SCALIA AND DEMOCRACY

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I am both grateful and thrilled to be afforded the honor of delivering this opening lecture for the inaugural Scalia Forum at the law school that bears Justice Antonin Scalia's name. After our patron saint, Sir Thomas More, Justice Scalia was and remains my next best role model as a judge and public servant. I finished law school the year after his appointment to the Supreme Court, so for me, Justice Scalia was the American judge "for all seasons."[1]

Many have praised Justice Scalia since his untimely death in 2016.[2] Scholars and jurists alike have lauded his enormous contributions to

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[*] Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit. I thank my law clerk, Eric Palmer, for his superb research assistance and my former law clerk, Taylor Meehan, who clerked for Justice Scalia during the October 2015 Term, for her helpful comments.

[1] ROBERT BOLT, A MAN FOR ALL SEASONS (1990).

[2] *See, e.g.*, *In Memoriam: Justice Antonin Scalia (1936–2016)*, 84 U. CHI. L. REV. (SPECIAL ISSUE) 2163 (2017); *Federal Courts, Practice & Procedure Symposium: Justice Scalia and the Federal Courts*, 92 NOTRE DAME L. REV. 1907 (2017); *Online Scalia Symposium*, 101 MINN. L. REV. HEADNOTES 1 (2016). The Notre Dame symposium included an address by then-Judge Brett Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907 (2017), and articles by several law professors (all but one former law clerks of Justice Scalia). *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945 (2017); Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977 (2017); Kevin C. Walsh, *The Limits of* Reading Law *in the Affordable Care Act Cases*, 92 NOTRE DAME L. REV. 1997 (2017); Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013 (2017); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053 (2017); Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077 (2017); William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107 (2017); Bradford R. Clark, Boyle *as Constitutional Preemption*, 92 NOTRE DAME L. REV. 2129 (2017); Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143 (2017); Adrian Vermeule, *Reviewability and the "Law of Rules": An Essay in Honor of Justice Scalia*, 92 NOTRE DAME L. REV. 2163 (2017). The *Harvard Law Review* published tributes by the Chief Justice and two associate justices, John G. Roberts, Jr., *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1 (2016); Ruth Bader Ginsburg, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 2 (2016); Elena Kagan, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 5 (2016); and four law professors (the first two former law clerks), Rachel E. Barkow, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 9 (2016); John F. Manning, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 14 (2016); Martha Minow, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 20 (2016); Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 22 (2016). The *Yale Law Journal* published tributes by three associate justices, Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600 (2017); Samuel Alito, *A Tribute to Justice Scalia*, 126 YALE L.J. 1605 (2017); Sonia Sotomayor, *A Tribute to Justice Scalia*, 126 YALE L.J. 1609 (2017); and two law professors (the second a former law clerk), Stephen L. Carter, *Scalia, J., Dissenting: A Fragment on Religion*, 126 YALE

constitutional[3] and statutory interpretation,[4] administrative law,[5] and legal writing.[6] Courts now regularly cite his treatise on interpreting written laws[7] as authoritative[8] and undoubtedly will continue to do so for years to come. And Americans from all walks of life have enjoyed and admired the recently published collections of his speeches[9] and his reflections on faith.[10]

But not everyone is an admirer. Justice Scalia had and still has his critics. *They* have said things too—sometimes harsh things. I plan to answer some of those critics, as he would have done, with enthusiasm.

Justice Scalia never shied away from a good debate or truth-telling. As every first-year student quickly learns, Justice Scalia's dissents provide a master class in legal writing. A close mutual friend, Judge Marty Feldman, told me that years ago Justice Scalia once mused about changing careers and

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L.J. 1612 (2017); Christine Jolls, *The Real Justice Scalia*, 126 YALE L.J. 1629 (2017). *See also* Steven G. Calabresi, *The Unknown Achievements of Justice Scalia*, 39 HARV. J.L. & PUB. POL'Y 575, 575 (2016) (declaring Scalia "the greatest Justice ever to sit on the Supreme Court"); Paul G. Mahoney, *A Tribute to Antonin Scalia*, 102 VA. L. REV. 285 (2016); Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24 (2016); Ian Samuel, *The Counter-Clerks of Justice Scalia*, 10 N.Y.U. J.L. & LIBERTY 1 (2016); Jeffrey S. Sutton, *Remembering Justice Scalia*, 69 STAN. L. REV. 1595 (2017).

3 Professor Michael Ramsey lauded Scalia as "the leading judicial theorist and advocate of originalism of his era," and "along with Justice Clarence Thomas, the leading judicial practitioner of originalism of his era." Ramsey, *supra* note 2, at 1945.

