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Justice Scalia's Concurrence to *Merck*: Is Adopting the Ordinary Reader's Perspective a Solution to Judicial Activism?

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Attorneys, and perhaps the public, are often in the habit of concluding that personal and political considerations determine judges' decisions. Yet on this point, Justice Antonin Scalia's recent concurrence in *Merck & Co. v. Reynolds* should give us all pause.

Of course, Justice Scalia has not always been seen as a paragon of fairness and neutrality—as the following anecdote demonstrates: Four years ago, during an oral argument before the Supreme Court, Scalia jokingly proposed a harsh interpretation of a securities law, one that would disadvantage plaintiffs. The lawyer at the podium breached decorum by replying, "Is that because you never met a plaintiff you really liked?"

That lawyer was Arthur Miller, co-author of the definitive treatise on federal civil procedure nicknamed "Wright & Miller."[1] Last month, lawyers reminded Miller of that exchange when New York University honored him, before an audience that prominently included Justice Ruth Bader Ginsburg, for his outstanding career.

Miller's story provides a good laugh—perhaps because while only a person of Miller's stature could get away with such a statement before the Justices, many of us secretly agree: Isn't it obvious that judges often let their policy preferences drive their interpretations of the law? Granted, Chief Justice John Roberts said during his confirmation hearing, "I will remember that it's my job to call balls and strikes, and not to pitch or bat." But a recent op-ed in *The New York Times* was persuasive in concluding that when it comes to judging on the High Court, "the umpire analogy is absurd."[2]

Still, Justices can sometimes surprise us by arguing or voting directly against what we thought were their ideological prefer-

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ences—which brings us to *Merck*, and Justice Scalia's concurrence there.

In *Merck*, a statute required a plaintiff to bring a claim for securities fraud "2 years after the discovery of the facts constituting the violation" or "5 years after such violation," whichever occurred first. The Court, in an opinion written by Justice Stephen Breyer, held that the "word 'discovery' refers not only to a plaintiff's actual discovery of certain facts, but also to the facts that a reasonably diligent plaintiff would have discovered."

The *Merck* opinion has been seen as "pro-plaintiff"—unexpectedly so. The *Wall Street Journal* entitled a related blog post "Supreme Court Gives Unanimous (!) Go-Ahead to *Vioxx* Class Action." The blog post began by noting, "The current U.S. Supreme Court isn't one you necessarily think of as being friendly to shareholder class-action lawsuits."[3] Also taken by surprise was liability-insurance specialist Kevin LaCroix, who concluded on his blog, *The D&O Diary*, "I thought this case would likely lead to a victory for Merck in another defense friendly decision. Instead, the plaintiffs prevailed in a unanimous holding. Maybe my presumptions were completely off base, but I still find the outcome interesting and a little unexpected."[4]

The decision itself may have been surprising, but what was actually shocking to many is that Justice Scalia would have gone further in favor of the plaintiffs than the majority did. In a concurrence joined by Justice Clarence Thomas, Justice Scalia argued that "discovery" means actual discovery, no more and no less. On his interpretation, a plaintiff who failed, or even refused, to investigate whether a violation had occurred would still have had two years from the point of his, her, or its actual knowledge of the violation to file an action (with the important caveat that—based on the second statutory limitation—the filing still could not occur more than "5 years after such violation").

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Why did Justice Scalia reach such a pro-plaintiff conclusion? In part, it is because Justice Scalia attempts to be principled and to reach decisions impartially, regardless of the identity of the parties before him. While this is not an earth-shattering insight, it is one worth remembering in an era where some believe that judges are entirely results-oriented.

In part, too, Justice Scalia may also have been influenced by his method of interpretation. In *Merck*, he started by asking how an ordinary reader would interpret the term "discovery." "In ordinary usage, 'discovery' occurs when one actually learns something new," he wrote—before also referring to *Webster's New International Dictionary*. Later in his concurrence, Scalia noted that interpreting the term "discovery" to mean "actual discovery" was "the more natural reading."

Scalia's *Merck* concurrence thus indicates that changing one's reference point to that of an ordinary reader may help temper even strong contrary policy preferences. Significantly, that same hypothesis has recently received some empirical support from a trio of scholars: Ward Farnsworth, Dustin Guzior, and Anup Malani. In their study,[5] they found that if law students were asked whether a statute was ambiguous, the students would give answers that were biased by their own policy preferences. Moreover, this was true even when the study specifically told the students to put aside their own policy preferences and to determine which reading was most consistent with the ordinary meaning of the text.

Asking the study's participants, however, whether the text would likely be read the same way by ordinary readers of English did not produce the same results. As Prof. Malani has explained, instead of asking students, "what they thought the

statute meant as a matter of ordinary English, we asked them what they thought ordinary readers would think it meant. The answers were then remarkably different. They weren't biased."[6]

Future research may also support the hypothesis that asking how an ordinary reader would interpret a statute helps reduce a judge's bias when interpreting a statute. If it does, then one of the most important questions to ask any person nominated to be a judge could be: "Do you agree to interpret a statute by at least considering what would an ordinary reader would think it meant?"

Notably, Senators of all political persuasions ought to be able to agree on the importance of this question—for while an "ordinary reader" approach elicited markedly "liberal" votes from Justices Scalia and Thomas in *Merck*, it should be just as likely to elicit "conservative" votes from more liberal justices in the future. Indeed, it is this approach's very ability to transcend any personal ideology that proves its merit, and ought to allow it to draw bipartisan support.

NOTES

1. Wright, Charles A. & Miller, Arthur R., *et al.*, Federal Practice & Procedure, St. Paul: Thomson West Publishing. © 1978-updates to 2010.
2. Geoffrey R. Stone, April 13, N.Y. Times, at A27, *Our Fill-in-the-Blank Constitution*.
3. *See* http://blogs.wsj.com/law/2010/04/27/supreme-court-gives-unanimous-go-ahead-to-vioxx-class-action.
4. *See* http://www.dandodiary.com/2010/04/articles/securities-litigation/us-supreme-court-allows-merck-vioxx-securities-suit-to-proceed.
5. Farnsworth, Ward, Guzior, Dustin F. and Malani, Anup, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation* (October 22, 2009). The Journal of Legal Analysis (Forthcoming) U of Chicago, Public Law Working Paper No. 280; Boston Univ. School of Law Working Paper No. 09-50.
6. *See also* http://uchicagolaw.typepad.com/faculty/2010/04/ambiguity-in-legal-i.html.