TRIBUTE TO JUSTICE ANTONIN SCALIA

I am honored to contribute to this tribute to Justice Scalia—although, as I warned him, I consider this not only a toast, but also a roast! After all, that is completely consistent with his own style. Certainly no one could accuse Justice Scalia of mincing words, especially when conveying contrarian or dissenting views!

I have had the pleasure of knowing Nino for about 15 years, and that is not despite our strong disagreements on fundamental issues—including about fundamental constitutional rights under the Due Process Clauses. Rather, we have developed our friendship precisely because of those disagreements, since they have led to our joint appearances as debaters or co-panelists on many memorable programs all over the world, from London, to Honolulu, to New Zealand.

This history of shared podiums illustrates one of Nino’s outstanding qualities that I especially value: He is so generous in sharing his time and thoughts with public audiences everywhere, including TV audiences. Not only is Justice Scalia unusual in accepting so many speaking engagements before diverse audiences, but he also shows great respect for the organizers and audiences, including by patiently answering questions from individual audience members long after formal events have concluded.

This aspect of Justice Scalia’s personality might well be surprising to those who know him only through his opinions, where some of his strong rhetoric, expressing the utmost confidence in his own views and disdain for some alternative views, might create the misimpression that he must be arrogant in his interpersonal interactions. Drawing on the world of opera, which is one passion that Nino and I share, I can attest that in all his dealings with many diverse individuals that I have observed—including students who ask him ignorant or hostile questions—he does not act like a prima donna! That said, I should also note that when Justice Scalia graciously accepted an invitation to judge a moot court competition at New York Law School in 1996, my students who met him at Grand Central Station reported that some commuters there who caught sight of him were thrilled with this glimpse of ... Luciano Pavarotti. Justice Scalia had just grown a beard, and he really did bear a striking resemblance to the opera star.

Let me add one illustration of my non-diva point. In 1999, Nino Scalia and I both made several presentations at a nationwide conference of lawyers and judges in New Zealand, including a de-
bate with each other.\textsuperscript{1} Despite the jet lag and the very lengthy proceedings over several days, after we had finished our own contributions we both sat in the audience listening to the remainder of the program. Other so-called "featured speakers" from overseas left after their own remarks, so I told Nino that I was pleasantly surprised to see him sitting through all the ongoing proceedings, including some that dealt with purely local issues. In response, he expressed what was also my reason for remaining: "It's important," he said, "to demonstrate my respect for all the other participants, and also for the conference organizers."

One of my first joint appearances with Justice Scalia was on a couple of the Fred Friendly Seminar programs,\textsuperscript{2} televised by PBS to mark the bicentennial of the Bill of Rights in 1991. Tapes of these programs are still being widely used on campuses around the country, and I continue to hear from professors and students about how exciting it is to watch such a dynamic Supreme Court Justice engage in that kind of spontaneous dialogue, with his trademark dramatic flair and quick wit, as well as his provocative ideas, which spark lively discussion and debate.

Likewise, in all his writings, including judicial opinions, he is always thought-provoking, raising essential questions and perspectives. Since I require my constitutional law students to be able to articulate every plausible perspective on all the issues we study, they know they cannot possibly earn good grades unless they are able to defend Justice Scalia's ideas—and, of course, also able to refute those ideas. In that vein, I would like to share an excerpt from an e-mail I got from a student several years ago, after she had completed my constitutional law course, graciously thanking me for the learning experience. She wrote: "My eyes opened up to things that I never knew possible. For example, before your class I never thought I would see eye-to-eye with Justice Scalia on any issue. You taught the class in a very balanced and fair manner."\textsuperscript{3} As I told

\textsuperscript{1} Some of the conference presentations were published in \textit{Litigating Rights: Perspectives from Domestic and International Law} (Grant Huscroft \& Paul Rishworth eds., 2002). \textit{See, e.g.}, Antonin Scalia, \textit{The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?}, in \textit{id.} at 19; Nadine Strossen, \textit{Liberty and Equality: Complementary, Not Competing, Constitutional Commitments}, in \textit{id.} at 149. For transcript excerpts from the conference, see Ian Binnie, Antonin Scalia, Hilary Charlesworth, Elizabeth Evatt, Grant Huscroft \& Nadine Strossen, \textit{A Dialogue on Rights}, 1999 N.Z. L. Rev. 547.

\textsuperscript{2} \textit{See generally} Fred Friendly Seminars, http://www.fredfriendly.org/.

\textsuperscript{3} E-mail to Nadine Strossen, Professor of Law, New York Law Sch. (on file with author).

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Nino in sharing that comment with him, perhaps I have been too successful a devil’s advocate.

Another one of my students, many years ago, told me of a related exchange she had with Justice Scalia after she had gone to hear him speak at another law school in the New York City area. His lecture expounded on his views about the appropriate way to interpret the Constitution. Taking advantage of the Justice’s characteristic generosity in remaining after the formal lecture to interact with members of the student audience individually, my student introduced herself to him and, on the subject of constitutional interpretation, proudly noted that her constitutional law professor (Yours Truly) insisted that her students must be conversant with, and able to defend, a whole range of plausible approaches to interpreting the Constitution. Whereupon, she recounted, Justice Scalia took her hand and earnestly said, in a commiserating tone (but with a twinkle in his eye): “Oh, my dear, I feel so sorry for you.”

I still prize the letter that Nino sent me after one of our first meetings, since it is so emblematic of the mutual respect we share for one another, despite our deep differences in views. He paid a big compliment to me and the ACLU, but he could not resist qualifying it with a parenthetical little dig—all in good humor, to be sure. I am going to share the key sentence from this letter with you, since it also precisely conveys my view about him. As he wrote, referring to both me and the ACLU: “I admire you for consistently adhering to your (often incorrect) principles.”