4 Two of the foremost (perhaps *the* foremost) scholars of statutory interpretation, Professors William Eskridge and John Manning, recognized Scalia's contributions to statutory interpretation as singular. Eskridge described Scalia as "the leading theorist as well as practitioner of . . . *the new textualism*" and credited him with "generat[ing] great debates," which have led to a "substantial consensus" that "the text [is] the starting point for statutory interpretation" and that judges should "follow statutory plain meaning if the text is clear." William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)). Manning credited Scalia with "promoting statutory textualism" with "surprising success in a legal culture that had not taken [that] idea all that seriously before his arrival on the Court." John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 747 (2017). *See also* William H. Pryor Jr., *Textualism After Antonin Scalia: A Tribute to the Late Great Justice*, 8 FAULKNER L. REV. 29, 34 (2016) (describing Scalia's "greatest achievement" as "mak[ing] us think rigorously about the interpretation of written laws, particularly statutes").

5 "Justice Antonin Scalia contributed more to the development of administrative law than any other Justice in history." Richard J. Pierce, Jr., *Justice Scalia's Unparalleled Contributions to Administrative Law*, 101 MINN. L. REV. HEADNOTES 66, 66 (2016).

6 "Justice Scalia was a transformational jurist for many reasons, but foremost among them was his skill as a writer and rhetorician." Jonathan F. Mitchell, *Remembering the Boss*, 84 U. CHI. L. REV. 2291, 2296 (2017).

7 ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

8 *See, e.g.*, Lockhart v. United States, 136 S. Ct. 958, 963 (2016); *id.* at 970 (Kagan, J., dissenting).

9 ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED (Christopher J. Scalia & Edward Whelan eds., 2017).

10 ANTONIN SCALIA, ON FAITH: LESSONS FROM AN AMERICAN BELIEVER (Christopher J. Scalia & Edward Whelan eds., 2019).

becoming a talk radio host. The entertainment value of the *Nino Scalia Show* would have been high, no doubt.

In the tradition of the Legal Realists, some of Justice Scalia's critics have sought to expose the belief system that supposedly explained his jurisprudence. To these critics, there must be some reason—some extralegal philosophy—that caused Justice Scalia to judge as he did. Justice Scalia's opinions were conservative activism, they say. Or he was a libertarian in a black robe, they declare. Or Catholicism is the key that unlocks his approach to judging, they suppose.[11]

These critics are wrong. Justice Scalia favored a limited judiciary and both originalism and textualism to serve that end. But his approach had nothing to do with furthering political conservatism, libertarian philosophy, or Catholic beliefs. He rejected the notion that his political or religious views should play any role in the exercise of his judicial office.

Instead, time and again, Justice Scalia defended—with wit and wisdom—his profound respect for the first three words of the Constitution he

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[11] In a controversial op-ed, Professor Geoffrey Stone suggested that Justice Scalia's vote to uphold the Partial-Birth Abortion Act of 2003 was motivated by his Catholic faith. *See* Geoffrey R. Stone, *Our Faith-Based Justices*, HUFFINGTON POST (Apr. 20, 2007, 2:45 PM), https://www.huffingtonpost.com/geoffrey-r-stone/our-faith-based-justices_b_46398.html. Bruce Murphy, Linda Greenhouse, and Dahlia Lithwick have expressed a similar view. *See* BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 364–65 (2014); Interview by Bill Moyers with Professor Linda Greenhouse, on *Moyers & Company* (PBS television broadcast July 11, 2014), http://billmoyers.com/episode/is-the-supreme-court-out-of-order/ ("I think they're coming from, you know, a narrow worldview. I mean, you know, let's be impolite and point out that all five of them are Roman Catholic and in service of an agenda by a couple of presidents who were elected on a party, Republican Party platform that called for picking judges who would overturn Roe against Wade. And you know, being Catholic is a fair proxy for that in the minds of judge pickers."); Dahlia Lithwick, *Scalia v. Scalia: Does His Faith Influence His Judicial Decision Making?*, THE ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/scalia-v-scalia/361621/; *cf.* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 109 (2009) (mentioning Justice Scalia's "deep-seated conservativism and Christian orthodoxy," but declining to attribute his jurisprudential views to his religious beliefs). Some critics have gone even further. Professor Gary Peller, a member of the Critical Legal Studies movement, described Justice Scalia as a "defender of privilege, oppression and bigotry, one whose intellectual positions were not brilliant but simplistic and formalistic." David Lat, *Controversy Erupts at a T14 Law School over How (or Even Whether) to Mourn Justice Scalia*, ABOVE THE LAW (Feb. 17, 2016, 6:21 PM), https://www.abovethelaw.com/2016/02/controversy-erupts-at-a-t14-law-school-over-how-or-even-whether-to-mourn-justice-scalia/2/. Peller is, of course, wrong, but I must give him credit on one small point. Although his jurisprudence was anything but simplistic, Justice Scalia would have regarded the label "formalistic" as a badge of honor, not as an epithet. As he once said, "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (1997) [hereinafter Scalia, *Common-Law Courts*]. Justice Scalia declared, "Long live formalism. It is what makes a government a government of laws and not of men." *Id.*

swore to uphold: "We the People."[12] He was a true believer in the sovereignty of the American people and their right to self-government. He favored a limited judiciary because our constitutional structure demands it and our democratic republic depends on it. He opposed judicial usurpation of popular sovereignty. He would be the first to say that "nine people picked at random from the Kansas City telephone directory"[13] knew better than the Court how to solve the political questions of our time. He championed democracy as practiced in our federal constitutional republic. Indeed, the case for this explanation is overwhelming.[14]

