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Scalia in the Casebooks

Brian T. Fitzpatrick† & Paulson K. Varghese††

In the time since Justice Antonin Scalia's untimely death, much has been written about what his influence has been and what his influence will be. It is said that, perhaps more than any of his predecessors, he shaped how lawyers, judges, and even laypeople see the role of unelected federal judges in a democratic society.¹ In particular, his theories of originalism and textualism gave us an elegant and compelling way to put into practice the "judicial restraint" that many have urged since the Founding.² His influence has been attributed not only to the power of his ideas but also to his provocative, attention-generating writing style and his willingness to evangelize to wide audiences.³

Many scholars have tried to quantify how influential Scalia has been. There are studies, for example, showing that Scalia's colleagues relied less on legislative history over time⁴ and started citing dictionaries⁵ and *The Federalist*⁶ more often after he arrived on the Court. Other studies show that lower-court judges

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¹ See Brian Fitzpatrick, *Former Clerk on Justice Antonin Scalia and His Impact on the Supreme Court* (The Conversation, Feb 24, 2016), archived at <http://perma.cc/Z8VT-C7XB>; Jeffrey Rosen, *What Made Antonin Scalia Great* (The Atlantic, Feb 15, 2016), archived at <http://perma.cc/AQK5-KLLF>.

² See Fitzpatrick, *Former Clerk* (cited in note 1); Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 Harv L Rev F 24, 25–27 (2016).

³ See generally Fitzpatrick, *Former Clerk* (cited in note 1); Yury Kapgan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 J Legal Writing Inst 71 (2003).

⁴ See James J. Brudney and Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 Judicature 220, 229 (2006).

⁵ See John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 Yale L J 484, 505 (2014).

⁶ See Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 Wm & Mary Bill Rts J 243, 295 (2005) (noting the increase in citations to *The Federalist* during the Rehnquist Court, which began with Scalia's appointment to the Court and Justice William Rehnquist's elevation to chief justice).

cite opinions by Scalia more often than any of his colleagues.⁷ Scholars, too, grapple with Scalia's ideas more than those of his colleagues.⁸

In this Essay, we examine what some people have suspected may be Scalia's most influential sphere of all: legal education. For many of the same reasons he is thought to be so influential in other spheres, it is thought that his ideas are often overrepresented in law school constitutional-law curricula.⁹ This is despite the fact that Scalia was often not on the winning side in many of the Court's most high-profile cases during his tenure. The conventional view of Scalia is that, although he may not have contributed much to constitutional-law doctrine, he did contribute a great deal to legal and interpretative theory.¹⁰

In this Essay, we try to quantify Scalia's influence in law school constitutional-law curricula by studying how often his ideas are explored in constitutional-law casebooks. In particular, relative to other justices, we look at how often Scalia's opinions (for the Court, or his separate opinions) are excerpted in the principal cases and how often he is referred to by name in the notes preceding and following the principal cases.

We find that Scalia is at or near the top of most of the metrics we explore here, but he does not tower over the competition. Indeed, the data reveal that perhaps the most important factor driving inclusion in our casebooks is seniority: chief justices and justices who led their ideological wings of the Court have a great deal of power to assign themselves opinions that are likely to end up in our casebooks. We find that the most notable exception in the data is not Scalia, but Justice Samuel Alito: he is included in our casebooks to an especially surprising extent given that, until this year, he has always been the most junior member of his wing of the Court.

⁷ Frank B. Cross, *Determinants of Citations to Supreme Court Opinions (and the Remarkable Influence of Justice Scalia)*, 18 S Ct Econ Rev 177, 191 (2010).

⁸ See Ralph A. Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition* 206 (Kansas 2006).

⁹ See *id.* at 205 ("He has confessed that he writes with the verve and panache he does in part to ensure that his opinions are included in constitutional-law casebooks.").

¹⁰ See *id.*; William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 Geo Wash L Rev 1601, 1603–04 (2012) (noting how Scalia's inability to get votes for his positions in many cases was countered by his influence regarding how to interpret both the Constitution and statutes).