Justice Scalia had a similar response when I wrote him last summer to tell him that one of the biggest rounds of applause at the ACLU’s Membership Conference in June, 2004 was for his dissent in the Hamdi case, which was joined by Justice Stevens and expressed the strongest endorsement of robust individual rights and limited executive power in the War on Terror. I also want to note that one of the ACLU’s conference participants who was most enthusiastic about Justice Scalia’s opinion—a striking repudiation of the Court’s last decision involving the unjustified incarceration of U.S. citizens on alleged national security grounds—was Fred Kore-

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matsu. Sadly, this human rights hero died just two weeks ago, on March 30, 2005. So, Justice Scalia's *Hamdi* opinion was a capstone to Fred's lifelong crusade for equal justice for all, even—if not especially—during national security crises.

When I passed on to Nino this praise from the ACLU Membership Conference for his *Hamdi* opinion, he responded by dismissively describing us civil libertarians as "sunshine originalists." Of course, Nino, from my perspective, you originalists are "sunshine civil libertarians!"

In contrast with his strong protection of individual rights in the *Hamdi* case, Justice Scalia stubbornly refuses to acknowledge the Constitution's implicit respect for individual freedom of choice on matters ranging from abortion, to gay rights, to even his own right to send his children to Catholic schools. That latter stance is an excellent example of—to paraphrase the letter describing me and the ACLU that I quoted earlier—Justice Scalia's consistent application of his incorrect principles. But despite his blind spot about implied rights, Nino does unflinchingly and eloquently defend many rights that the Constitution explicitly protects, having written or joined some of the Court's most forceful, important opinions enforcing the First Amendment's Free Speech Clause.

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10. See, e.g., Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) ("[T]he Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution . . . ."); Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (arguing that the Court should explicitly overrule the constitutional right to choose).


12. See, e.g., Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (arguing that the concept of unenumerated parental rights established in earlier cases such as *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating a state statute requiring that all children between the ages of eight and sixteen attend public schools as an impermissible interference with "the liberty of parents . . . to direct the upbringing and education of [their] children"), should not be entitled to strong *stare decisis* protection).

13. See, e.g., Republican Party of Minn. v. White, 536 U.S. 765 (2002) (Scalia, J.) (holding that the Minnesota Supreme Court's canon of judicial conduct

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the Fourth Amendment’s right to be free from unwarranted, unreasonable searches and seizures,¹⁴ and the Sixth Amendment’s Confrontation Clause.¹⁵

I cannot resist adding how I wish that he would equally strongly enforce other rights that are explicitly protected under the Bill of Rights, such as the First Amendment’s Free Exercise¹⁶ and Establishment Clauses¹⁷ and the Eighth Amendment’s prohibition on cruel and unusual punishment.¹⁸ But he is still quite young—at least by Supreme Court standards—so I have not given up hope that his future opinions might show even greater consistency in sup-


¹⁴. See, e.g., Kyllo v. United States, 533 U.S. 27 (2001) (Scalia, J.) (holding that the Government’s use of a thermal imaging device to explore details of a private home otherwise not knowable without physical intrusion constitutes a Fourth Amendment search and is presumptively unreasonable without a warrant); Arizona v. Hicks, 480 U.S. 321 (1987) (requiring that officers have probable cause to seize evidence in plain view).

¹⁵. See, e.g., Crawford v. Washington, 541 U.S. 36 (2004) (Scalia, J.) (vacating defendant’s conviction under the Confrontation Clause when tape-recorded testimonial statements were played at trial, depriving defendant of any cross-examination); Coy v. Iowa, 487 U.S. 1012 (1988) (Scalia, J.) (holding that placement of a screen between defendant and child sexual assault victims during testimony violated defendant’s rights under the Confrontation Clause).


¹⁷. See e.g., McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2748 (2005) (Scalia, J. dissenting) (urging that the Court’s modern Establishment Clause doctrine should be radically reformed to bar only certain government discriminatory support of particular religions and to allow government endorsement of the concept of a monotheistic deity). For criticism of Justice Scalia’s views about the limited reach of the Establishment Clause, see Strossen, supra note 16, at 461–63.

¹⁸. See, e.g., Roper v. Simmons, 125 S. Ct. 1183, 1217–30 (2005) (Scalia, J. dissenting) (arguing that the execution of an offender who committed murder as a minor is not cruel and unusual); Ewing v. California, 538 U.S. 11, 31–32 (2002) (Scalia, J. concurring) (asserting that California’s three strikes law did not violate the Eighth Amendment, which prohibits only certain modes of punishment and contains no guarantee of proportionality in terms of sentence length).

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porting at least express constitutional rights. After all, there are famous precedents of other Justices who have gotten more liberal as they have gotten older and wiser. In this past Sunday’s New York Times, Linda Greenhouse wrote a fascinating piece about one such Justice: Harry Blackmun.\(^{19}\) So maybe you will follow in his footsteps, Nino!

In an important area where Justice Scalia already has strongly protected rights—freedom of expression about public policy issues—I can personally attest that he has bravely withstood harsh criticism for his staunch defense of unpopular ideas from across the political spectrum. Of course, we at the ACLU empathize with that kind of attack. In fact, Nino, you will not be surprised that I have gotten some strong condemnations for speaking right here, right now. And I know that you join me in supporting robust free speech rights for such critics even to express their views in the most inflammatory fashion—literally.\(^{20}\) In 1996, the Jewish Theological Seminary, located uptown here in New York City, hosted a dialogue


20. In the text, I am referring to the fundamental First Amendment principle that government may not suppress or punish expression based on the fact that officials, or the majority of the community, might find its content—the ideas it conveys—objectionable. On this basis, courts have struck down government efforts to censor or punish such unpopular expression as a neo-Nazi parade in Skokie, Illinois and burning the American flag, where the restriction was based on dislike of the ideas expressed. Nat’l Socialist Party v. Skokie, 432 U.S. 43 (1977), remanded to Skokie v. Nat’l Socialist Party, 366 N.E.2d 347 (Ill. App. Ct. 1977), rev’d in part, 373 N.E.2d 21 (Ill. 1978); Texas v. Johnson, 491 U.S. 397 (1989) (invalidating a prohibition on flag burning as political speech). Justice Scalia joined in the majority opinion in the latter case.