I want to make that case by addressing three topics. First, I want to address some of Justice Scalia's critics by recounting what he said about the very topics that they allege explained his judicial philosophy. Second, I want to address what Justice Scalia said about originalism and textualism as it relates to democracy. And third, I want to review specific areas of his jurisprudence that illustrate his profound respect for self-government.

I. THE CRITICS' THEORIES V. JUSTICE SCALIA

First, let us consider the critics. Professor William Eskridge, a preeminent scholar of statutory interpretation, suggested that Justice Scalia's textualism was the product of a Hayekian view of "ordered liberty."[15] He described Justice Scalia's interpretive method as the product of "Blackstonian (libertarian, property-protecting, and pro-business) values."[16] In a similar

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12 U.S. CONST. pmbl.

13 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

14 To be sure, some scholars have acknowledged Justice Scalia's devotion to democracy. For example, more than two decades ago, Professor Cass Sunstein wrote that Justice Scalia advanced "a species of *democratic formalism*." Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)). He argued, "Justice Scalia is a democrat in the sense that much of his jurisprudence is designed to ensure that judgments are made by those with a superior democratic pedigree." *Id.* In an elegant op-ed written soon after Justice Scalia's death, Professor Gail Heriot wrote, "'Democrat' is a word seldom applied to Supreme Court Justice Antonin Scalia, but it is perhaps the term that best describes him." Gail Heriot, *Antonin Scalia Was a Friend of Democracy*, BOSTON GLOBE (Feb. 14, 2016), https://bostonglobe.com/opinion/2016/02/14/heriot/YWTITJITd7ZeQK17O9UTXL/story.html. And an Australian scholar, James Allan, lauded Justice Scalia's "respect for democratic decision-making." James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia,* 6 BRIT. J. AM. LEGAL STUD. 25, 38 (2017).

15 William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 890–91, 891 n.122 (2013).

16 Eskridge, *supra* note 4, at 549. A student of Eskridge, Gautam Bhatia, later took this suggestion further and published a law review article arguing that Hayek's views provide the foundation of Justice Scalia's textualism. *See* Gautam Bhatia, *The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia's Jurisprudence*, 42 HASTINGS CONST. L.Q. 525 (2015). *But cf.* William H. Pryor Jr., *Hayek and Textualism*, 11 N.Y.U. J.L. & LIBERTY 893, 897–98 (2018) (arguing that whether Hayek would have endorsed textualism is "open to debate"). Professor James Staab has also described

vein, but more polemically, Professor Stephen Gottlieb accused Justice Scalia of subscribing to a "social Darwinis[t]" vision in which "survival" is the paramount moral goal and "virtue is superfluous."[17]

Justice Scalia never cited the works of Friedrich Hayek in his judicial opinions, scholarship, or speeches, except for one reference to *The Road to Serfdom*[18] in the bibliography of *Reading Law*,[19] and Justice Scalia emphatically rejected the idea that the Constitution is a libertarian charter.[20] Indeed, Justice Scalia was the Supreme Court's most trenchant defender of the constitutionality of legislation intended for what he called the "promotion of majoritarian . . . morality,"[21] even when it clearly circumscribed individual liberty.

Justice Scalia also harbored no ambition to reverse the New Deal. He rejected so-called "substantive due process," which was the underpinning of *Lochner v. New York*.[22] Indeed, he described the *Lochner* Court's "constitutional opposition to the . . . New Deal" as "erroneous."[23]

Justice Scalia was no libertarian. He maintained that the libertarian conception of the state as a necessary evil is at odds with the Christian view of government as an instrument of the divine will to order temporal affairs toward the common good, which includes "preserving a common fabric of

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Justice Scalia as a "classical liberal in the tradition of Thomas Hobbes, David Hume, John Locke, Charles de Secondat Montesquieu, and Niccolo Machiavelli," but he acknowledges that "[i]n contrast to modern-day libertarians, Scalia has a rather positive view of governmental power." JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT xxi, xxiv (2006). In a related vein, Professor Amy Wax has identified commonalities between Scalia and thinkers such as "Friedrich Hayek, Alasdair MacIntyre, Michael Oakeshott, Richard Weaver, James Burnham, Robert Scott, and James Bowman," though she stops short of attributing any comprehensive view defended by these authors to Justice Scalia. Amy L. Wax, *Trust Me, I'm an Expert: Scientific and Legal Expertise in Scalia's Jurisprudence*, *in* SCALIA'S CONSTITUTION: ESSAYS ON LAW AND EDUCATION 103, 106 (Paul E. Peterson & Michael W. McConnell eds., 2018).

