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## A Tribute to Justice Antonin Scalia

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# A TRIBUTE TO JUSTICE ANTONIN SCALIA

MICHAEL S. MCGINNISS\*

## ABSTRACT

This Tribute to Justice Antonin Scalia is based on remarks originally presented on Wednesday, April 6, 2016 in the UND School of Law Central Commons, for our School of Law’s law-related discussion series called “The Buzz.”

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## I. INTRODUCTION

Good afternoon. It is my great pleasure and truly a privilege to be with you today to pay tribute to the public life and legacy of United States Supreme Court Justice Antonin Scalia, who passed away in February at the age of seventy-nine. I serve as the faculty advisor for the School of Law's chapter of the Federalist Society for Law and Public Policy (a national organization of which Justice Scalia was supportive from the time of its founding in the 1980s).<sup>1</sup> I am also a law teacher, a legal scholar, a member of the legal profession, and a person who has been inspired by Justice Scalia and his example since even before I started law school almost twenty-six years ago. The views I will express to you today are entirely my own.

To open a window of insight into Justice Scalia's legacy, I would like to show you a short video that was prepared by the national Federalist Society in honor of Justice Scalia after his passing.<sup>2</sup>

## II. A CONSTITUTIONAL CONSERVATIVE

Michael W. McConnell is a law professor and the director of the Constitutional Law Center at Stanford Law School.<sup>3</sup> He served for a number of years on the Tenth Circuit Court of Appeals, and in the 2000s he was on President George W. Bush's short list for the Supreme Court.<sup>4</sup> When he was a younger law professor, and when I was a younger law student at William & Mary, I had the privilege of meeting Professor McConnell. While he was visiting the law school for its annual Supreme Court symposium, he took the time out of his busy schedule to meet with our Christian Law Fellowship for a Bible study (at his suggestion, on the Old Testament Book of Haggai) and some encouragement on being a

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1. See *A Tribute to Justice Scalia*, FEDERALIST SOC'Y (Mar. 14, 2016), <http://www.fed-soc.org/multimedia/detail/a-tribute-to-justice-scalia>. In fact, when he was a law professor at the University of Chicago, he was the original faculty advisor to their student chapter of the Federalist Society. *Antonin Scalia, U.S. Supreme Court Justice and Former UChicago Law Professor, 1936-2016* (Feb. 14, 2016), <http://www.law.uchicago.edu/news/antonin-scalia-us-supreme-court-justice-and-former-uchicago-law-professor-1936-2016>.

2. The Federalist Society's tribute video is available at <http://www.fed-soc.org/multimedia/detail/a-tribute-to-justice-scalia>.

3. *Michael W. McConnell Biography*, STANFORD LAW SCHOOL, <https://law.stanford.edu/directory/michael-w-mcconnell/> (last visited July 29, 2016).

4. See Neil A. Lewis, *Court in Transition; Supreme Court Short List*, N.Y. TIMES (Sept. 5, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9901E6D61431F936A3575AC0A9639C8B63>.

person of faith in the legal profession.<sup>5</sup> He is a wonderful man and a tremendously accomplished and renowned legal scholar.<sup>6</sup> In a *Wall Street Journal* piece published after Justice Scalia's passing, Professor McConnell shared the following thoughts on the Justice's legacy:

Antonin Scalia . . . was the most influential Supreme Court justice of the past 30 years. Not because he had the votes. He was influential because he had a clear, consistent, persuasive idea of how to interpret the Constitution: It means what it says; it means what those who enacted it meant to enact. And Justice Scalia was influential because he wrote opinions with verve and good sense, in prose that any American could read and understand. He was the best writer the Supreme Court has ever known—and with justices like John Marshall, Oliver Wendell Holmes and Robert Jackson, that is saying a lot. He was the court's most withering logician. He showed us what a real judge can be, even on that most political court.<sup>7</sup>

Professor McConnell acknowledges that “Justice Scalia's text-and-history approach to constitutional interpretation sounds wonkish.”<sup>8</sup> He asks, “How can the attractions of text and history compare with getting quick national victories” on highly contested matters of law?<sup>9</sup> But he observes that “text and history are about more than fastidious jurisprudence. They are about democracy: allowing Americans to decide contentious questions for themselves, where the Constitution is, honestly read, silent.”<sup>10</sup>

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5. The Book of Haggai consists of a series of prophetic messages to the people of Israel after their return from exile. Professor McConnell's remarks and our discussion focused on a passage that includes these verses:

Now therefore says the LORD of hosts: Consider how you have fared. You have sown much, and harvested little; you eat, but you never have enough; you drink, but you never have your fill; you clothe yourselves, but no one is warm; and you that earn wages earn wages to put them into a bag with holes.

*Haggai* 1:5-6 (NRSV). I warmly recall how masterfully Professor McConnell applied this passage to our experiences as law students, called to persevere in our work and make sacrifices to achieve our goals, without losing sight of the purposes of God in our lives both then and in the future.

6. For an insightful profile of Professor McConnell, see Jamshid Ghazi Askar, *Scholar Michael W. McConnell Mixes Law, Religion*, DESERET NEWS (Jan. 9, 2011, 12:00 AM), <http://www.deseretnews.com/article/700099094/Scholar-Michael-W-McConnell-mixes-law-religion.html?pg=all>.

7. Michael W. McConnell, *Antonin Scalia Was Democracy's Legal Champion*, WALL ST. J. (Feb. 14, 2016, 3:46 PM), <http://www.wsj.com/articles/antonin-scalia-was-democracys-legal-champion-1455482790>.

