessarily vague terms in the Constitution”—like equal protection and due process of law, Scalia said, but the “only sensible way” to answer constitutional questions is to use common sense and ask what the framers intended when they wrote it.

By that logic, the death penalty, for example, cannot amount to cruel and unusual punishment under the Eighth Amendment because every state performed executions at the time it was written, the justice said.

He mentioned states’ now-invalidated anti-abortion and even anti-sodomy laws: “When did the American people say you couldn’t have laws against them?”

“Now, it may be a good idea not to have laws against them ... but don’t stuff it down their [the states’] throats,” he added.

It’s the Constitution’s articles, not its bill of rights, that truly is “the source of our freedom,” Scalia said.

“Think about what ‘constitution’ means—it means structure,” he said.

“There are few countries in the world in which the chief executive is not the tool of the legislature. ... The genius of the American Constitution is the dispersal of powers,” he added, without which, freedom is only “a parchment guarantee”—one that’s only on paper.

Other nations look at Congress and see gridlock, but, Scalia said, “it is designed for gridlock—it is designed so that substantial legislation only gets through with significant support.”

The remarks—only some of which had to do with the state of the federal government—were interspersed throughout the roughly hour-long appearance, during which the justice delivered a brief address before spending a longer period fielding prewritten and prescreened questions from the admiring crowd.

Topics varied depending on the question, but Scalia was never at a loss for words.

Returning to the bureaucrats, he said it’s “probably not” government by the people to have federal agencies writing implementing regulations, but “frankly, I don’t know if you could run a state of our size without [the] principle” that agencies must be given wide deference by the judicial branch.

“To some extent, the problem could be solved” if Congress wrote more specific legislation, but “it won’t happen,” the justice said.

Scalia called it a “horrible idea” to hold a constitutional convention in the age of special interests.

“Once you get those people together, you never know what they’re going to do,” he said, citing other nations where such issues as minimum wage have been included in the text. “You’ll get everything but the kitchen sink written into the Constitution.”

Scalia characterized the 17th Amendment—by which U.S. Senators became elected rather than appointed by their state governments—as one of the biggest structural changes to government.

“Who protects the states from an ever-expanding federal government?” he said. “We now have senators who have no connection whatsoever to state government.”

Still, he said, “we are overwhelmingly a federal republic” in which the vast majority of legal issues are matters of state law, from criminal justice to torts to real estate.

Asked by one young attendee whether becoming a lawyer would be a fulfilling career, Scalia joked that the question was a loaded one.

“I don’t think there is any profession more fulfilling than the law for someone who loves the law,” he said. “The reason not to go into the law is not because it’s not fulfilling; it’s because you don’t like the work. And a lot of people don’t like the work.”

No matter the topic, Scalia let show his admiration for the framers, likening them to the Ancient Greek philosophers and the Renaissance artists.

“We’re graduating people from high school, even from college, who’ve never read the Federalist Papers,” Scalia said. “Only if you read the Federalist Papers do you understand how brilliant those people were. ... What they put together was brilliant.”

Numerous leaders were in attendance, including Lt. Gov. Kim Guadagno, who is an attorney and the spouse of Appellate Division Judge Michael Guadagno.

She told the Law Journal after the event that Scalia's address "shows you can read the rule of law and apply the rule of law in the 21st century."

She added that those who detract from federalism tend not to understand its tenets, but, asked if she considered herself a federalist, said with a chuckle: "I'm thinking about it."

Also among the attendees were former state attorney general and former acting U.S. Sen. Jeffrey Chiesa, as well as two of the state Legislature's more conservative members: Sen. Gerald Cardinale, R-Bergen, and Assemblyman Michael Patrick Carroll, R-Morris.

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