17 Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 234 (1996).

18 FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

19 *See* SCALIA & GARNER, *supra* note 7, at 471. Justice Scalia's coauthor assured me that he—not Justice Scalia—listed Hayek's book there.

20 Justice Scalia decried the notion that the meaning of the Constitution should "evolve" in "the direction of greater personal liberty." Scalia, *Common-Law Courts*, *supra* note 11, at 42. As he explained, "[a]ll government represents a balance between individual freedom and social order, and it is not true that every alteration of that balance in the direction of greater individual freedom is necessarily good." *Id.*

21 Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

22 198 U.S. 45 (1905).

23 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 998 (1992) (Scalia, J., concurring in part and dissenting in part). And although Justice Scalia acknowledged meaningful limitations on congressional power to regulate inter- and intrastate commerce, in his separate concurring opinion in *Gonzales v. Raich* he explained that Congress has the power under the Interstate Commerce Clause and the Necessary and Proper Clause to "facilitate interstate commerce by eliminating potential obstructions" and "potential stimulants" to economic activity and to "regulate [intrastate] activities necessary to effective interstate regulation." 545 U.S. 1, 35, 38 (2005) (Scalia, J., concurring).

morality."[24] As he explained, "It is particularly hard for someone in the American democratic tradition to have the proper Christian attitude toward lawful civil authority."[25] He acknowledged, "We are a nation largely settled by those fleeing from oppressive regimes, and there is in our political tradition a deep strain of the notion that government is, at best, a necessary evil."[26] But he argued that "it is disabling—and . . . contrary to long and sound Christian teaching—to believe that all government is bad."[27]

Although his rejection of libertarianism as a political philosophy was based, at least in part, on religious conviction, Justice Scalia also made clear that he would not substitute the teachings of the Catholic Church for the law. As he explained in a lecture a quarter of a century ago, "I don't have any more problem than Thomas Aquinas did in saying that every religious prescription does not have to be a legal prescription . . . . I don't insist that every jot and tittle of my religious belief be in the law."[28] But he also acknowledged the potential conflict of legal duty and religious belief when he said, "Now there may come a point at which the conflict between the two is such that I cannot enforce the law," citing Nazi Germany as an example.[29] Regarding complicity, he acknowledged, "I could not condemn an innocent person to death—I would have to resign. But that is the course, to resign and not to distort the law so that it does conform to your religious beliefs. That would be wrong."[30]

Justice Scalia later addressed moral complicity as it relates to abortion. Contrary to his critics, he described his "difficulty with *Roe v. Wade*" as "a legal rather than a moral one: I do not believe (and, for two hundred years, no one believed) that the Constitution contains a right to abortion."[31] And to prove his point, he explained, "[I]f a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law."[32] He maintained that he would do so "for the same reason that [he would] vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence [him]) no power over the matter."[33]

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24 ANTONIN SCALIA, *Church and State*, *in* SCALIA SPEAKS, *supra* note 9, at 134, 136.

25 *Id.* at 143.

26 *Id.*

27 *Id.*

28 Antonin Scalia, *1994 William O. Douglas Lecture Series Transcript*, 51 GONZ. L. REV. 583, 595–96 (2015).

29 *Id.* at 596.

30 *Id.*

31 Antonin Scalia, *God's Justice and Ours*, FIRST THINGS 2 (May 2002), https://www.firstthings.com/article/2002/05/gods-justice-and-ours.

32 *Id.* at 2–3.

33 *Id.* at 3. Justice Scalia said something similar about capital punishment: "It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse-thieving, as anyone can verify by watching a western movie)." *Id.* at 2. For

II. ORIGINALISM, TEXTUALISM, AND DEMOCRACY

If we put aside the critics' theories and turn instead to Justice Scalia's *own* words, we find abundant evidence of his paramount and unwavering respect for democracy. Let us turn first to what he said about originalism and textualism. And then we will turn to specific areas of his jurisprudence.