I. PRIOR CASEBOOK STUDIES

To our knowledge, there has been only one prior effort to study how often each Supreme Court justice is included in constitutional-law casebooks. Ten years ago, the political scientist Professor Ralph Rossum counted how often two law school constitutional-law casebooks and four political science constitutional-law casebooks “included” (what we take to mean “excerpted in principal cases”) Justice Scalia’s opinions compared to the other justices he served with.¹¹ Rossum found that, in every book examined, no justice’s opinions were included more often than Scalia’s.¹²

Rossum obviously did not intend his study to be comprehensive; he examined only a few casebooks and only a few justices. There is a more comprehensive study of lower-court judges. Professor Mitu Gulati and Veronica Sanchez examined how often lower-court judges authored principal cases in the three hundred casebooks (of all subject areas) in use from June 1999 to May 2000.¹³ Their main finding was that Judges Richard Posner and Frank Easterbrook completely dominated the data; beyond that, they also found that the number of years of service on the bench (among other things) was positively correlated with casebook inclusion.¹⁴ We appreciate the methodological thoughtfulness of the Gulati-Sanchez study, and we follow it here in important ways.

II. OUR STUDY: DESIGN AND DESCRIPTIVE STATISTICS

We asked the law library at Vanderbilt to compile a list of all generalist constitutional-law casebooks used in law schools today; we excluded casebooks specific to the First Amendment and specific to the Equal Protection Clause. The list yielded seven casebooks published by Lexis, sixteen by West, and eight by Wolters Kluwer-Aspen (thirty-one total). In order to search the books electronically, we then asked the publishers to give us access to an electronic version of each of these casebooks, which they kindly did for the twenty-five books for which electronic versions existed. It was not as easy as we had hoped to search

¹¹ See Rossum, *Antonin Scalia’s Jurisprudence* at 205 (cited in note 8).

¹² See *id.* at 205–06.

¹³ See Mitu Gulati and Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 *Iowa L Rev* 1141, 1153–54 (2002).

¹⁴ See *id.* at 1155–56, 1188.

the electronic versions of the casebooks: they must be accessed with software that prevents them from being copied or shared, and, whether by design or inadvertence, the software often made it difficult to search the books for keywords. For this reason, we were unable to gather data from any of the Lexis casebooks, and we had to exclude several of the West and Wolters Kluwer–Aspen books. Thus, our study is limited to the fourteen casebooks for which electronic versions existed and for which electronic searches were not unreasonably difficult.¹⁵

For each casebook, we examined three metrics. First, we counted how often each of the 112 past and present Supreme Court justices (other than Justice Neil Gorsuch) authored any opinion of the principal cases in the casebook. Like the Gulati-Sanchez study,¹⁶ we then aggregated these numbers across all fourteen casebooks on the theory that, even if multiple casebooks included the same opinion, the more casebooks that included the opinion, the more influence its author had.

Second, we broke with the Gulati-Sanchez study and counted how many of these opinions were separate opinions (concurrences or dissents)¹⁷ as opposed to opinions of the Court. We did this because, unlike opinions by lower-court judges, opinions of the Court are often included out of obligation by casebook authors because they tell students what current law is.¹⁸ Separate

¹⁵ See generally Lawrence Friedman, *Modern Constitutional Law: Cases, Problems and Practice* (Wolters Kluwer 2017); Kathleen M. Sullivan and Noah Feldman, *Constitutional Law* (Foundation 19th ed 2016); Calvin Massey, *American Constitutional Law: Powers and Liberties* (Wolters Kluwer 5th ed 2016); Aaron H. Caplan, *An Integrated Approach to Constitutional Law* (Foundation 2015); Jesse H. Choper, et al, *Constitutional Law: Cases, Comments, and Questions* (West 12th ed 2015); William Funk, *Introduction to American Constitutional Law: Structure and Rights* (West 2014); Daniel A. Farber, et al, *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* (West 5th ed 2013); Jonathan D. Varat, Vikram D. Amar, and William Cohen, *Constitutional Law: Cases and Materials* (Foundation 14th ed 2013); Randy E. Barnett and Howard E. Katz, *Constitutional Law: Cases in Context* (Wolters Kluwer 2d ed 2013); Erwin Chemerinsky, *Constitutional Law* (Wolters Kluwer 4th ed 2013); Geoffrey R. Stone, et al, *Constitutional Law* (Wolters Kluwer 7th ed 2013); Michael Stokes Paulsen, et al, *The Constitution of the United States* (Foundation 2d ed 2013); Russell L. Weaver, et al, *Constitutional Law: Cases, Materials, and Problems* (Wolters Kluwer 3d ed 2013); Charles A. Shanor, *American Constitutional Law: Structure and Reconstruction—Cases, Notes, and Problems* (West 5th ed 2013).

