Justice Scalia Objects

By LINDA GREENHOUSE

One rough measure of how any Supreme Court term is going is to track the decibel level of Justice Antonin Scalia’s dissenting opinions. In a case last week, the question was whether statements made to the police by a shooting victim as he lay bleeding to death in the parking lot of a Detroit gas station were properly used at trial to obtain a murder conviction of the man he named as the gunman.

The court’s answer, by a vote of 6 to 2, was yes. Writing for the majority in the case, Michigan v. Bryant, Justice Sonia Sotomayor explained that what was all-important was the context in which the police-victim interaction occurred. Rather than trying to obtain a dying man’s testimony for later use in a courtroom, she said, the police were urgently investigating what they believed to be an “ongoing emergency,” someone with a gun on the loose on the streets of Detroit. Under that view of the facts, the victim’s statements were not “testimonial,” meaning that their use at trial did not violate the defendant’s right under the Sixth Amendment to “confront” an accuser who was unavailable for cross-examination.

That conclusion enraged Justice Scalia. Of course the police officers knew they were gathering evidence for potential use at trial, he objected, and to maintain otherwise was “so transparently false that professing to believe it demeaned this institution.” With this decision, the Supreme Court “makes itself the obfuscator of last resort,” he complained. A “gross distortion of the facts,” “utter nonsense,” and “unprincipled” were a few of the other zingers the dyspeptic justice aimed at Justice Sotomayor’s opinion.

Granted, Justice Scalia has long been the court’s leading champion of a categorical view of the Sixth Amendment confrontation clause, one that admits of only the narrowest of exceptions to a defendant’s right to face his accuser. And no less than any other member of the court, Justice Scalia doesn’t like to lose. (The other dissenter, Justice Ruth Bader Ginsburg, notably did not join Justice Scalia’s opinion, instead filing a bland two-paragraph one of her own. Justice Elena Kagan did not participate.) But what strategic sense could lead a justice to administer such a public thrashing to a junior colleague?

I was reminded of how, in a crucial abortion case years ago, Justice Scalia lashed out at Justice Sandra Day O’Connor for...
refusing to provide a fifth vote for an outcome that would have left Roe v. Wade a hollow shell. It was the Webster case in 1989. Justice Scalia was then only in his third term on the court. Justice O’Connor, the court’s only female member, had written critically of Roe v. Wade in earlier opinions. But she found this case an inappropriate vehicle for overturning the decision. When the right case came along, she said pointedly, “there will be time enough to re-examine Roe. And to do so carefully.”

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With the result he desired having slipped from his grasp, a furious Justice Scalia wrote in a separate opinion that Justice O’Connor’s position was “irrational” and “cannot be taken seriously.” Would he have aimed those particular put-downs at a male colleague? Maybe. As the ensuing years have demonstrated, male colleagues, including Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., have not escaped Justice Scalia’s barbs. He recently described a majority opinion by Justice Alito as incoherent and as displaying such sleight of hand as to be worthy of Alfred Hitchcock. But in the innocence of 1989, the insults he delivered to Justice O’Connor appeared shocking.

They also proved wildly inefficacious. Just three years later, in Planned Parenthood v. Casey, Justice O’Connor did “carefully” consider whether to retain the constitutional right to abortion and voted with four other justices to do so.

In fact, I can’t think of an example of one of Justice Scalia’s bomb-throwing opinions ever enticing a wavering colleague to come over to his corner. Certainly his angry prediction in a dissenting opinion three years ago that granting habeas corpus rights to the Guantánamo detainees “will almost certainly cause more Americans to be killed” did not lead Justice Anthony M. Kennedy, author of the majority opinion in that case, Boumediene v. Bush, to switch sides. Publishing such an inflammatory statement once it was clear that it would not shake the majority loose was an exercise in self-indulgence that could serve only to undermine the court’s own legitimacy.

So the question raised by Justice Scalia’s most recent intemperate display remains: what does this smart, rhetorically gifted man think his bullying accomplishes?