Nowhere was Justice Scalia's commitment to self-government more on display than in his defense of originalism in constitutional interpretation. Originalism is responsive to the counter-majoritarian difficulty[34]—that is, the problem of reconciling judicial review with a democratic form of government. The solution to that problem lies in the recognition that federal courts are not entitled to engage in constitutional lawmaking but must instead confine themselves to explicating the text that was actually adopted by the People. As Justice Scalia wrote in *Obergefell v. Hodges*,[35] "The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. . . . Aside from these limitations, those powers 'reserved to the States respectively, or to the people' can be exercised as the States or the People desire."[36] So when, as he explained, "the People who ratified [a constitutional] provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification," then "the public debate over [that practice] must be allowed to continue."[37]

He decried the assertion of a judicial power to recognize constitutional rights based on "reasoned judgment"[38] as "a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government."[39] As he described it, our system is supposed to work another way: "Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' 'reasoned judgment.'"[40] The

him, that fact meant that the death penalty "is clearly permitted today." *Id.* He added, "For me, therefore, the constitutionality of the death penalty is not a difficult, soul-wrenching question." *Id.* But he also explained that, on the subject of capital punishment, he did "not agree with the [papal] encyclical *Evangelium Vitae*." *Id.* at 7. Though as a Catholic, of course, he said he had given it "thoughtful and careful consideration." *Id.* at 9.

34 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

35 135 S. Ct. 2584 (2015).

36 *Id.* at 2627 (Scalia, J., dissenting) (citation omitted).

37 *Id.* at 2628.

38 *Id.* at 2598 (majority opinion).

39 *Id.* at 2629 (Scalia, J., dissenting).

40 *Id.*

alternative, he argued, "makes the People subordinate to a committee of nine unelected lawyers [and] does not deserve to be called a democracy."[41]

When the Supreme Court declared the federal Defense of Marriage Act unconstitutional,[42] Justice Scalia argued that the Court had disenfranchised all Americans. As he put it, "[w]e might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide."[43] By not doing so, he lamented, "the Court ha[d] cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better."[44]

Justice Scalia often explained that removing political questions from popular control undermines the flexibility that allows a constitutional republic to endure. He said,

> [I]f you think that the aficionados of the living Constitution want to bring you flexibility, think again. My Constitution is a very flexible Constitution. You think the death penalty is a good idea? Persuade your fellow citizens, and adopt it. . . . You want a right to abortion? . . . Persuade your fellow citizens it's a good idea, and enact it. . . . That's flexibility. But to read either result into the Constitution, is not to produce flexibility. It is to produce . . . [r]igidity.[45]

When the Court ruled that an all-male military academy violated the Constitution in *United States v. Virginia*,[46] he wrote in dissent, "The virtue of a democratic system with a First Amendment 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."[47] And he lauded the Founders by writing, "So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change."[48]

He explained that the alternative to originalism, living constitutionalism, "enfeebles the democratic polity."[49] It empowers the judiciary to "fashion law rather than fairly derive it from governing texts," thereby subjecting the judiciary "to intensified political pressures—in the appointment process, in their retention, and in the arguments made to them."[50] And it harms the polity because "every time a court constitutionalizes a new sliver of law—as

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41 *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

42 United States v. Windsor, 570 U.S. 744, 774 (2013).

43 *Id.* at 802 (Scalia, J., dissenting).

44 *Id.*

45 *See Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Remarks on Constitutional Interpretation at Woodrow Wilson International Center for Scholars* (C-SPAN broadcast Mar. 14, 2005), http://www.c-span.org/video/?185883-1/constitutional-interpretation.

46 518 U.S. 515, 534 (1996).

47 *Id.* at 567 (Scalia, J., dissenting).

48 *Id.*

49 SCALIA & GARNER, *supra* note 7, at 4.

50 *Id.*

by finding a 'new constitutional right' to do this, that, or the other—that sliver becomes thenceforth untouchable by the political branches."[51] In other words, a legislature will then have "no power to abridge a right that has been authoritatively held to be part of the Constitution—even if that newfound right does not appear in the text."[52]

Although standard accounts of Justice Scalia's approach to statutory interpretation focus on the need to constrain judges,[53] his defense of textualism depended just as much on his view that it is contemplated by the Constitution. For him, that "[w]e are governed by the text enacted by Members of Congress, not by their purposes" is "the assumption of democracy."[54] In his treatment of the "false canon" about legislative history being a useful aid in statutory interpretation,[55] he argued that to interpret a statute based on unexpressed purposes or unenacted legislative history "violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented."[56]

In Justice Scalia's view, purposivist and pragmatic theories of statutory interpretation originate in a common-law conception of the judicial role inconsistent with what he called, in his ever-humorous way, "a trend in government that has developed in recent centuries[] called democracy."[57] He acknowledged that "[i]n medieval England, when the legislative and judicial powers were commingled, judges did exercise both."[58] And he found it "unsurprising that [later] the judges who used to be the lawgivers took some liberties with the statutes that began to supplant their handiwork."[59] So when those common-law judges "adopt[ed], for example, a rule that statutes in derogation of the common law (judge-made law) were to be narrowly construed and rules for filling judicially perceived 'gaps' in statutes,"[60] Justice Scalia saw it as having "less to do with perceived meaning than with the judges' notions of public policy."[61] He rejected this approach because "[s]uch distortion of texts that have been adopted by the people's elected representatives is

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51 *Id.*

52 *Id.* at 4–5.