In contrast, government may enforce content-neutral regulations on expression, which are often called “time, place, and manner” restrictions, in order to promote important countervailing interests. Cox v. New Hampshire, 312 U.S. 569 (1941). Consistent with generally applicable rules about noise volume, the Skokie, Illinois officials could constitutionally have prohibited the neo-Nazis from shouting so loudly during their demonstration that they drowned out portions of a meeting that was taking place in the adjacent Village Hall. Likewise, flag burnings can be punished for failure to comply with content-neutral restrictions on fires in public places for such purposes as protecting human safety and air quality. In short, government generally may not regulate what you may say, but it may regulate when, where, and how you say it.

This critical distinction—between illegitimate content-based restrictions, and legitimate content-neutral restrictions—was illustrated during the *NYU Annual Survey of American Law*’s (“Annual Survey”) dedication proceedings on April 12, 2005, which prompted me to make some impromptu remarks about the applicable free speech principles toward the beginning of my oral remarks there. Since I received

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a number of follow-up questions about these issues, I welcome the opportunity to address them briefly here.

Shortly after I began to speak, protesters on the sidewalk immediately outside the room where the dedication ceremony was taking place, N.Y.U. School of Law's Greenberg Lounge, began shouting at such a high volume that I could not hear my own voice. I understand, from subsequent conversations with others who attended this event, that depending on where audience members were seated, they either could or could not hear the speakers above the din of the demonstrators. Moreover, the volume of the shouting waxed and waned throughout the proceedings.

Let me hasten to note at the outset that N.Y.U. School of Law, as a private institution, is not bound by the Constitution, including the First Amendment's free speech guarantee. Moreover, to the best of my knowledge, neither any N.Y.U. official nor any public official made any effort to suppress or punish any participants in the demonstration. Nevertheless, I think it is important to understand that First Amendment principles do not protect this kind of disruptive expression—which is disruptive not because of its message, but because of its timing, location, and volume.

I could not hear the precise words that the demonstrators were shouting, but I assume from the timing and the location that they were voicing opposition to some of Justice Scalia's opinions, and to the Annual Survey's decision to honor him. Regardless of what their message was, they had a right to convey it, free of any restriction based on any objection to its content by Justice Scalia, the Annual Survey editors, or anyone else. In contrast, though—equally regardless of what the protesters' message was—they had no right to voice it in that particular time, place, and manner—making it impossible for at least some speakers and some audience members to hear some portions of the proceedings. To this extent, the demonstrators were using what the courts have called a "hecklers' veto" to suppress speech with which they (apparently) disagreed. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) (holding that "[l]isteners' reaction to speech is not a [valid] basis for regulation" and striking down as a hecklers' veto a county ordinance that made the fee for a parade license contingent on an administrator's estimate of providing security for the event). Ironically, then, when the demonstrators' volume drowned out speakers inside Greenberg Lounge, far from exercising their own free speech rights, the demonstrators were interfering with the free speech rights of others: the right of the speakers to address the audience and the right of the audience members to hear the speakers.

This problem could easily have been rectified had the protesters made only a slight alteration in the manner of their expression: lowering the volume a bit. They would not have had to change their message, or the time or place for conveying it. I would have defended their right even to shout loudly enough that they could be heard inside Greenberg Lounge, so long as the invited speakers could also be heard above them. Throughout most of the proceedings, the demonstrators' volume was in fact not so loud as to drown out the speakers, and therefore was consistent with free speech principles. However, during some portions of the proceedings, including at the outset of my remarks, the demonstrators' volume did amount to a "hecklers' veto" and thus was inconsistent with free speech principles.

I want to stress that this same analysis would apply—and the protesters would have had no right to drown out invited speakers, thus preventing invited audience members from hearing these speakers—even if the protesters had been shouting, "We love Justice Scalia and his ideas, and we thank the Annual Survey for honoring

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between Justice Scalia and myself about constitutional issues, which National Public Radio broadcast.\(^{21}\) The very first audience comment Nino got was from an irate woman who excoriated him for—of all things—upholding the freedom to burn the American flag.\(^{22}\) That prompted him to put his head in his hands and exclaim: “I can’t believe it; here I am on the Upper West Side of Manhattan—probably the most liberal neighborhood in the whole country—and I’m being attacked for being too liberal!”

As that episode indicates, Justice Scalia not only energetically engages with audiences in general, but he also, in particular, enthusiastically exchanges views with very diverse audiences. He does not only preach to the choir. Indeed, I was extremely pleasantly surprised when, in 2000, he accepted an invitation from—of all organizations—the ACLU. Even more surprisingly, this invitation was to engage in a one-on-one debate with Yours Truly in a forum that was open to the general public. Most Supreme Court Justices would not engage in that kind of public debate with anyone, much less with a spokesperson for an advocacy group such as the ACLU. Moreover, Justice Scalia also welcomed unfettered questions from audience members. Journalists who cover the Supreme Court have told me that they are not aware of any other Justice ever having accepted a comparable invitation for such an open, public exchange.

In short, you may well disagree with many of Justice Scalia’s ideas, but he gives you ample opportunity to air your disagreements directly with him. He held this type of open forum right here at the NYU School of Law just a couple of hours ago. So he is actually honoring the First Amendment in his life and in his actions, not only in his opinions.

As a law professor, I am especially grateful for the courtesies that Justice Scalia consistently shows toward law students, as all of you here today are witnessing first-hand. His interactions with my own students are uniquely thrilling to them, but typical for him. He has accepted their invitations to judge moot court competitions,

\(^{21}\) Likewise, the same analysis would apply—and the protesters would have had no right to drown out invited speakers, thus preventing invited audience members from hearing these speakers—if the event had been organized by the ACLU Lesbian and Gay Rights Project and the demonstrators outside had been shouting, “Down with gay rights and the ACLU! Up with Justice Scalia’s dissent in Lawrence v. Texas!”

\(^{22}\) See Nadine Strossen, Religion and Politics: A Reply to Justice Antonin Scalia, 24 Fordham Urb. L.J. 427 (1997) (adapting Prof. Strossen’s contribution to this Jewish Theological Seminary dialogue).

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he regularly arranges for them to watch the Court's oral arguments, including in major cases, and he even answers students' letters. All of these students will always cherish such inspiring interactions as highlights of not only law school, but also their whole legal careers.