¹⁶ See Gulati and Sanchez, 87 Iowa L Rev at 1154 (cited in note 13).

¹⁷ We could not separate concurrences from dissents because many opinions concurred or dissented only in part and there was no easy way to assign such opinions to one category or the other.

¹⁸ See Myron Moskowitz, *On Writing a Casebook*, 23 Seattle U L Rev 1019, 1026 (2000) (“Some cases are *mandatory* for an area of law—they are considered ‘landmark’

opinions, by contrast, are more like opinions by lower-court judges: they are included at the option of the casebook author.¹⁹ Casebook authors include these opinions because they offer students something other than a recitation of current law.²⁰ As a result, we think separate opinions tell us something that opinions of the Court do not. In particular, Supreme Court justices who are routinely included at the option of casebook authors are included because of what they have to say, not because they happened to be assigned the latest opinion in an area of constitutional law.

Finally, and again breaking with the Gulati-Sanchez study, we counted the number of times each justice's name appeared in the notes introducing or following the principal cases. We examined the notes because we thought that those numbers would be a distinct way to measure a justice's influence: like separate opinions, it is entirely discretionary on the part of the casebook author whether to mention a justice by name in a note. The Gulati-Sanchez study noted that when judges refer to each other by name in their opinions, it reflects a certain amount of respect for that judge as an individual.²¹ We think the same is true of casebook notes, and, for this reason, we counted appearances there, too.

Figure 1 shows distributions of the number of total authorships, separate-opinion authorships, and note citations across all fourteen of the casebooks. The black arrows show where Scalia falls. Scalia does very well on all three measures: he trails only Chief Justice William Rehnquist and Justice John Paul Stevens on the first measure, and only Stevens on the other two measures.

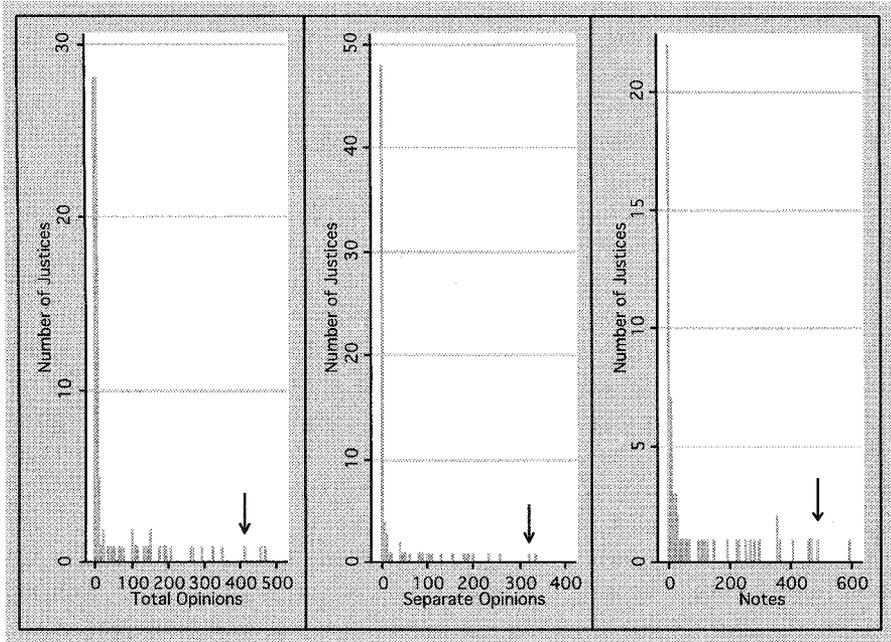
cases. You have no choice; you *must* include them if the student is to learn the particular area of law.”).

¹⁹ See *id.* at 1031 (discussing when concurrences and dissents should be included in a casebook).

²⁰ See *id.* at 1026–31 (listing considerations used for case selection and editing).

²¹ See Gulati and Sanchez, 87 *Iowa L Rev* at 1193–1201 (cited in note 13).