53 *See, e.g.*, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 553 (2009) (describing Justice Scalia as the "leading proponent" of the need for textualism as a form of judicial restraint).

54 Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012).

55 SCALIA & GARNER, *supra* note 7, at 369.

56 *Id.* at 388.

57 Scalia, *Common-Law Courts*, *supra* note 11, at 9.

58 SCALIA & GARNER, *supra* note 7, at 23.

59 *Id.* at 3.

60 *Id.*

61 *Id.*

undemocratic."[62] He argued, "In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge's principal function is to give those texts their fair meaning."[63]

Consider a case-specific example, *King v. Burwell*[64]—the second decision credited with saving the Affordable Care Act—where the Court ruled that a statute providing tax credits for purchasers of health insurance from an "Exchange established by the State" meant instead "Exchange established by the State or the Federal Government."[65] Justice Scalia pronounced this reading "quite absurd."[66] He argued that the "decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery."[67] He charged that "[it] ignores the American people's decision to give *Congress* '[a]ll legislative Powers' enumerated in the Constitution."[68] The People "made Congress, not th[e] Court, responsible for both making laws and mending them."[69] The Court, he argued, "holds only the judicial power—the power to pronounce the law as Congress has enacted it."[70] The ruling in *King* undermined democracy: "We lack the prerogative to repair laws that do not work out in practice," he argued, "just as the people lack the ability to throw us out of office if they dislike the solutions we concoct."[71] So "the Court should have left it to Congress to decide what to do about the Act's limitation of tax credits to state Exchanges."[72]

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[62] *Id.*

[63] *Id.* Justice Scalia even grounded the doctrine of judicial deference to administrative agencies in a respect for popular sovereignty. As he explained, "An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989). The doctrine of deference repudiated a "statute-by-statute evaluation" to determine which of these two circumstances was obtained "with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant." *Id.* In his view, "one of [deference's] major advantages from the standpoint of governmental theory" is to "permit needed flexibility, and appropriate political participation, in the administrative process." *Id.* at 517. And, in contrast, he explained, "One of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change." *Id.*

[64] 135 S. Ct. 2480 (2015).

[65] *Id.* at 2491.

[66] *Id.* at 2496 (Scalia, J., dissenting).

[67] *Id.* at 2505.

[68] *Id.*

[69] *Id.*

[70] *King*, 135 S. Ct. at 2505.

[71] *Id.*

[72] *Id.* at 2506.

III. JUSTICE SCALIA'S JURISPRUDENCE RESPECTING DEMOCRACY

Now let us consider how Justice Scalia respected democracy in specific areas of constitutional law. He defended self-government in areas ranging from equal protection and the culture wars to the role of international law. His respect for democracy also manifested itself in his opinions about the Bill of Rights. In all these areas, he championed the right of the American people to govern themselves.

Justice Scalia's fidelity to democracy played a prominent role in his opinions about the Equal Protection Clause of the Fourteenth Amendment,[73] in which he chided the Court for betraying the supposed democratic logic of the need for enhanced judicial scrutiny of suspect classifications. In 1938, in the famous fourth footnote of *United States v. Carolene Products*,[74] the Supreme Court proposed that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[75] So the New Deal Court proposed weak judicial review for economic legislation and "more searching" review when a legislative classification singled out a supposed politically weak group for disparate treatment. Justice Scalia showed that the modern Court did not adhere to what the New Deal Court said in that footnote.

For example, in *United States v. Virginia*,[76] the case about an all-male military academy, Justice Scalia argued that sex discrimination should not receive heightened judicial scrutiny under the framework from *Carolene Products*. He rejected the notion that women, a majority of the electorate, were "a 'discrete and insular minorit[y]' unable to employ the 'political processes.'"[77] And he argued that "the suggestion that [women] are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns."[78] So "if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration," he concluded, "the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review."[79]

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73 U.S. CONST. amend. XIV, § 1.

74 304 U.S. 144 (1938).

75 *Id.* at 152–53 n.4.

76 518 U.S. 515 (1996).

77 *Id.* at 575 (Scalia, J., dissenting) (quoting United States v. Carolene Prods., 304 U.S. 144, 152–53 n.4 (1938)).

78 *Id.*

79 *Id.* at 574–75.

Justice Scalia made a similar argument in his dissent in *Romer v. Evans*.[80] There, the Court overturned a state constitutional amendment that prohibited recognizing sexual orientation as a protected status.[81] Justice Scalia rejected the majority's view that the amendment sprung from nothing more than "a bare . . . desire to harm a politically unpopular group."[82] To him, it was "nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics, and which . . . though composing no more than 4% of the population had the support of 46% of the voters"[83] on the amendment.