8. *Id.*

9. *Id.*

10. *Id.*

Justice Scalia believed this silence should be filled by the voices of the people through their elected representatives, either through legislation or constitutional amendments. The Court, in his approach, should not use interpretation either to add to the constitutional text, to expand on the given rights or create new ones, or to remove from the text or whittle down the rights that it does create. Professor McConnell explains:

As Justice Scalia wrote in [one of his most famous dissents,] *Planned Parenthood v. Casey* (1992), “if in reality our process of constitutional adjudication consists primarily of making value judgments,” instead of “doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text,” then the issue is properly one for democratic debate. “The people know that their value judgments are quite as good as those taught in any law school—maybe better.” After all, [Justice Scalia] wrote, “value judgments should be voted on, . . . not dictated [by nine unelected judges].”<sup>11</sup>

As Chief Justice John Marshall wrote in 1803 in *Marbury v. Madison*, “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>12</sup> But as Professor McConnell observes:

[I]f constitutional controversies are governed by something other than law, if they are governed by “what the Court calls ‘reasoned judgment,’ which turns out to be nothing but philosophical predilection and moral intuition,” as Justice Scalia put it, there is no reason judges should decide. In other words, it would not be the province or duty of the judicial department to say what the law should be, or to resolve disagreements about philosophy or morality.<sup>13</sup>

There is no question that Justice Scalia was a conservative, both judicially and in his personal views.<sup>14</sup> And, as Professor McConnell notes, it is also true that “the results of his text-and-history approach [to constitutional interpretation] were often conservative. He believed in a colorblind Constitution; . . . he defended the presence of religion in the

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11. *Id.*

12. 5 U.S. 137, 177 (1803).

13. McConnell, *supra* note 7.

14. *Id.*; see also Ross Douthat, *Antonin Scalia: Conservative Legal Giant*, N.Y. TIMES (Feb. 13, 2006), [http://www.nytimes.com/2016/02/13/opinion/antonin-scalia-conservative-legal-giant.html?ref=opinion&\\_r=2](http://www.nytimes.com/2016/02/13/opinion/antonin-scalia-conservative-legal-giant.html?ref=opinion&_r=2) (observing that Justice Scalia’s “intellectual importance was compounded by the way he strained to be consistent, to rule based on principle rather than on his partisan biases — which made him stand out in an age when justices often seem as purely partisan as any other office holder”).

public square” under the Establishment Clause.<sup>15</sup> He authored the Court’s 2008 milestone majority opinion in *District of Columbia v. Heller*, reaffirming the historically-grounded understanding that the Second Amendment does indeed confer “an individual right to keep and bear arms.”<sup>16</sup> And he opposed congressional attempts to silence core First Amendment political speech rights through campaign finance prohibitions, joining the Court’s critically important 2010 decision in *Citizens United v. Federal Election Commission* protecting those rights.<sup>17</sup> On First Amendment freedom of speech, in opinions such as his brilliant 2000 dissent in *Hill v. Colorado*, he also spoke compellingly for the rights of pro-life individuals to engage in peaceful protests, when, under the standards articulated by a majority of his colleagues, such speech should be treated less favorably based on its content and context and have special restrictions imposed upon it.<sup>18</sup>

As much as I have long admired and looked up to Justice Scalia, I have had my own disagreements with his judicial opinions from time to time. For example, I believe he took too narrow a view of the scope of the Free Exercise Clause of the First Amendment in the 1990 *Employment Division v. Smith*<sup>19</sup> decision, a development which led to Congress’ adoption of the federal Religious Freedom Restoration Act of 1993 (“RFRA”)<sup>20</sup> to protect the rights of religious believers not merely to freely worship, but also to act in their daily lives in accordance with their religious beliefs without governmental interference unless the highest standards of strict scrutiny are satisfied.<sup>21</sup> Moreover, I think Justice Scalia tended to take too broad a view

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15. McConnell, *supra* note 7; see, e.g., Lee v. Weisman, 512 U.S. 577 (1992) (Scalia, J., dissenting).

16. 554 U.S. 570, 595 (2008).

17. 558 U.S. 415 (2010) (Scalia, J., concurring).

18. 530 U.S. 703 (2000) (Scalia, J., dissenting).

19. 494 U.S. 872 (1990).

20. 42 U.S.C. §§ 2000bb-2000bb-4 (2016).

21. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 137 S. Ct. 2754 (2014) (Alito, J., majority opinion joined by Justice Scalia). Subsequent to Justice Scalia’s passing, his likely fourth vote was keenly missed when the Court narrowly denied a petition for certiorari in *Stormans, Inc. v. Wiesman*, 579 U.S. \_\_\_\_ (2016). Justice Alito, joined by Chief Justice Roberts and Justice Thomas, dissented vigorously and, sounding a note of alarm for the future, described this denial as “an ominous sign” for religious freedom:

At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. There are strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose. And there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment, and this Court does not deem the case

of federal authority (and too narrow a view of state prerogatives) in cases decided under the *Erie/Hanna*<sup>22</sup> doctrine, which involves choice-of-state-or-federal law in the cases in federal court on the basis of diversity of citizenship when a Federal Rule of Civil Procedure<sup>23</sup> or Rule of Appellate Procedure<sup>24</sup> is involved. (Very interestingly, instead of Justice Scalia, it has been Justice Ruth Bader Ginsburg who has been hoisting the sail for Tenth Amendment federalism and state law in the *Erie/Hanna* cases.<sup>25</sup>) And, in some instances, I have thought that Justice Clarence Thomas or Justice Samuel Alito had the better reasoning in cases in which they diverged from Justice Scalia, whether by concurrence<sup>26</sup> or in disagreement on the judgment itself.<sup>27</sup>

But in each case involving constitutional interpretation, whether one might agree or disagree when it comes to the underlying public policy question at issue, Justice Scalia strove to call each case as he saw it based simply on the Constitution and the original public meaning of its text.<sup>28</sup> For example, in the face of our Nation's post-September 11 national security challenges, he authored a dissenting opinion advocating habeas corpus rights under the Constitution for American citizens detained as enemy

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worthy of our time. If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.