It’s a puzzle. But having raised the question, I will venture an answer. Antonin Scalia, approaching his 25th anniversary as a Supreme Court justice, has cast a long shadow but has accomplished surprisingly little. Nearly every time he has come close to achieving one of his jurisprudential goals, his colleagues have either hung back at the last minute or, feeling buyer’s remorse, retreated at the next opportunity.

The area of property rights is a prime example. A 1992 Scalia opinion, Lucas v. South Carolina Coastal Council, had raised the prospect that even temporary restrictions on a land owner’s right to develop property can amount to a “taking” for which the owner is entitled to compensation, as if the government had physically seized possession of the
property. But within a decade, the court was backing away from this unsettling position, treating the Lucas decision as an exception rather than a rule.

Justice Scalia did have a moment of triumph with his majority opinion three years ago in District of Columbia v. Heller, interpreting the Second Amendment to convey an individual right to own a gun, at least for a law-abiding person, in the home, for self-defense. Because so few jurisdictions have stringent gun-control laws of the sort that the ruling invalidated, it remains to be seen whether the Heller decision will have much practical impact. Just last week, the federal appeals court in Philadelphia rejected a Heller-based constitutional challenge to the federal prohibition on gun use by convicted felons.

Justice Scalia’s real shining moment had come four years earlier, on the subject of the Sixth Amendment’s confrontation clause. His opinion in Crawford v. Washington ushered in a revolution in criminal procedure. While under the Supreme Court’s prior approach, statements by unavailable witnesses could be admitted at trial if a judge deemed the statements sufficiently “reliable,” the Crawford decision established a contrary bright-line rule: confrontation means confrontation. If a statement was “testimonial” in character and the witness could not appear in court, the statement stayed out unless the defendant had an earlier opportunity for cross-examination. Speaking for seven justices, Justice Scalia said that this was the only interpretation of the confrontation clause that was true to the original understanding of the Constitution’s framers.

The Crawford opinion left open the crucial question of what kinds of statements were “testimonial.” A series of decisions drawing various distinctions followed. Two years ago, to the consternation of prosecutors around the country, another Scalia opinion held that the affidavits of crime laboratory technicians, attesting to a substance’s identity as an illegal drug, were testimonial, inadmissible unless the individual analyst appeared at trial or had previously been available for cross-examination. “This case involves little more than the application of our holding in Crawford v. Washington,” Justice Scalia wrote in this case, Melendez-Diaz v. Massachusetts. Not all his colleagues were persuaded. His margin shrank to 5 to 4, with Chief Justice Roberts and Justices Alito, Kennedy and Stephen G. Breyer in dissent.

Like Justice Alito, Justice Sotomayor is a former prosecutor. She replaced Justice David H. Souter, a reliable member of the Scalia majority in these cases. A new case, argued last week, gives the court an opportunity to revisit the Melendez-Diaz precedent if a new majority is so inclined. The question in the new case, Bullcoming v. New Mexico, is whether for confrontation clause purposes a laboratory supervisor who did not actually perform the analysis is an acceptable substitute for the individual technician.

Which brings us to last week’s decision and dissent in Michigan v. Bryant. While Justice Sotomayor’s majority opinion purported to accept Crawford as binding precedent, the
opinion is suffused with an attitude of pragmatism. In the originalist cosmos of Antonin Scalia, pragmatism has no place. With the highest achievement of his originalist jurisprudence now in peril, fear as well as anger was palpable in his dissenting opinion as he suggested that the majority was not only wrong but was composed of hypocrites.

“Honestly overruling Crawford would destroy the illusion of judicial minimalism and restraint,” he said, wondering aloud whether the court instead was now embarked on a course that would, through “a thousand unprincipled distinctions,” resurrect the old “reliability” test “without ever explicitly overruling Crawford.”

This Friday, March 11, is Justice Scalia’s 75th birthday. It doesn’t promise to be a happy one.