To be sure, although Justice Scalia wielded the *Carolene Products* framework as a weapon against those rulings, he also expressed doubt about its validity. He once described the alleged need for enhanced judicial scrutiny for classifications of "discrete and insular minorities" as an "old saw" that was "derived from dictum in a footnote."[84] He critiqued that framework for not being democratic enough because it failed to appreciate "that a group's 'discreteness' and 'insularity'" may be "political strengths" instead of "political liabilities."[85]

Justice Scalia's respect for resolving political issues democratically also featured prominently in his opinions about culture-war issues like gay rights and abortion. In *Lawrence v. Texas*,[86] he faulted the Court for "tak[ing] sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[87] He made clear that his dissent had nothing to do with morality, but instead with respecting "normal democratic" process.[88] He maintained, "Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best."[89] But as he saw it, "persuading one's fellow citizens is one thing, and imposing one's views

80 517 U.S. 620 (1996).

81 *Id.* at 635–36.

82 *Id.* at 634 (majority opinion) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

83 *Id.* at 652 (Scalia, J., dissenting).

84 Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 325 (2014) (Scalia, J., concurring).

85 *Id.* at 326. For that proposition, he cited a law review article by Professor Bruce Ackerman of Yale Law School that argued that "[o]ther things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics." Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723–24 (1985). That phenomenon, Ackerman argued, ordinarily "should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are 'anonymous and diffuse' rather than 'discrete and insular.'" *Id.* at 724; *see also* Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 688 (1991) (arguing that although Ackerman likely did not "have affirmative action in mind, . . . his theory fits Justice Scalia's assertions well").

86 539 U.S. 558 (2003).

87 *Id.* at 602 (Scalia, J., dissenting).

88 *Id.* at 603.

89 *Id.*

in absence of democratic majority will is something else."[90] He said, "I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so."[91] He concluded that "it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best."[92]

Justice Scalia's dissent in *Obergefell* echoed a similar theme. He declared that same-sex marriage was "not of immense personal importance"[93] to him as a matter of policy, but what was of "overwhelming importance" to him was "who it is that rules me."[94] "Today's decree," he complained, "says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[95] He described the decision as the latest in a "practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty,"[96] and he charged that it "robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."[97]

His approach to abortion was no different. Justice Scalia contended that "[t]he permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[98] He lambasted the suggestion that *Roe v. Wade*[99] had resolved the issue: "Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve."[100] He predicted that reaffirming *Roe* would "prolong[] and intensif[y] the anguish" of the national division over abortion "by foreclosing all democratic outlet for the deep passions this issue arouses

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90 *Id.*

91 *Id.*

92 *Lawrence*, 539 U.S. at 603–04.

93 Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

94 *Id.* at 2627.

95 *Id.*

96 *Id.*

97 *Id.* Justice Scalia also complained that "[u]ntil the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best." *Id.* He recounted, "Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote." *Id.* Not surprisingly, the results were divided. By Justice Scalia's count, "The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to." *Id.* Justice Scalia lauded the vitality of that continuing debate: "Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win." *Id.* He declared, "That is exactly how our system of government is supposed to work." *Id.*

98 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

99 410 U.S. 113 (1973).

100 *Casey*, 505 U.S. at 995.

[and] by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight."[101]

Justice Scalia also understood that government by the People means government by a particular People: "We the People of the United States."[102] This People—the American People—does not include the whole of humanity. As he explained, in all "provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community."[103] And this understanding of a community united by political allegiance informed his views about the use of international law.

When the Supreme Court suggested that federal courts enjoy a discretionary power to recognize causes of action to enforce customary international law,[104] under the Alien Tort Statute, Justice Scalia objected. He explained, "In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives."[105] He argued that, in our democratic system, federal judges lack common lawmaking authority. As he put it, "[w]e Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect."[106] He complained, "For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law."[107] As he saw it, "American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court."[108]

Not surprisingly, he also objected to the notion that our constitutional law should be informed by contemporary international or foreign law. For example, in *Roper v. Simmons*,[109] where the Supreme Court ruled that the Eighth Amendment barred the execution of juveniles, Justice Scalia dissented as "the views of other countries and the so-called international community t[ook] center stage."[110] The Court found "confirmation" for its ruling "in the stark reality that the United States is the only country in the world that

101 *Id.* at 1002.
102 U.S. CONST. pmbl.
103 District of Columbia v. Heller, 554 U.S. 570, 580 (2008).
104 Sosa v. Alvarez-Manchain, 542 U.S. 692, 724–25 (2004).
105 *Id.* at 747 (Scalia, J., concurring in part and concurring in the judgment).
106 *Id.* at 750.
107 *Id.*
108 *Id.* at 751.
109 543 U.S. 551 (2005).
110 *Id.* at 622 (Scalia, J., dissenting).