*Id.* at 1; see Kelsey Harkness, *A Supreme Court Justice's Dire Warning for Those Who Value Religious Freedom*, THE DAILY SIGNAL (June 28, 2016), <http://dailysignal.com/2016/06/28/justice-alito-those-who-value-religious-freedom-have-cause-for-great-concern>; see also David F. Forte, *Religious Liberty After Scalia*, FEDERALIST SOC'Y BLOG (May 6, 2016), <http://www.fed-soc.org/blog/detail/religious-liberty-after-scalia>; see generally MARY EBERSTADT, IT'S DANGEROUS TO BELIEVE: RELIGIOUS FREEDOM AND ITS ENEMIES (2016).

22. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460 (1965).

23. See, e.g., *Hanna*, 380 U.S. at 470-73.

24. See, e.g., *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 3 (1987).

25. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1995) (Ginsburg, J., majority opinion); *id.* (Scalia, J., dissenting). Compare also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (Scalia, J., plurality opinion) with *id.* (Ginsburg, J., dissenting). See generally Glenn S. Koppel, *The Fruits of Shady Grove: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999 (2011).

26. See, e.g., *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011) (Alito, J., concurring in part and concurring in judgment; majority opinion by Justice Scalia); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring in part and concurring in judgment; majority opinion by Justice Alito joined by Justice Scalia).

27. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2262 (2013) (Thomas, J., dissenting; majority opinion by Justice Scalia); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (Thomas, J., dissenting; majority opinion by Justice Scalia); *United States v. Stevens*, 559 U.S. 460 (2010) (Alito, J., dissenting; majority opinion by Chief Justice John Roberts joined by Justice Scalia).

28. See generally SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS (Kevin A. Ring ed., 2016); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006).

combatants.<sup>29</sup> He authored a significant number of the Court's majority opinions fortifying important safeguards for the rights of criminal suspects and defendants.<sup>30</sup> These included a series of landmark opinions decided under the Confrontation Clause of the Sixth Amendment; students who have taken my Evidence class will recall the landmark Justice Scalia opinion in *Crawford v. Washington*.<sup>31</sup> He also ruled in favor of strong protections for the First Amendment freedom of speech, even (and, in fact, especially) for speech and expressive conduct of the most offensive nature (for example, the burning of an American flag).<sup>32</sup>

However, as Professor McConnell observes, on each question for decision, Justice Scalia "offered reasons based on text and history, never on his own philosophy or moral intuitions."<sup>33</sup> He did not assert either his ability or his authority to read changes in the times among the body politic or to discern what the "right side of history" is on a given question and make judicial rulings on that basis. He consistently studied and offered his legal interpretations in good faith as a judge who was appointed to understand the law as it has been given, and not as a Platonic philosopher-king to proclaim mandates of the law as he believed it should be. In the constitutional republic designed by its Framers, effective separation of powers is and always has been a necessity (1) as a protection against tyranny, being a safeguard against the flaws of human nature by avoiding the vesting of too much authority in one person or branch, and (2) as a means of preserving, especially for those holding minority or unpopular views, the promise of freedom when faced with shifts in popular sentiment. Justice Scalia's jurisprudence constituted an essential call to conserve those core principles and hold fast to their enduring protections.

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29. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Scalia, J., dissenting). Justice Scalia's dissenting opinion was joined only by Justice John Paul Stevens. *Id.*

30. *See, e.g., Florida v. Jardines*, 133 S. Ct. 1409 (2013); *United States v. Jones*, 132 S. Ct. 945 (2012); *Blakely v. Washington*, 542 U.S. 296 (2004).

31. 541 U.S. 36 (2004); *see also* *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

32. *See Texas v. Johnson*, 491 U.S. 397 (1989) (Brennan, J., majority opinion, joined by Justice Scalia).

33. McConnell, *supra* note 7.



III. “A JUSTICE IN FULL”<sup>34</sup>

When Justice Scalia passed away in February, there were many tributes written and published about his life of public service, including by legal scholars and others who very much disagreed with him on the outcomes of his decisions and their jurisprudential approach.<sup>35</sup> Yet very sadly, but not surprisingly in our contentious and increasingly uncivil national culture, there were also outbursts of venom and hatred—including on social media. In an online op-ed in February, Yale Law Professor Stephen L. Carter, who had the great honor of clerking for Justice Thurgood Marshall, recounted with great dismay and disappointment some of these unfortunate outpourings that expressed celebratory glee at Justice Scalia’s death.<sup>36</sup> As Professor Carter described these messages he received in his own Twitter account, they were not simply “disagreement or disrespect . . . [They were] actual hate. He was an ignorant waste of flesh, wrote one young fool. His death was the best news in decades, cheered another. Then there was the woman who just had to tell the world that she felt safer now than she had at the death of Osama bin Laden. And several people expressed the hope the *hope!* that Clarence Thomas would die next.”<sup>37</sup> Professor Carter, after recounting some of his recollections of Justice Marshall and the respect the Justice had for his colleagues on the Court (including those who were frequently in disagreement with him), concluded that “[t]o trash the justices because we don’t like their votes (usually on a handful of issues) is to diminish the majesty of the court itself. The more we do it, the less reason there is for anybody to respect the justices when at last whichever side we’re on has a majority.”<sup>38</sup>