Nino Scalia's warm and ebullient personality has won him many friends, across the ideological spectrum. To cite one prominent example, Ruth Bader Ginsburg refers to him as her closest friend on the Court, and, as I hope you all know, before she became a judge, she was the founding Director of the ACLU Women's Rights Project, one of the ACLU's General Counsel, and a member of our National Board of Directors. Reason magazine recently interviewed me for an article about the Supreme Court and asked who my all-time favorite Justice was, in terms of opinions and ideas overall. I know you will not be surprised that my answer to that particular question was not Antonin Scalia. However, I would have chosen him in response to many other important questions, including: "With which Justice would you want to spend an evening, or share a platform?"

I am going to close by again borrowing some of Nino's words about me, since they so well capture my reciprocal views about him. He made these remarks in November, 2002, when he cordially introduced me to then-Attorney General John Ashcroft at a conference where all three of us were speaking. (You will not be surprised to learn that it was a Federalist Society conference.) I will just substitute male pronouns for female, since Nino's own words about me apply at least as fully to himself: "Even though he has some very bad ideas, he also has some very good ones, and at least as importantly, he is a terrific person!"

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* J.D. 1975, B.A. 1972, Harvard University. The author is grateful to Steven Cunningham, J.D. 1999, New York Law School, for his valuable assistance. She also thanks the editors of the NYU Annual Survey of American Law for having prepared most of the footnotes for this published version of the remarks she delivered at the dedication reception on April 12, 2005.

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TRIBUTE TO JUSTICE ANTONIN SCALIA

Good afternoon, and thank you for the invitation to join in this celebration.

I was introduced to you as the Emerson Spies Professor of Law at the University of Virginia. Few of you will recognize that name, but Emerson Spies was a mainstay of our faculty in the mid-twentieth century and the Dean of our law school from 1975 through 1980.

At a memorial service following Emerson’s death in 1990, his friend and former colleague on the Virginia faculty, Nino Scalia—by then Justice Scalia—gave the principal remarks. Emerson, said Nino, was not a variable person, not someone who takes on the hue of those he is with, not someone who looks different to different observers. No, said Nino, Emerson’s colors were “bright and clear—and they neither changed nor were ever dissembled.”

The same words might be said of the man who spoke them. Justice Scalia’s colors are bright and clear, and they neither change nor are ever dissembled.

Critics, of course, delight in finding the discrepancies in a judge’s work, instances in which the judge may be said to have strayed from the announced criteria of decision. And, inevitably, they succeed.

Perfect consistency is a false expectation, and not only because of human fallibility. There are also important differences in the content and structure of constitutional provisions, not to mention variations in the contexts in which constitutional questions arise. Perhaps most destructive of the hope for a unified-field theory of constitutional law is the confusing and contradictory overlay of precedent. Too often, fidelity to the best understanding of a constitutional guarantee and to the Court’s prior constructions of it is a logical impossibility.

Any unitary approach or methodology—if sufficiently specific to be meaningful—will encounter cases where it simply does not work, where it leads to outcomes that are absurd or silly. And a practical judge, confronted with that prospect, will opt for good sense rather than rigorous consistency.

That said, Antonin Scalia is the most nearly consistent of our judges. He cares more about methodology than is usual among judges, worries more about fidelity to the law laid down, feels himself more closely bound by external sources, and is more dedicated

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to a vision of constitutional law as something distinct and apart from constitutional politics.

The bright, clear colors of Scalia’s jurisprudence are well known. First and foremost is the text—the words used, in their plain meaning, as authority and as external constraint. There is also respect for tradition—American tradition—as a guide to decision when the text is not clear. And also, it must be said, there are decisions where the anchors to text and history seem strangely tenuous. These and other elements of Justice Scalia’s jurisprudence will be charted here by wiser heads than mine.

I want to add just a thought on what seems to me the animating vision behind Scalia’s jurisprudence. Perhaps unusually among Supreme Court Justices, Scalia is informed by an awareness of the fragility of human achievement, by a sharp distrust of easy promises about a better world, by a keen appreciation of what we have to lose.

Unfortunately, no word in our language does full justice to this perspective. There is pessimist of course, but anyone who knows Antonin Scalia knows that’s all wrong. He is a happy warrior—a man of vitality, warmth, charm, and magnetism. Even when you are infuriated by his opinions—and most of us sometimes are—it’s hard to resist his zest for intellectual combat, his delight in pungency of expression, his love of a good joke. In this sense, there is no hint of the “pessimist” in Nino Scalia.

But he is deeply skeptical about the capacity of judges to work improvements in the world—skeptical not merely about the legitimacy of judicial efforts to shape the future, but more fundamentally about their ability to get it right.

Thirty-five years ago, Alexander Bickel warned against the idea of progress and its beguiling attraction for our nation’s judges.1 He warned against the too-easy confidence that heartfelt beliefs are harbingers of future wisdom. He counseled against the temptation to abandon constraint in the quest for a better world.2 He urged judges not to seek vindication in the future but to rely instead on the less-ambitious virtues of analytic coherence, principled judgment, and fidelity to the law laid down.3

Here, it seems to me, we near the core of Scalia’s judging. It is not merely that he doubts the authority of judges to make bets on

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2. See id. at 173–75.
3. See id. at 81.

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the future; he doubts their capacity to do so with anything like consistent success. The qualities of a statesman may be, as Edmund Burke said, "[a] disposition to preserve and an ability to improve," but for Justice Scalia only the former is in the province of the judge.

Insofar as one can learn the man from his opinions, Justice Scalia believes that the advances of civilization are hard-won and must be carefully guarded, that the lessons of long experience should not be lightly cast aside, that reform carries risk of loss, and that good intentions do not guarantee good results. He knows that untold suffering has flowed from utopian visions and that even the soft utopias of the 1960s have had their costs. In this sense—and it is a rather particular sense—he is more modest than most judges, and a better democrat.

Justice Scalia's alertness to the risks of constitutional innovation may seem to some to be at odds with the American spirit. It is less exhilarating than that heady confidence in our own foresight that has often graced (and sometimes afflicted) our young nation. Yet there is wisdom in Scalia's approach, and it is the better for being time-tested. If even the most ardent of the Justice's admirers may be permitted to doubt that a Court of nine Scalías would be ideal, we should all be thankful for having the one.