continues to give official sanction to the juvenile death penalty."[111] It cited both the United Nations Convention on the Rights of the Child, which the Senate had *not* ratified,[112] and the International Covenant on Civil and Political Rights, which the Senate had ratified *with* an express reservation of the right to use capital punishment.[113] Justice Scalia quipped, "Unless the Court has added to its arsenal the power to join and ratify treaties . . . I cannot see how this evidence favors, rather than refutes, its position."[114] He added, "More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."[115] After all, he explained, "In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself."[116]

Justice Scalia's devotion to democracy even shone in his jurisprudence about the counter-majoritarian Bill of Rights. For example, he called the right to a jury in a criminal trial "the spinal column of American democracy."[117] He viewed trial by jury more as a right retained by the people than as an individual right of the accused. As he explained, "the people reserved the function of determining criminal guilt *to themselves*, sitting as jurors."[118] He wrote, "That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[119] He explained, "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[120] For that reason, he rejected the idea that omitting an element of an offense from a jury instruction could ever constitute harmless error. In his view, it was

> not within the power of us Justices to cancel that reservation—neither by permitting trial judges to determine the guilt of a defendant who has not waived the jury right, nor (when a trial judge has done so anyway) by reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty.[121]

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111 *Id.* at 575 (majority opinion).
112 *Id.* at 576.
113 *Id.*
114 *Id.* at 622 (Scalia, J., dissenting).
115 *Roper*, 543 U.S. at 624.
116 *Id.*
117 Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).
118 *Id.* at 32.
119 Blakely v. Washington, 542 U.S. 296, 305–06 (2004).
120 *Id.* at 306.
121 *Neder*, 527 U.S. at 32.

And he explained that a state could not allow a court to increase a defendant's punishment based only on a judge's finding of wrongdoing: "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours.'"[122]

He expressed a similar view about the role of the jury in a state civil trial. In *BMW v. Gore*,[123] the Supreme Court ruled that a punitive damages award of $4 million for civil fraud—reduced to $2 million by the Supreme Court of Alabama—violated the Fourteenth Amendment.[124] In dissent, Justice Scalia wrote that "[a]t the time of adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, *as the voice of the community*, of the measure of punishment the defendant deserved."[125] In his view, this "decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court."[126]

Justice Scalia also viewed the Second Amendment as codifying "a *pre-existing* right"[127] retained by the People. As he explained in *District of Columbia v. Heller*, "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'"[128] He quoted St. George Tucker, a Founding-era constitutional scholar, as describing the right to keep and bear arms as "the true palladium of liberty."[129] For, as Tucker put it, "Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[130]

CONCLUSION

These tributes to American democracy are only a few of the many that Justice Scalia offered in his thirty years on the Supreme Court. Fittingly, a host of elected leaders of our federal democratic republic, across the political

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122 *Blakely*, 542 U.S. at 313–14 (*quoting* 4 WILLIAM BLACKSTONE, COMMENTARIES 343 (1769)).

123 517 U.S. 559 (1996).

124 *See id.* at 565–67, 585–86.

125 *Id.* at 600 (Scalia, J., dissenting) (emphasis added).

126 *Id.*

127 District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

128 *Id.*

129 *Id.* at 606 (quoting ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 300 (Lawbook Exchange, 1996) (1803).

130 *Id.*

spectrum, paid tribute to him in return upon his death. For example, President Obama called Justice Scalia "one of the towering legal figures of our time."[131] These leaders recognized that Justice Scalia's legacy involves more than a revival of originalism and textualism.

Justice Scalia's fidelity to our democracy represents his greatest lesson to us all. He taught us to be better patriots and engaged citizens: to vote, to read the news, to persuade our neighbors, and to lobby our representatives. He taught us to depend far less on the judiciary to resolve our disagreements. Dare I say, he reminded us how to be, in a word, *democrats* (lower case "d," of course).

His critics, in contrast, distrust the democratic process. They are, at best, indifferent and, at worst, hostile to the written Constitution adopted by the Founding generation and amended by later generations of Americans. They prefer rule by elites and judicial paternalism to self-determination. Justice Scalia taught us to *resist* that mindset.

I submit that the secret to Justice Scalia's success was that he always remembered for whom he worked: the American people. He understood that they wrote, ratified, amended, and defended—sometimes with their very lives—the Constitution he swore to uphold and that their elected representatives passed the laws he pledged to interpret faithfully. He understood the necessary relationship between popular sovereignty and the rule of law. No judge has ever been a greater friend of We the People. And for that reason, the American people will revere his opinions so long as we continue this experiment in self-government.

131 The President on the Passing of Supreme Court Justice Antonin Scalia (Feb. 13, 2016) (on file with WH.gov), https://obamawhitehouse.archives.gov/photos-and-video/video/2016/02/13/president-passing-supreme-court-justice-antonin-scalia.