This is such an important point and message not only for you as law students, but also for the entire legal profession. In his own relationship with his colleagues on the Court, particularly those with whom he had the most frequent and significant disagreements about the law (including those literally involving life and death), Justice Scalia modeled for us how this

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34. Justice Scalia was so-described in the title of a *National Review Online* remembrance symposium published soon after his passing. NRO Symposium, *Antonin Scalia – A Justice in Full*, NAT’L REVIEW ONLINE (Feb. 29, 2016, 4:00 AM), <http://www.nationalreview.com/article/432005/antonin-scalia-supreme-court-justice-remembrances>.

35. See, e.g., Lawrence H. Tribe, *The Legacy of Antonin Scalia—The Unrelenting Provoker*, BOSTON GLOBE (Feb. 17, 2016), <https://www.bostonglobe.com/opinion/2016/02/17/the-legacy-antonin-scalia-unrelenting-provoker/mH40dhHDvEPXCzyXCLfxqI/story.html>.

36. Stephen L. Carter, *Scalia’s Grave-Dancers Deserve a Harsh Verdict*, BLOOMBERG VIEW (Feb. 14, 2016, 11:06 AM), <http://www.bloomberg.com/view/articles/2016-02-14/justice-scalia-s-death-brings-out-the-worst-in-opponents>.

37. *Id.*

38. *Id.*

can and should be done. Yes, his dissenting opinions were often quite scathing in his assessment of the majority's conclusions and reasoning, and on occasion his frustration in defeat on matters of core jurisprudential import came through perhaps too bluntly.<sup>39</sup> But in his professional and personal relationships on the Court, his colleagues have long attested to his caring concern, his humanity, and his joie de vivre and good humor. Most famously, Justice Ruth Bader Ginsburg and Justice Scalia were close friends for decades, and greatly enjoyed each other's company on many outings and excursions together (including attending the opera, sharing gourmet dinners at their homes, and making a vacation trip to Africa).<sup>40</sup> In a *National Review* remembrance symposium entitled "A Justice in Full," which contained personal memories about Justice Scalia from multiple colleagues, friends, and family members, Justice Ginsburg told the following stories:

[On] December 12, 2000, the day the Court decided *Bush v. Gore*, I was in chambers, exhausted after the marathon: review granted Saturday, briefs filed Sunday, oral argument Monday, opinions completed and released Tuesday. Justice Scalia and I were on opposite sides. The Court did the right thing, he had no doubt. I disagreed and explained why in a dissenting opinion. Around 9 P.M. the telephone, my direct line, rang. It was Justice Scalia. He didn't say, "Get over it." Instead, he asked, "Ruth, why are you still at the Court? Go home and take a hot bath." Good advice I promptly followed.

Among my favorite Scalia stories [Justice Ginsburg recalled] is that, when President Clinton was mulling over his first nomination to the Supreme Court, Justice Scalia was asked, "If you were stranded on a desert island with a Court colleague, whom would you prefer, Larry Tribe or Mario Cuomo?" Scalia answered

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39. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) (criticizing some of the prose in the Court's 5-4 majority opinion creating a constitutional right to same-sex marriage, by stating that if he had to accept such language in an opinion, "even as the price to be paid for a fifth vote," he would "hide [his] head in a bag"). Although I agree as a matter of constitutional law with Justice Scalia's dissenting opinion in *Obergefell*, I also believe this rhetorical choice detracted from, rather than enhanced, the power of his legal argument, and that the other dissents (which Justice Scalia also joined) offered the most compelling and convincing challenges to the legal analysis and conclusions of the majority opinion. Cf. *id.* (Roberts, C.J., dissenting); *id.* (Thomas, J., dissenting); *id.* (Alito, J., dissenting).

40. See Ariane de Vogue, *Scalia-Ginsburg Friendship Bridged Opposing Ideologies*, CNN (Feb. 14, 2016, 10:51 AM), <http://www.cnn.com/2016/02/14/politics/antonin-scalia-ruth-bader-ginsburg-friends>.

quickly and distinctly: “Ruth Bader Ginsburg.” Within days, the president chose me.<sup>41</sup>

Justice Stephen Breyer, another colleague with whom Justice Scalia often disagreed on the most controversial cases, told the following story in the same symposium of remembrances:

We would sometimes debate our philosophical differences in public, once before the Senate Judiciary Committee, once on a football field before several hundred students in Lubbock, Texas. He would explain the benefits of “originalism.” I would respond that George Washington was not aware of the Internet. He would reply, “Actually, I knew that.” And, sometimes conceding that originalism, too, had imperfections, he would add that, comparatively speaking, it’s like the camper who sees his friend lacing up his running shoes: “What are you doing?” he asks. “There’s a bear coming,” answers the friend. “You can’t outrun a bear,” he replies. “True, but I can outrun you.”<sup>42</sup>

In a February online article published in *The Public Discourse*, Princeton University and Harvard Law Visiting Professor Robert P. George offered additional perspective on Justice Scalia’s personal qualities:

What was Nino Scalia like as a person? He was a man of limited patience and great compassion. To say that he “did not suffer fools gladly” would be an understatement. He had no tolerance for slouchers, slackers, rent-seekers, time-servers, or free riders, and he wouldn’t bend the law for anybody—even if he personally believed the law too harsh. But as his friends of all political persuasions unanimously attest, he was capable of great kindness and generosity. He was a limited-government man, both as a matter of political philosophy and constitutional law, but he deeply believed in personal responsibility, including the duty of charity to those who are suffering or in need.