JOHN C. JEFFRIES, JR.
Dean and Emerson Spies Professor of Law
and Arnold H. Leon Professor of Law
University of Virginia School of Law

4. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 181 (Thomas H.D. Mahoney ed., 1955) ("A disposition to preserve and an ability to improve, taken together, would be my standard of a statesman. Everything else is vulgar in the conception, perilous in the execution.").
TRIBUTE TO JUSTICE ANTONIN SCALIA

It's a great honor for me to pay tribute to Justice Scalia because clerking for him was one of the highlights of my life.

But I confess that I have had a hard time choosing what to say, because Justice Scalia has had a profound influence on so many areas of law and jurisprudence. Indeed, he is a towering force in all the subjects I research and teach.

To avoid picking just one substantive area, I originally thought about highlighting what I see as one of the Justice's great, overarching contributions to law, and that is his gift with words. Too often judges forget that someone will actually read their opinions, but Justice Scalia never does. He treats his readers to gems like this one, from a dissent to a case involving application of the *Lemon* test\(^1\) to an Establishment Clause question: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."\(^2\) Or this, from his concurrence in a case involving the regulation of nude dancing:

Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you - may - do - what - you - like - so - long - as - it - does - not - injure - someone - else" beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.\(^3\)

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1. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (stating a test for determining when a statute passes muster under the Establishment Clause that looked to whether the law had a "secular legislative purpose," whether its "principal or primary effect" was one that "neither advance[d] nor inhibit[ed] religion," and whether the statute "foster[ed] an excessive government entanglement with religion") (internal quotation and citation omitted).


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And then there's my personal favorite, from Justice Scalia's lone and prescient dissent in *Morrison v. Olson*, the case that upheld the independent counsel law⁴ against a separation of powers challenge:

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.⁵ I often read many of the Justice's opinions as I prepare for class, and I never cease to admire his skill and style.

But because his talent with a pen truly does speak for itself, I have decided to highlight an area of the Justice's jurisprudence that does not always receive the attention it deserves. And that is his transformation of the criminal law. He has written countless opinions defending a criminal defendant's rights against the power of the state. His contributions to criminal law have been critically important and will have lasting effects. Indeed, they alone would merit the honor that the Annual Survey bestows today. They also demonstrate the Justice's fidelity to constitutional principles of liberty—even when a politically conservative viewpoint would yield a different conclusion.

I don't have the luxury of time to focus on all of his contributions, so I will briefly highlight four.

The first is the Justice's commitment to trial by jury. Since joining the Court, the Justice has been a staunch advocate of the jury guarantee. He has eloquently explained in numerous opinions that a failure to instruct a jury on all material elements⁶ of the crime charged or to give a proper definition of reasonable doubt⁷ can never be harmless error. And in the last few years, the Justice's opinions on the relationship between trial by jury and sentencing laws have led to a sea change in modern sentencing practices. Be-

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⁵ *Id.* at 699 (Scalia, J., dissenting).

⁶ *Neder v. United States*, 527 U.S. 1, 30–40 (1999) (Scalia, J., concurring in part and dissenting in part); *see also* *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) (stating that the question of materiality must go to the jury because "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged").

beginning with his powerful dissent in Almendarez-Torres, the Justice has argued that modern sentencing laws that require judges to increase a defendant's sentence on the basis of factual findings made by the judge run afoul of our jury system. His views have ultimately won over a majority of the Court in Apprendi, Blakely, and Booker, and sentencing laws throughout the country have changed as a result.

Second, the Justice has also fundamentally changed the Court's Confrontation Clause jurisprudence. In 1990, the Justice dissented in Maryland v. Craig because the Court allowed a child witness to testify via closed circuit television in a sex abuse case. The Justice wrote: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." The Justice dissented because, in his view, the Court was "not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." But that was not the last we would hear from the Justice on the meaning of the Confrontation Clause. His recent opinion for the Court in Crawford v. Washington establishes unequivocally that out-of-court, testimonial statements by witnesses are barred, under the Confrontation Clause, unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine them. Thus, we now have a bright-line rule protecting defendants that replaces the Court's previous test that often admitted such evidence as long as a judge found it to be reliable.

Third, Justice Scalia has also protected the individual rights of defendants through his textualist interpretation of criminal statutes and his adherence to the rule of lenity, the venerable canon of in-

11. United States v. Booker, 125 S. Ct. 738 (2005). Although a majority of the Court agreed with Justice Scalia's analysis and found that the Sixth Amendment as construed in Blakely applies to the Federal Sentencing Guidelines, his views did not win over a majority of the Court on the remedial question of what to do with the Guidelines in light of that analysis. See id. at 771.
12. U.S. Const. amend. VI.
14. Id. at 860.
15. Id. at 870. For another case outlining Justice Scalia's views on the Confrontation Clause, see Coy v. Iowa, 487 U.S. 1012 (1988).
interpretation that ambiguous statutes should be interpreted in favor of one accused of a crime. The Justice has consistently interpreted substantive criminal statutes carefully and narrowly,\(^\text{18}\) and the rule of lenity has had no greater supporter on the Supreme Court than Justice Scalia. Whether the crime has been carjacking,\(^\text{19}\) using guns in connection with drug trafficking,\(^\text{20}\) evading currency reporting requirements,\(^\text{21}\) extortion,\(^\text{22}\) securities violations,\(^\text{23}\) fraud,\(^\text{24}\) or juvenile crime,\(^\text{25}\) the Justice has time and again interpreted criminal statutes in favor of the accused. True to his methods of statutory interpretation, he applies the rule of lenity by looking solely to the text, so legislative history can never be used to support an interpretation against a criminal defendant.\(^\text{26}\)

Fourth, and finally, I want to note that the Justice’s commitment to constitutional criminal procedures and strict separation of powers has not diminished, even in the face of wartime and the fear of terrorism. Most members of the Court were content to allow the Government to deprive Yaser Esam Hamdi, an American citizen captured during military operations in Afghanistan and alleged to be an enemy combatant, of his procedural guarantees under the Constitution and to give him instead only the barest of procedural protections. Justice Scalia’s powerful dissent, in contrast, made

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\(^{19}\) Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (finding the statute unambiguous in favor of the defendant but noting that “if ambiguity existed, however, the rule of lenity would require it to be resolved in the defendant’s favor”).