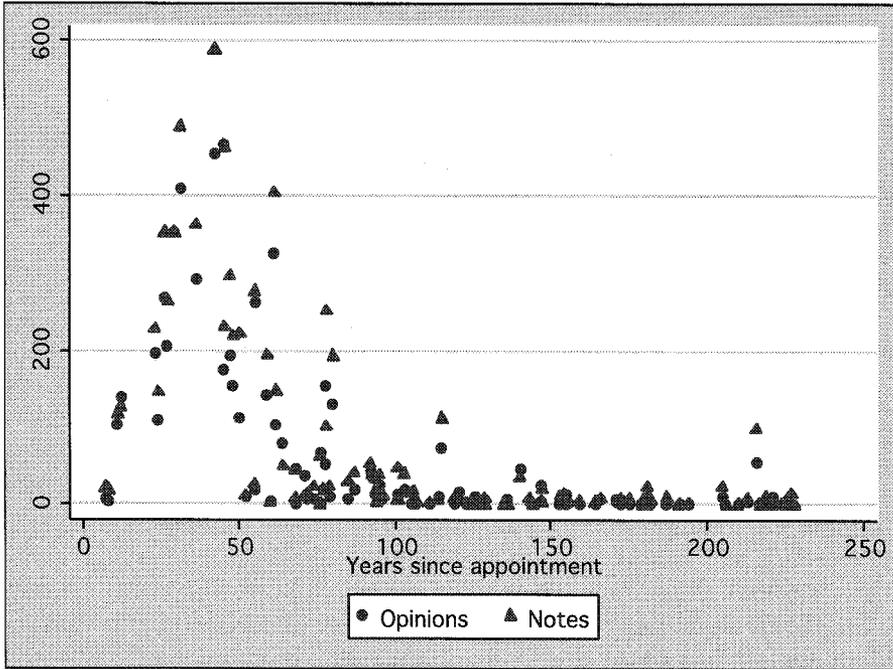
FIGURE 1: DISTRIBUTION OF AUTHORSHIPS AND NOTE CITATIONS
IN FOURTEEN CONSTITUTIONAL-LAW CASEBOOKS



As Figure 1 shows, many justices are not mentioned (let alone excerpted in the principal cases) in even a single one of the constitutional-law casebooks in our study. The casebooks are dominated by the work of recent justices. This is, of course, unsurprising: the work of recent justices has the most doctrinal significance for students.²² Older opinions are often not probative of current law because they have been overruled, distinguished away, or are simply anachronistic. This can be seen from Figure 2, in which we graph the number of total authorships and the number of note citations versus the number of years that have passed since the justice was confirmed to the Supreme Court. Justices see their peak representation in casebooks between twenty and fifty years after their appointments, at which point they taper off.

²² See Moskowitz, 23 *Seattle U L Rev* at 1028 (cited in note 18) (“I prefer most of my cases to be relatively recent. . . . [S]tudents want to know what the law *is* more than what it *was*.”); Jerome A. Barron, *Capturing the Canon*, 17 *Const Comm* 349, 354 (2000) (“The times, of course, influence . . . content.”).

FIGURE 2: AUTHORSHIPS AND NOTE CITATIONS IN FOURTEEN CONSTITUTIONAL-LAW CASEBOOKS VERSUS NUMBER OF YEARS SINCE APPOINTMENT



It is therefore unsurprising that the top ten highest-ranked justices in terms of authorships and note citations are exclusively drawn from the justices of recent years. We provide the authorship lists in Table 1. We do not provide the note-citation list because, as Figure 2 suggests, there is considerable agreement between the total authorship and note-citation numbers. We found this was the case because the notes often refer to the authors of the opinions in the principal cases. Indeed, plotting the authorship numbers against the note numbers (a graph we do not include here) shows that they are almost perfectly correlated. This leads us to conclude that there is little independent significance to examining note citations, and, for this reason, we focus only on authorships of total and separate opinions hereafter. As we said, Scalia is third and second on these lists.