A devout Catholic, Scalia neither hid nor flaunted his faith. When asked about his beliefs, he spoke of his Christian commitments with no hint of embarrassment. He was not ashamed of the Gospel. In a widely publicized speech, he reminded his fellow Christians of the teachings of St. Paul, urging them to “have the

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41. NRO Symposium, *supra* note 34.

42. *Id.*

courage to have your wisdom be regarded as stupidity: Be fools for Christ.”<sup>43</sup>

#### IV. A PERSONAL REFLECTION

I never had the privilege of meeting Justice Scalia. But I do remember how, when I attended law school at William & Mary from 1990 to 1993, and he was serving his fourth through seventh of his eventual thirty years on the Court, he powerfully shaped my learning and experiences as a law student. If you will allow me, I would like to take this opportunity to share some personal background and perspective on how Justice Scalia’s work and example influenced me then and in the years that followed.

I attended law school only a few years in the aftermath of the 1987 confirmation battle against the originalist Judge Robert Bork, whose appointment to the Supreme Court was narrowly defeated after a vicious public campaign of character attacks, led by Senator Ted Kennedy among others.<sup>44</sup> Judge Bork was one of the most (if not the most) objectively qualified individuals ever placed in nomination for the Court, and he was a man of principle and integrity.<sup>45</sup> The zeal with which Judge Bork’s

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43. Robert P. George, *Antonin Scalia: An American Originalist*, PUBLIC DISCOURSE (Feb. 16, 2016), <http://www.thepublicdiscourse.com/2016/02/16478>. Justice Scalia alluded to a Biblical passage encouraging followers of the newly-emerging Christian faith to persevere in a spirit of humility while engaging a dominant culture that opposed them:

For I think that God has exhibited us apostles as last of all, as though sentenced to death, because we have become a spectacle to the world, to angels and to mortals. We are fools for the sake of Christ. . . . When reviled, we bless; when persecuted, we endure; when slandered, we speak kindly.

1 *Corinthians* 4:9-12 (NRSV).

44. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 267-349 (1990) (documenting and discussing the nature, scope, and history of the campaign against Judge Bork’s nomination to the Court).

45. This assessment was shared not only by Judge Bork’s supporters, *see, e.g.*, Edwin Meese III, *The Double Standard in Judicial Selection*, 41 U. RICH. L. REV. 369, 370 (2007) (observing that Judge Bork “was one of the most distinguished and qualified people ever nominated to the Supreme Court: Yale law professor, leading scholar in antitrust and constitutional law, Solicitor General of the United States, and a judge on the United States Court of Appeals for the District of Columbia Circuit”), but also by prominent and fair-minded legal scholars who strongly disagreed with his judicial philosophy:

[W]hen judged by normal personal and professional criteria, Robert Bork is among the best qualified candidates for the Supreme Court of this or any other era. Few nominees in our history compare with him in the range of their professional accomplishments—as public servant, private practitioner, appellate judge, legal scholar. Few compare in the seriousness of their lifelong engagement with the fundamental questions of constitutional law. Of course, Bork’s answers to these questions are controversial. But who can be surprised by that? Even those, like myself, who disagree with Bork both can and should admire the way he has woven theory and practice, reason and passion, into a pattern that expresses so eloquently our deepest hopes for a life in the law. The Republic needs more people like Robert Bork.

character was attacked was driven by ideologically partisan concerns that he would join other Justices in overruling the 1973 Court opinion in *Roe v. Wade*, which had found a constitutional right to abortion in the unenumerated “penumbras” of its text, and had broadly swept away most state laws that sought to protect unborn human lives.<sup>46</sup> It was this very vision of the Court’s role in American society that Justice Scalia’s jurisprudence has warned against so emphatically—that, in the absence of firm grounding in the ratified Constitution or amendments adopted thereto, a body of nine federal judges could and should remove such critical moral questions from the states or the people. In so doing, the Court has enormously raised the stakes for each nomination and confirmation of a Justice, frequently turning the process into a political firestorm.

In 1990, the summer before I began law school, I studied Judge Bork’s *The Tempting of America*, an outstanding book that sets out his approach to constitutional interpretation based on original understanding and reviews the Court’s history through this jurisprudential lens.<sup>47</sup> I anticipated, accurately, that my own views not only of law, but also of fundamental moral questions and beliefs, would be in a distinct minority in my law school, William & Mary. I nevertheless resolved to be myself as much as I could, and to find others who shared my beliefs and values for support, encouragement, and camaraderie. I also resolved to learn as well and as much as I could from the faculty and fellow students who thought differently, to hear their perspectives and analysis of the law, and to maintain an open mind for the refining and transformation of my own ideas. This was true not only in my Constitutional Law classes, but in many other fora my legal education afforded me for such exchanges.