\(^{26}\) Id. at 307–11.
clear that the bright lines of the Constitution must not yield in times of fear.27

The case of Hamdi, Justice Scalia noted, “brings into conflict the competing demands of national security and our citizens’ constitutional right to personal liberty.”28 But whereas a majority of the Court significantly curtailed Mr. Hamdi’s constitutional rights in the face of executive demands for flexibility, Justice Scalia used his traditional methods of analysis—originalism and formalism—and concluded that Mr. Hamdi was entitled to all the protections the Constitution establishes in criminal proceedings. In a theme that is evident throughout the Justice’s jurisprudence, he criticized the plurality’s opinion for reflecting what he called “a Mr. Fix-it Mentality.”29 “The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions.”30 Justice Scalia, in contrast, did not bend the constitutional rights of an accused to a claimed exigency.

Here is another quote that proudly sits alongside so many other beautifully written passages from the Justice’s opinions:

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis . . . . Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.31

In all of these areas, and so many others,32 it is evident that the touchstones of the Justice’s jurisprudence—a commitment to the

28. Id. at 554.
29. Id. at 576.
30. Id. at 576–77.
31. Id. at 579.
32. Among Justice Scalia’s other notable criminal justice opinions are Kyllo v. United States, 533 U.S. 27 (2001) (holding that thermal imaging of a home is a search for purposes of the Fourth Amendment); Mistretta v. United States, 488 U.S. 361, 413–27 (1989) (Scalia, J., dissenting) (finding the Federal Sentencing Guidelines unconstitutional); County of Riverside v. McLaughlin, 500 U.S. 44, 59, 70 (1991) (Scalia, J., dissenting) (concluding that, absent extraordinary circumstances, it is an unreasonable seizure under the Fourth Amendment for the police to make a warrantless arrest and delay probable cause for the arrest “(1) for reasons unre-
separation of powers, respect for the democratic process, fidelity to the Framers' constitutional design, careful textualism, and bright line rules of decision—have not yielded when those values have come up against someone accused of a crime, no matter how serious or repugnant the alleged conduct. The Justice has held firm, and our criminal law jurisprudence—and constitutional order—is the stronger for his efforts.

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TRIBUTE TO JUSTICE SCALIA

I have a book at home entitled *The Wit & Wisdom of Winston Churchill*, authored by James C. Humes. I doubt that there are many prominent figures in American contemporary life for whom such a book could be written. Ronald Reagan would surely qualify, but most of our leading citizens, I regret to say, are neither witty nor wise, and the few that are wise are not very witty, and vice versa.

The list of potential candidates for such a book narrows to the vanishing point when eligibility is limited to lawyers. Aside from being a fertile subject matter for jokes, lawyers are not widely regarded as funny. The same is true for judges—wise maybe, but seldom witty.

But I fully expect someday to possess a book entitled *The Wit & Wisdom of Antonin Scalia*. This is a jurist whose opinions, whether you agree with them or not, are typically wise, eminently readable, and often very witty.

Justice Scalia’s wit, originality, and writing skills are important, it seems to me, because it is one thing to produce thoughtful, insightful legal opinions. That is challenging enough and all too rare. It is quite another, however, to produce brilliant legal analysis in a style that not only conveys the intended message, but does so with style, brevity, uniqueness, sagacity, and wit. Justice Scalia has an extraordinarily rare capacity to express himself with succinct, incisive, and colorful language and phrasing that conveys ideas that are at once persuasive and memorable.

Let me, in my few minutes, give you some examples.

You may have noticed that Justice Scalia does not hesitate to dissent when, in his view, his colleagues have read their personal values into the Constitution, withdrawing those issues from debate and resolution by the political branches, and by the people. He does so in powerful and indelible language. For example, one memorable passage deplored the Court’s decision striking down as unconstitutional Virginia’s financial support for single-sex higher education:

The virtue of a democratic system . . . is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to
change. The same cannot be said of this most illiberal court, which has embarked on a course of inscribing one after another of the current preferences of the society . . . into our Basic Law.¹

Justice Scalia has expressed similar frustration with what he calls the Court’s “famed sweet-mystery-of-life passage”² that was given birth, so to speak, in the Court’s abortion jurisprudence and later imported into the Court’s sodomy decision. That passage, as you know, declares that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³ That dictum, Justice Scalia explained in Lawrence v. Texas:

“[C]asts some doubt” upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s “right to define” certain concepts; and if the passage calls into question the government’s power to regulate actions based on one’s self-defined “concept of existence, etc.,” it is the passage that ate the rule of law.⁴

Justice Scalia is vigilant to point out when the Court makes value judgments that, in his view, have no business being pronounced and imposed by judges. As he explained in the right-to-die case:

[The point at which life becomes “worthless,” and the point at which the means necessary to preserve it become “extraordinary” or “inappropriate” are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory . . . . 

. . . This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.⁵

Justice Scalia has been bluntly skeptical concerning the meaning and jurisprudential soundness of certain of the Court’s multipart subjective tests, which it often employs to resolve constitutional

⁴. Lawrence, 539 U.S. at 588 (Scalia, J., dissenting).
questions—none more so than the famed three-part Lemon test employed by the Court in Establishment Clause cases. He colorfully explained:

Like some ghoulish character from a late-night horror movie that repeatedly sits up in his grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . . The secret of the Lemon test’s survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.6

Justice Scalia’s frustration with the Court’s tendency to take on subjects that he perceives to be beyond the Court’s competence led him to observe in one recent case that “[t]he Court seems incapable of admitting that some matters—any matters—are none of its business.”7 That exasperation was near its zenith when, as Justice Scalia put it, the majority’s faulty logic required the Court not long ago to decide “What is Golf?”8 As he explained:

I am sure that the Framers of the Constitution, aware of the 1457 Edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a “fundamental” aspect of golf.

Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question.9

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9. Id.
As a fierce proponent of separation of powers and judicial restraint, Justice Scalia believes that judges must be very careful not to let their personal views substitute for constitutional analysis, lest the rule of law be replaced by the rule of whatever judges want it to be. As he put it in one of the abortion cases:

"The best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice . . . . But it is obvious to anyone applying "reasoned judgment" that the same adjectives [such as "intimate relationships" and "personal autonomy and bodily integrity"] can be applied to many forms of conduct that this Court . . . has held are not entitled to constitutional protection . . . . It is not reasoned judgment that supports the court's decision; only personal predilection."10

Justice Scalia is, of course, the jurisprudential master of those concise but colorful sentences or phrases that capture a full opinion's worth of wisdom in a few words. One remembers his point because his words so adroitly capture his concept. Some examples:

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A priest has as much liberty to proselytize as a patriot.11

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"No government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify."12

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It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*.13

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If the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would

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surely have said so. It did not do so, I think, because the juice is not worth the squeeze.\textsuperscript{14}

\* \* \*

From the nude dancing free speech case a few years ago: "The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd."\textsuperscript{15}

\* \* \*

Once in a while, Justice Scalia explains that the temptation to respond to something his colleagues have expressed is simply more than he could possibly be expected to resist. For example, he stated in the \textit{Casey} case: "I must . . . respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered."\textsuperscript{16} "[T]o come across this phrase ['liberty finds no refuge in a jurisprudence of doubt'] in the joint opinion—which calls upon federal district judges to apply an 'undue burden' standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear."\textsuperscript{17}

\* \* \*

And, once in a while, his frustration simply cannot be contained: "The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."\textsuperscript{18}

\* \* \*

Let me conclude with my personal favorite. As you might have guessed, it is from a case known as \textit{Morrison v. Olson}:

[T]his suit is about . . . [p]ower. The allocation of power among Congress, the President, and the courts . . . . Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is

\begin{itemize}
  \item \textsuperscript{15} Barnes v. Glen Theater, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).
  \item \textsuperscript{16} \textit{Casey}, 505 U.S. at 981.
  \item \textsuperscript{17} \textit{Id.} at 984-85.
  \item \textsuperscript{18} Bd. of County Comm'rs v. Umbhr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).
\end{itemize}
not immediately evident, and must be discerned by a careful
and perceptive analysis. But this wolf comes as a wolf.¹⁹

* * *

Thank you, Justice Scalia, for making your opinions so clear, so
persuasive, so provocative, and so enjoyable to read.

HON. THEODORE B. OLSON
Partner
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Solicitor General of the United States, 2001–2004

phasis added).

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REMARKS BY
THE HONORABLE J. MICHAEL LUTTIG
IN TRIBUTE TO
ASSOCIATE JUSTICE ANTONIN SCALIA
NEW YORK UNIVERSITY SCHOOL OF LAW
NEW YORK, NEW YORK
APRIL 12, 2005

Things as they are in political Washington these days, I was urged by friends to begin this afternoon by denying any friendship with our honoree. At the very least, I was told, do not concede any such thing. This is not a man, they reminded, who moves about in camouflage—save, of course, when he is with the Vice President.

Well, with my customary pliancy to politics, I will respond to this well-intentioned injunction in this way: I do deny that Justice Scalia is a friend of mine. He is not. He is one of my closest friends.

For those who demand fealty to politics, I do, however, offer up this renunciation. At least where matters of law are concerned, it is no more comfortable being Justice Scalia’s friend than it must be being his foe. The friend who is fool is suffered no more gladly than the fool who is not. Lest you doubt, consider these missives, the like of which his friends—not his enemies, his friends—risk receiving from him on any day of the week.

Dear Mike: I have just read your first opinion. Looks like a summary reversal to me. Sincerely, Antonin Scalia.

Dear Mike: It occurred to me, as I read several of your more recent opinions, that you must not have access to the United States Reports. Please be advised that I have made arrangements with the Marshal here at the Court for you to have 24-hour access to our library for purposes of reading our opinions, by which, incidentally, as an inferior court judge, you are bound. Sincerely, Antonin Scalia.

Dear Mike: As should be apparent from this week’s unanimous reversal of your court, I cannot even fathom how one could reasonably take the position that you did. Had it not been for your precipitate telephone call chastising me, I would have been prepared to believe that even you understood that such a
holding was indefensible and had voted to concur only because you believed yourself bound by prior circuit precedent. Sincerely, Antonin Scalia.

Now, as the last of these attests, I cannot represent that each of these letters was written by him without any provocation whatsoever from me; I have not been able to resist all of his influence. Still, from anyone but him I would be quite disinclined to take such thinly veiled ad hominem “sitting down,” as the saying goes. So, as I prepared my remarks for this afternoon, I began finally, after all these years, to ask myself “just why do I take the likes of this from this man? Who is he? And by what measures does he have the right, or as I am sure he might correct me, the ‘standing,’ to roam at large with such insufferable comments?” Well, the answers, frankly, are these.

This jurist to whom we pay tribute today truly is a man of immense intellect. Dazzling intellect, even. On this aspect of him, there is apparent consensus. Indeed, he perhaps has no equal in all of the Supreme Court’s history. He sees clearly what others see only dimly, when they see at all. That which eludes the rest of us, somehow is always within his grasp. The intractable is, to him, the simple; he can resolve the most vexing of conundrums, disentangle the most entangled of analytical threads, and unknot the hardest conceptual knots. For him, the impenetrable is penetrable, and effortless—or so it seems.

Like no other, he is able to reach into a case, seize its essence from among all the distractions, understand not only its doctrinal implications, but also its systemic implications (this latter I might add despite what would be for most a crippling disability—his academic bent) and he can reason to resolution with a facility and pel lucidity seldom witnessed.

What is more, this most exquisite of intellects does not exist within our honoree unalloyed. As if to punctuate the point, to him was also portioned the even rarer gift that is often withheld from those of vast intellect: he is able to impart through the written word all that even his brilliant mind can conjure.