TABLE 1: TOP JUSTICES IN TOTAL AND SEPARATE-OPINION
AUTHORSHIPS IN FOURTEEN CONSTITUTIONAL-LAW CASEBOOKS

Justice	Total Opinions	Justice	Separate Opinions
Rehnquist	465	Stevens	335
Stevens	453	Scalia	320
Scalia	409	Thomas	259
Kennedy	351	Rehnquist	233
Brennan	325	Brennan	199
O'Connor	291	O'Connor	196
Thomas	267	Kennedy	187
White	261	Souter	183
Souter	206	Breyer	178
Breyer	197	White	152

The Gulati-Sanchez study found that the number of years of service was correlated with the casebook authorships. They noted this was because judges who served longer wrote more opinions and therefore had more opportunities to find their ways into the casebooks. The same is no doubt true for Supreme Court justices. Following the Gulati-Sanchez study, we normalized our data by the number of years each justice served on the Supreme Court. This gives us a somewhat different measure of influence. Rather than overall influence in the casebooks, this measure looks at bang for buck: which justices contributed the most to our constitutional-law curricula given their limited time on the Court. Table 2 shows the normalized data. Here, Scalia moves into a tie for first place for total opinions and into first place alone for separate opinions. Many of the other justices are the same as those in Table 1, with the exceptions of Chief Justice John Roberts (on the first list), Justice Lewis Powell (on the first and second lists), Justice William Brennan (on the first list), and Justice Alito (on the second).

TABLE 2: TOP JUSTICES IN TOTAL AND SEPARATE-OPINION
AUTHORSHIPS PER YEAR OF SERVICE IN FOURTEEN
CONSTITUTIONAL-LAW CASEBOOKS

Justice	Total Opinions	Justice	Separate Opinions
Rehnquist	14	Scalia	11
Scalia	14	Thomas	10
Stevens	13	Souter	10
Kennedy	12	Stevens	10
Powell	12	O'Connor	8
O'Connor	12	Breyer	8
Roberts	12	Alito	8
Souter	11	Powell	7
Thomas	10	Rehnquist	7
Brennan	10	Kennedy	6

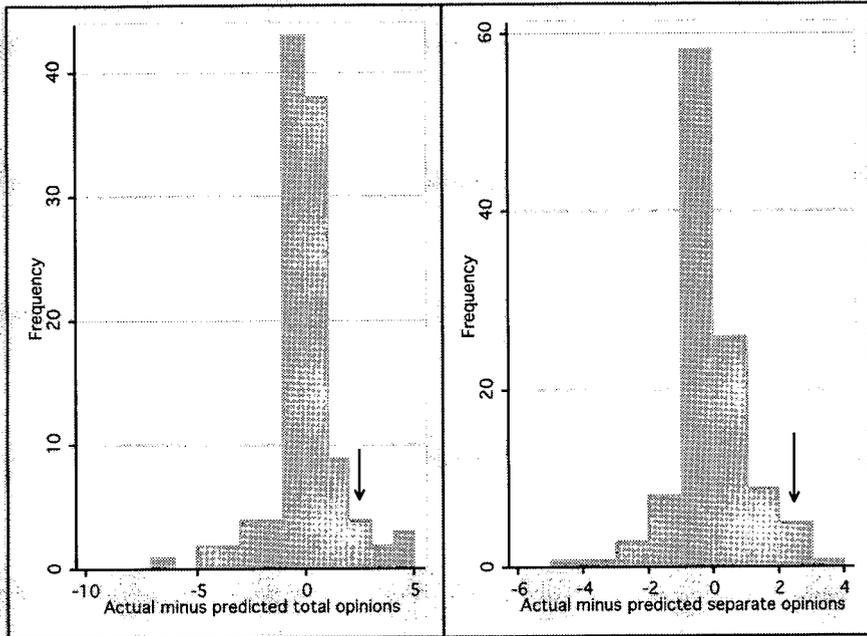
We think both the normalized and unnormalized data are largely consistent with the conventional notion that Scalia has had outsized influence on constitutional-law curricula. He is high on all these lists. At the same time, Scalia does not exactly tower over many of his contemporaries. This is because the need to include doctrinally relevant cases of recent vintage in casebooks obscures the influence of any recent justice. It also means that justices who served many years ago have no chance to reach the top of one of these lists. This complicates our attempt to put Scalia's influence in either current or historical perspective. One way to deal with this problem is to try to control for the era in which a justice served through regression analysis. In the next Part, we attempt to do this.