In a November 2015 talk at the University of St. Thomas Law School, Justice Scalia said that he wrote his dissents “mainly for you guys, for law students.”<sup>48</sup> He hoped to mold and influence the next generation of lawyers in the profession through his judicial philosophy and his arguments, and to encourage them. I found this to be very true when I was a law student. After my second year of law school, in the summer of 1992, the Court

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It is a tragedy that the Republic should repay him for his decades of service by publicly humiliating him.

Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988).

46. *Roe v. Wade*, 410 U.S. 113, 129 (1973); see BORK, *supra* note 44, at 111-17, 337-43 (critiquing *Roe* and describing the outpouring of concern from *Roe*’s supporters that he would overrule the decision if confirmed).

47. BORK, *supra* note 44.

48. Thomas Berg, *Antonin Scalia: Devout Christian, Worldly Judge*, CHRISTIANITY TODAY (Feb. 17, 2016), <http://www.christianitytoday.com/ct/2016/february-web-only/antonin-scalia-devout-christian-worldly-judge.html>.

issued its ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>49</sup> re-affirming the central holding in *Roe v. Wade*.<sup>50</sup> I was deeply moved in sadness and disappointment by the Court’s decision not to overrule *Roe*. I keenly felt the weight of the injustice I believed had been done in an arena—the law—to which I was directing my education and future professional life. Justice Scalia wrote a passionate and powerful dissent in *Casey*,<sup>51</sup> perhaps the most famous of the many opinions that established his reputation as an emerging Great Dissenter.<sup>52</sup> (This title has also been bestowed on Justice John Marshall Harlan,<sup>53</sup> who served on the Court in the late Nineteenth and early Twentieth Centuries and whose best known dissent was in the 1896 decision *Plessy v. Ferguson*.<sup>54</sup>) Joined by Chief Justice Rehnquist and Justices White and Thomas, Justice Scalia’s brilliant *Casey* dissent mounted a scathing critique of the joint opinion’s legal reasoning and its justifications for the application of stare decisis.<sup>55</sup> It also offered a compelling account, grounded in *The Federalist Papers* and the founding constitutional framework, for why the federal judiciary was so exceeding its bounds by foreclosing the ability of states to enact robust protections for unborn human lives.<sup>56</sup> I found his dissent to be not only constitutionally convincing, but morally and emotionally cathartic. A judicial figure as bright and as bold as Justice Scalia had responded to what I believed to be a grave wrong in the law with words I wished I could have

49. 505 U.S. 833 (1992).

50. 410 U.S. 113 (1973).

51. *Casey*, 505 U.S. at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

52. See, e.g., Thomas F. Shea, *The Great Dissenters: Parallel Currents in Holmes and Scalia*, 67 MISS. L.J. 397, 398 (1997) (observing that Justice Oliver Wendell Holmes, who was the first Justice to be described as a “great dissenter,” had “earned his sobriquet not by the volume of his dissenting opinions, but by the fact that many of them, over the course of time, were adopted as controlling authority by new majorities of Supreme Court Justices”; and opining that “[o]nly time will tell whether the same outcome awaits the dissents of Justice Scalia, but a trend in that direction may now be discerned.”); see generally SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT’S WITTIEST, MOST OUTSPOKEN JUSTICE (Kevin A. Ring ed., 2004).

53. See, e.g., ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT 32 (1974) (describing Justice Harlan’s dissent in *Plessy* as “prophetic”); FRANK LATHAM, THE GREAT DISSENTER: SUPREME COURT JUSTICE JOHN MARSHALL HARLAN (1833-1911) at viii (1970) (describing Justice Harlan’s dissents as “miles ahead of [Justice] Holmes”); see generally Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 800-01 (2000) (discussing the *Plessy* dissent and “John Marshall Harlan the Elder”).

54. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (adopting the “separate but equal” rationale in upholding the constitutionality of state laws imposing racial segregation); *id.* at 559 (Harlan, J., dissenting) (rejecting the majority’s “separate but equal” rationale and stating “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens”).

55. *Casey*, 505 U.S. at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

56. *Id.*

written myself, or joined with to form a majority of five, if only I were a Justice of the Supreme Court.

I was comforted, I was inspired, and I hoped for the future.<sup>57</sup>

I graduated from law school in 1993. Living and practicing law for seventeen years in a comparatively secular and “Blue State” like Delaware<sup>58</sup> and in a legal profession that tends to be quite “Blue” as well,<sup>59</sup> I was all too aware my evangelical Christian faith and my political conservatism would make me quite different than most of my superiors and my peers, and looked down upon by some. However, each of these distinctive traits was an essential element in my developing professional identity. Although I made no secret of my worldviews and framework for understanding life and the law, I exercised careful judgment about what to express, to whom to express it, and on which occasions. But I was resolved never to compromise my core values for the sake of conformity. When speech, including in dissent, has been called for in the arising moment, I have strived never to silence my conscience, but instead I have sought, with good judgment, to offer the words I believe are needed. And when I was

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57. Although Justice Scalia’s remaining tenure on the Court saw an occasional victory for those dedicated to the protection of unborn human lives, *see* *Gonzales v. Carhart*, 550 U.S. 124 (2007), and freedom of speech for those expressing pro-life viewpoints, *see* *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), *Roe* and *Casey* have survived as precedents. Subsequent to Justice Scalia’s passing, the Court decided a case that had been argued while he remained on the bench, and by a vote of 5-3 struck down two provisions in a Texas health and safety statute regulating abortion providers. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Even with Justice Scalia’s likely vote to uphold the statutory provisions, there would still have been a majority of Justices willing to conclude that such basic government health and safety regulations pertaining to abortion violate the United States Constitution. Now writing twenty-four years after reading Justice Scalia’s *Casey* dissent, I remain hopeful for a future change in the Court’s jurisprudence to overrule *Roe v. Wade*. But I have also begun to fear this may be a milestone of legal justice I will not live to see fully realized.