In words like those of no other who has taken seat on the High Court does this man speak. His words bring law to life, as they bring life to law. His words persuade or critique, they excite or incite, they please or anger, or they comfort or agitate—all upon command. There is neither idea nor emotion that he cannot capture and commit to page—and with perfect clarity. So complete

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and honed is his pencraft that, for him, if it is within life, it is within the reach of his composition.

The fusion of these twin gifts, it should come as no surprise, produces a yield worthy indeed. When in the form of opinion, it defies refutation. Upon his pages, the question to be resolved leaps out in edifying relief; the law is captured masterfully replete with all of its texture and nuance; the analysis is developed both flawlessly and pungently; and the dictates of the law appear, suddenly, as if all along self-evident. So utterly powerful is the prose that issues from his pen that one is discouraged from rejoinder, if not even from attempt. In fact, often are those who oppose him relegated to empty observation of unexplained disagreement, if this. By even those who believe themselves in disagreement, it is wondered as often as not just how it is possible to come to a conclusion different than his.

For this man, every opinion, whether ordinary or landmark, is a performance virtuoso.

Many learn of the results decreed by the tribunal of which he is a member, but only infrequently are its opinions pored over for their insight, for their illumination, or for their mastery—that is, with one exception.

But yet, to conclude that his power derives wholly, or even in large part, from these conjoined gifts—as considerable as they are—would be not only to misunderstand, but also to underestimate, this jurist. Such power as his cannot be of the mind; certainly it cannot be of the mind alone. And it is not. His power comes from deeper within. If you wish to know this man, put down his résumé, and seek him there.

There is where you will find the profundities of the jurist—his inextinguishable passion, his utter commitment to principle, his unyielding conviction as to right, and his unsubdual courage to testify to all that he believes, even when to do so comes, as it emphatically has, at unthinkable price to person. These constitute the man. His intellectual ideas have the centrifugal force that they do because they are powered by these constituents of the spiritual.

Equipped thus, did our honoree ascend to the Highest Court now two decades ago, passionately possessed of a view of law and of the role of the judiciary in the constitutional order that far surpassed in refinement that of all but a handful of those who had come before him, if that. This was a man neither jurisprudentially neophytic nor jurisprudentially adrift. His was an already-steadfast belief that, while law is of man, it partakes of the sacred, and therefore must not be subject to the whim of man; that, as guardians of

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that law, jurists are not to act out their own will in their decisions, but rather, they are to give effect to the will of those for whom they but hold power in trust. And disarmingly, he arrived fully prepared to live, himself, in accordance with the principles by which he proposed that others live. He would be first, he promised, to refuse to drink from the cup of power that recognizes no limits.

Predictable it was, then, in retrospect, that this man's eloquent expression and spirited defense of his pure principles would soon command the attention of his brethren. And so it happened. And as their attention was turned, a conversation was begun, a conversation which, had it not begun at his invitation, may never have begun at all. A conversation that forced consideration of views held but considered little and reconsideration of views much considered but regarded as fixed.

And what followed has been the dramatic alteration of the entire landscape of law.

The alterations have not always been the particular ones that he has sought, and for which at times he has even implored. They have not always been even in the direction he has counseled. But they have invariably borne his imprint. Where he has not won the debate, he has defined its terms, and thereby affected its outcome. Where he has been unable to achieve the particular change he sought, he has nonetheless wrought change from what had been and from what might have been. It would be fair to say that no area of the law has been spared his influence, be it statutory or constitutional.

Perhaps even more significant, though, is the impact that he has had on the judicial mindset, which both precedes and transcends the decision of individual disputes. That which, once affected, will dictate into the future the eventual course of law. Here, he has opened judicial minds to the troubling paradox that courts themselves chafe at rules that prevent them from working their personal will, and thus in truth are only uncomfortably guardians of a rule of law. He has forced into the judicial consciousness that courts are as susceptible to hypocrisy as every other, unwilling to be bound by the rules that even they themselves have fashioned. And as he has reminded the judiciary of the source of its power, and thereby reminded it of the limitations that it accepted by oath, he has impressed upon the judicial conscience not only the constitutional, but the moral necessity, for accountability to those on whose behalf the courts exercise their derivative power.

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If all of these should remain infixed within the judicial mind even for a time, the impact that this man will have had, as the conscience of law, will be disputable by no one.

But, in the end, the most consequential and lasting of our honoree’s contributions may well lie far beyond the particulars of any decision, far beyond any doctrinal development within the decided caselaw, and even far beyond the effect that he has had on the collective judicial mind. That contribution is this: for the first time in history, he has, as judicial ombudsman, laid the judicial process open and bare for public scrutiny in a way that none has done before. And in so doing, he has awakened America to the rule of law and to the dangers that the rule of law faces from within that Branch charged foremost with its nurture and protection.

Today, many believe that the Nation is poised to decide nothing less momentous than whether we will or will not have law separate and distinct from politics and judicial whim, or whether the three will become, and, worse, become accepted as, one in the same. If, as a Nation, we are finally to confront and openly decide this question of questions, it will be in no small part because our honoree has, through the words that have filled his allotted pages in the United States Reports, ignited its debate. For, when he writes, he writes of nothing less than the definition of law itself and the legitimate role that the judiciary is to play in the preservation of that law.

Antonin Scalia has offered up unequivocal and unapologetic answers to these profound questions, which answers may be accepted or rejected by future generations. He may or may not ultimately be proven prophet. But whether he is or is not, this much will be undeniable: not only will this jurist have been largely, if not wholly, responsible for the fact that these most fundamental of questions that can be asked in a democracy were finally asked at all. But as a consequence of the principles and convictions to which he has courageously and forcefully given voice, the influence that he will have exerted on the final resolution of these questions will be palpable in every sinew of the process that preceded.

**********

Mr. Justice Scalia, it is high honor to join in this tribute to you and to the contributions that you have made to law through your singular devotion to the Constitution. As trying at times as it is for one, like myself, who has remained within your impressive sphere, it is a privilege to have been first, your hapless law clerk, and then,
your friend, along your inspirational journey. May you continue to
serve with the same distinction that has marked your service for the
past two decades on the Supreme Court of the United States.