III. OUR STUDY: ANALYSIS

In order to control for temporal distance from contemporary doctrine, we plotted the justices' normalized total and separate-opinion authorship data against the years since their appointment like we did in Figure 2; we then fit curves to the data. We examined how far each justice's actual numbers were from the numbers predicted by the curves. Figure 3 shows the distribution of the justices' underrepresentation (negative numbers) and overrepresentation (positive numbers) versus their peers from the same era for both total and separate opinions. The black arrows represent Justice Scalia's bins; he is the eighth-most

overrepresented justice in total opinions and the fifth-most overrepresented justice in separate opinions.

FIGURE 3: DISTRIBUTION OF DISTANCES BETWEEN ACTUAL AND PREDICTED OPINION AUTHORSHIPS PER YEAR OF SERVICE



Who are the most overrepresented justices?²³ On the left side of Figure 3 (total opinion authorships), these are the top ten: Rehnquist, Roberts, Brennan, Alito, Stevens, Robert Jackson, Powell, Scalia, Oliver Wendell Holmes, and William O. Douglas (with a *wide* separation between the top two and Brennan). We think this shows the effect of opinion-assignment power: the two most recent chief justices are far and away the most overrepresented justices in our casebooks because they assigned themselves the opinions that are more likely to end up in casebooks. Some of the others in the top ten can be explained in the same way: Brennan, Stevens, and Douglas, for example, amassed a great deal of seniority and led their wings of the Court during a

²³ Perhaps even more remarkable (given her newfound lay popularity) than the most overrepresented justices is the most underrepresented one: on both the normalized total and separate opinion measures, the justice who finished dead last (112th out of 112) was Justice Ruth Bader Ginsburg.

significant chunk of their tenures. Thus, one conclusion we make from our data is that seniority drives casebook influence.

Scalia's placement, by contrast, cannot be explained by seniority; he never led his wing of the Court because he was always outranked by a conservative chief justice. Much the same can be said of Alito, Jackson, Powell, and Holmes. Thus, we suspect the casebook authors included opinions from justices like these not because they happened to be assigned the flashy opinions but because they add something to legal education that other justices do not. This is another way of saying that Scalia is indeed one of the most influential justices in our casebooks and his influence is not driven by seniority.

We think this is confirmed by the right side of Figure 3: separate-opinion authorships. Here, the top ten are Alito (by a fairly wide margin), Stevens, Brennan, Jackson, Scalia, John Marshall Harlan II, Clarence Thomas, Douglas, Hugo Black, and Arthur Goldberg. This list is clearly not driven by seniority. There are no chief justices, and, indeed, the leader is a justice who—as of the time period of our data—had always been the most junior member of his wing of the Court. The justices on this list are there for what they have said, not for whether they were assigned a sexy opinion. And, again, Scalia is well represented.

But perhaps the most surprising justice on both of these lists—because he has so little seniority—is Alito. Not only does he top the second list, but he tops Scalia on both lists.

CONCLUSION

We think our constitutional-law casebooks show Justice Scalia has had considerable influence over legal education. He is at the top or near the top of most of the metrics we examined in this Essay. But some of his position is a reflection of the fact that his tenure is now in the peak period during which justices find themselves included in casebooks. When we try to control for this, we find that Scalia's opinions are the eighth-most overrepresented in our casebooks; among separate opinions, he is the fifth-most overrepresented. Thus, although his influence is considerable, it is not unique.

Indeed, the most significant driver of who appears in the casebooks may be seniority and the opinion-assigning power that comes with it. In particular, we find that the most overrepresented justices in total authorships are chief justices

and justices who led their ideological wings of the Court for much of their tenures.

This does not, of course, explain Scalia's overrepresentation, because he was always outranked by a conservative chief justice. Thus, we think his overrepresentation can be explained by the content of his opinions, not because he received good assignments.

Scalia is not, however, the only justice whose overrepresentation cannot be explained by seniority. Indeed, perhaps even more impressive is Justice Alito. Despite serving as the most junior member of his ideological wing during the entirety of his tenure over the time period of this study, he leads Scalia both in total authorships and separate-opinion authorships per year of service (and, indeed, leads all justices in separate authorships per year of service).

This leads us to wonder: Has Alito out-Scalia'd Scalia? Only time will tell.