58. *See* Frank Newport, *New Hampshire Now Least Religious State in U.S.*, GALLUP (Feb. 4, 2016), <http://www.gallup.com/poll/189038/new-hampshire-least-religious-state.aspx> (reporting 2015 polling results showing Delaware ranked thirty-third among the states in religiosity, with North Dakota ranking seventeenth); Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, GALLUP (Feb. 3, 2016), <http://www.gallup.com/poll/188969/red-states-outnumber-blue-first-time-gallup-tracking.aspx> (reporting 2015 polling results showing Delaware as the thirteenth most Democratic state, with North Dakota ranking as the fourth most Republican state).

59. *See* Adam Liptak, *Legal Group’s Neutrality Is Challenged*, N.Y. TIMES (Mar. 30, 2009), [http://www.nytimes.com/2009/03/31/us/31bar.html?\\_r=0](http://www.nytimes.com/2009/03/31/us/31bar.html?_r=0) (observing the American Bar Association “takes public and generally liberal positions on all sorts of divisive issues,” and “studies suggest that [judicial] candidates nominated by Democratic presidents fare better in the group’s ratings than those nominated by Republicans”); *see also* Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *FORDHAM L. REV.* 1339, 1364 (2006) (concluding that “[a] legal profession identified with the Blue State vision of excluding values from the public square has little to contribute if the public square is inevitably full of value conflict and debate,” and that “[t]he legal profession . . . must abandon the Blue State rhetoric if it is to play a leading role in helping transform value conflicts from culture wars to civil and respectful disagreement”).

privileged to join the faculty of this School of Law in 2010, this commitment did not change, nor will it ever.

## V. A CALL FOR FREEDOM

One may come to understand much about the strength (or weakness) of a society and a culture from the way that it treats minority and dissenting views on matters of significance. In the years since I graduated from law school, and especially in the last decade, it has been disheartening to see growing efforts to restrict, or to chill into silence, viewpoints that are opposed by a majority, or by a strong plurality or minority faction that claims either a legal or a moral right to suppress the speech of others.<sup>60</sup> Most sadly, this trend has been highly pronounced in colleges and universities, the very institutions that should be the most dedicated to promoting open marketplaces for ideas.<sup>61</sup> Around the country, it has become all too common to encounter not only students, but also faculty and school administrators, promoting policies of increasing campus censorship (whether *de jure* or *de facto*) of ideas or speakers they disfavor.<sup>62</sup> It has also become all too common to hear about intimidating tactics and suppression of the speech of those whose opinions are contrary to the general will of the campus academic subculture and the viewpoints it may prefer.<sup>63</sup> In our national political culture, it has become too common for figures who lead emerging majorities or similarly powerful factions to pronounce that the time for debate is over, and that those who have opposed them must either be silent or suffer retribution for their speech.<sup>64</sup> And even

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60. This phenomenon is hardly a new one in the United States. *See, e.g.*, THOMAS SOWELL, *INSIDE AMERICAN EDUCATION: THE DECLINE, THE DECEPTION, THE DOGMAS* 174-201 (1993) (chapter on “Ideological Double Standards” for expression by faculty, students, and guest speakers at American colleges and universities). But commentators both right-of-center, *see, e.g.*, MARY KATHARINE HAM & GUY BENSON, *END OF DISCUSSION: HOW THE LEFT’S OUTRAGE INDUSTRY SHUTS DOWN DEBATE, MANIPULATES VOTERS, AND MAKES AMERICA LESS FREE (AND FUN)* (2015), and left-of-center, *see, e.g.*, KIRSTEN POWERS, *THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH* (2015), have expressed serious concerns about recent trends and justifications offered for seeking to silence disfavored conservative or religious viewpoints, and even punishing those who express or act on the basis of such convictions.

61. *See, e.g.*, Conor Friedersdorf, *The Glaring Evidence That Free Speech Is Threatened on Campus*, *THE ATLANTIC* (Mar. 4, 2016), <http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825>; Greg Lukianoff, *Campus Free Speech Has Been in Trouble for a Long Time*, *CATO UNBOUND* (Jan. 4, 2016), <http://www.cato-unbound.org/2016/01/04/greg-lukianoff/campus-free-speech-has-been-trouble-long-time>.

62. *See* Friedersdorf, *supra* note 61; Lukianoff, *supra* note 61.

63. *See* Friedersdorf, *supra* note 61; Lukianoff, *supra* note 61.

64. *See* POWERS, *supra* note 60, at 1-20, 49-67 (chapters entitled “Repressive Tolerance” and “Illiberal Intolerance and Intimidation”); *id.* at 21 (“In the illiberal attack on free speech, victory is silence. Any person who dissents from the illiberal left’s settled dogma is viewed as an



as technology has made possible more avenues for social communication and exchanges of ideas than ever before, we see persons who express disfavored viewpoints increasingly being subject to swarming and aggressive online and social media attacks (including sometimes threats of physical or financial harm) in retaliation for speaking their mind.<sup>65</sup> Whether the prevailing ideas are liberal or conservative, left or right, the urges and actions to silence disagreement about ideas are absolutely wrong, and terribly contrary to our founding constitutional principles and our American traditions.

But with full awareness of those very concerning national trends, I continue to act in faith and with full confidence in our own leadership and institutional environment at the University of North Dakota School of Law, and the strong support that exists here for academic freedom and for freedom of speech. This is why I am so enthusiastic about our student chapters of the Federalist Society and the American Constitution Society, as well as other student organizations, and about the opportunity events like today's "Buzz" session give us to express and hear points of view we otherwise might not. This School of Law's support for genuine freedom of speech and for genuine viewpoint diversity should be celebrated; but it should also never be taken for granted. Its endurance in the long term depends in very significant ways on a critical mass of fair-minded people being willing, on principle, to accept that there will be divergence and

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enemy to be delegitimized, demonized, and dismissed."'). As Professor Stephen L. Carter has observed:

[F]or whatever movement holds sway over the apparatus of the secular sovereign, loyalty is defined as allegiance and, all too often, allegiance as agreement; to dispute the political program of the moment is to be un-American. It is as though we have forgotten the advice of James Madison in *Federalist No. 10*, that "the first object of government" is to protect our ability to reach different conclusions, because the alternative is to create a society in which every citizen holds "the same opinions, the same passions, and the same interests."

STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 16 (1998).

65. See, e.g., Madeline Buckley, *Threat Tied to RFRA Prompt[s] Indiana Pizzeria to Close Its Doors*, INDYSTAR (Apr. 3, 2015, 4:33 PM), <http://www.indystar.com/story/news/2015/04/02/threats-tied-rfra-prompt-indiana-pizzeria-close-doors/70847230> (recounting online attacks made against Memories Pizza in Indiana, including threats of violence, in response to its owner's answers to a television news reporter's hypothetical question, posed during a controversy over the state's recently adopted religious freedom statute, about whether her pizzeria would cater a same-sex wedding if requested); HAM & BENSON, *supra* note 60, at 219-36 (recounting stories of retaliation against individuals for their speech and religious convictions relating to same-sex marriage, including how the discovery of a 2008 donation in support of the successful California Proposition 8 led to demands, from employees and activist groups, that Mozilla CEO Brendan Eich renounce his convictions on the issue or be fired by the board of directors; Eich, who is Catholic, refused to do so and then resigned); POWERS, *supra* note 60, at 11-12 (more details about the social media campaign attacking Eich); see also EBERSTADT, *supra* note 21, at 44-69 (chapter entitled "Acclaiming 'Diversity' vs. Hounding the Heretics").

disagreement about matters of great consequence, and that conformity of thought is not the price of admission to a conversation. It requires people of courage and resolve doing the most that they can to ensure that we do not go down the path other institutions of higher education have been traveling, including, in recent times, some law schools.<sup>66</sup> I am fully resolved to be vigilant about academic freedom and freedom of speech at the University of North Dakota School of Law, both for faculty and for students, and to always be ready to make the case to ensure these core First Amendment values continue to be protected not only in theory but in practice.

## VI. CONCLUSION

It is my sincere hope that, whether your own beliefs and convictions have some things in common with mine or are completely different, you will look for opportunities to listen to and learn from others in the law, and to grow from those engagements. In doing this over the course of my now almost twenty-three years in the legal profession, I have seen my views in important respects either change from what they had been or become deeper and more resolutely held as foundational principles. But I also beseech you not to allow the sway of opinions that may be popular among your professors or your peers to turn you from your beliefs or convictions, or

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66. See, e.g., Luke Milligan, *UofL Law School Is No Longer Neutral*, COURIER-JOURNAL (Jan. 17, 2016, 4:11 PM), <http://www.courier-journal.com/story/opinion/2016/01/13/commentary-uofl-law-school-no-longer-neutral/78655014> (law school faculty member critiquing the University of Louisville Brandeis School of Law's recently adopted program of "ideological branding," identifying itself as a "compassionate" law school favoring "progressive values" and "social justice," and with a new 1L-student orientation that "left students wondering if they'd need to sacrifice personal privacy, political values, and deeply held religious convictions in order to succeed at law school"); see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) (Alito, J., dissenting, joined by Chief Justice Roberts and Justices Scalia and Thomas) (responding to the majority opinion's upholding the University of California, Hastings College of the Law's refusal to register a Christian Legal Society student organization, purportedly because the required statements of faith and community life for its leaders and members violated an "accept-all-comers policy": "The proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.' Today's decision rests on a very different principle: no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.") (quoting *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting)); *Nationwide: "All-comers" Policies Jeopardize Free Association*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 2, 2013), <https://www.thefire.org/cases/nationwide-all-comers-policies-jeopardize-free-association> (collecting articles on recent campus controversies involving "all-comers" policies and state legislative responses to protect First Amendment freedom of speech and association); cf. Adam Steinbaugh, *After Harvard Law School Reaffirms Commitment to Free Speech, a 'Little Sign War' Erupts*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 1, 2016), <https://www.thefire.org/after-harvard-law-school-reaffirms-commitment-to-free-speech-a-little-sign-war-erupts> (recounting a controversy at Harvard Law School in which "Reclaim Harvard Law," a group of law students who had occupied for six weeks and renamed a lounge in the student center, tore down signs posted in the lounge by another student who objected to their occupation).

cause you to be silent, simply because you are or perceive yourself to be in the minority. Stand firmly for what you believe, treat others who disagree with you with kindness and respect (even if they do not always reciprocate), and look for occasions that may come to you—often unexpectedly and without warning, as Justice Scalia’s passing was for me to speak and act for your ideas and your convictions.