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SCALIA FORUM PRESENTATION

The Senate and the Courts: Constitutional Bulwarks Against Majoritarianism*

The Honorable Mitch McConnell†

Good afternoon. Thank you, Dean Randall, for that warm introduction and for the invitation to join this distinguished gathering.

It won't surprise anyone here to hear that I am a great admirer of Justice Scalia. But to be clear, my admiration long predates his titanic tenure on the federal bench. When I was a young lawyer in the Justice Department under President Ford, I got to hear Antonin Scalia go back and forth with fellow heavyweights like Robert Bork and Larry Silberman.

Of course, we were reacquainted when he made the rounds as a nominee to the Supreme Court. Almost forty years ago, I sent him a picture of the two of us during his courtesy visit to my office. The Scalia family found it among his papers after he died. They graciously sent it back to me, and it now has a prominent place in my office. Nobody could have predicted when that photo was taken that the two of us would be linked again in the most consequential decision I have made in my career: the decision to leave Justice Scalia's seat vacant in 2016.

As I explained at the time, an appointment with the potential to profoundly alter the direction of the Court should not be left to a lame duck President on his way out the door. My decision was rooted firmly in precedent. It followed the rule put forward by then-Judiciary Committee Chairman Joe Biden warning about the damage that this sort of election-year nomination could do—to a nominee, to the Senate, and to the country.[1] So we made sure the American people got a say. And the Court got an outstanding addition in Justice Neil Gorsuch.

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You are all familiar with the chapter of judicial history that followed. No doubt, a great many of you have been active participants. But today, I

* This Essay is a lightly edited version of Leader McConnell's remarks at the sixth annual Scalia Forum, held at George Mason University Antonin Scalia Law School, on February 13, 2024.

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1 *See* 162 CONG. REC. 1954 (2016) (statement of Sen. Mitch McConnell).

want to talk about the federal judiciary and the Senate in a context different from their mechanics. I want to talk about the similar roles they play in our constitutional system: as the great anti-majoritarian bulwarks of individual rights. As you all know, the Senate has two essential characteristics: (1) equal representation for each state and (2) unlimited debate and amendment for each Senator.[2] Together, they force cooperation—especially the bipartisan variety—and protect the rights of the minority against the majority.

The late Alexander Bickel of Yale—a favorite of Justice Alito and arguably the godfather of judicial conservatism—understood the importance of empowering legislative minorities.[3] He asked, "[I]f [political] minorities deserve representation, are they also [not] entitled to a measure of effective power . . . ?"[4] And answering his own question, he highlighted "such counter-majoritarian practices as the . . . two-thirds legislative vote,"[5] like the Senate cloture requirement that three-fifths of the body agree to end debate on a matter. Professor Bickel was writing in the context of the Warren Court, which was a fierce opponent of supposed anti-majoritarian practices in legislatures at the time.[6] He understood the irony of a Supreme Court enforcing the rights of the majority because "[a]nalytically, [the Supreme Court's] autonomy is not easily reconciled with any theory of political democracy . . . ."[7] In his view, the authority of the Court was not a self-evident democratic good, but rather "an ambivalent practical accommodation" and "a rhetorical tradition."[8] He noted, "It will be difficult to evolve a rhetoric of survival [for the Supreme Court] in a climate of uncompromising majoritarianism—as difficult for the judges as for the Electoral College."[9] Or, I might add, for the Senate.

Bickel understood that strict majoritarianism is empty.[10] He drew on the great Edmund Burke, observing that "[e]lections . . . do not establish consent, or do not establish it for long."[11] Majorities are fleeting, and "The [P]eople," he observed, "are something else than a majority registered on election day."[12] In our system, the people are the subject *and* the object of

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2 *See* U.S. CONST. art. I, § 3, cl. 1; JUDY SCHNEIDER, CONG. RSCH. SERV., RL30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 7 (2008).

3 *See generally* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978).

4 *Id.* at 152–53.

5 *Id.*

6 *See id.* at 153.

7 *Id.* at 112.

8 *Id.*

9 BICKEL, *supra* note 3, at 112.

10 *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 16–17 (1975).

11 *Id.* at 16.

12 *Id.* at 17.

our Constitution. They possess enumerated rights. They are divided into fifty states. And it is the courts and the Senate that, in effect, protect the rights of the people against the majority. That is what the Framers taught.[13] Madison explained that a core aspect of the Federal Constitution was "to restrain the states from . . . oppressing the minority within themselves by paper money and other unrighteous measures which favor the interest of the majority."[14]

Of course, equal representation in the Senate was designed to protect the interest of states.[15] But in designing it that way, the Framers also protected the minority. As Oliver Ellsworth explained, "an equality of votes in the [Senate] was not only necessary to secure the small [states], but would be perfectly safe to the large ones whose majority in the [House] was an effectual bulwark."[16] Madison agreed. In Federalist 62 he said, "No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states."[17] And in fact, that is exactly how it works. You have heard the Senate described as the "cooling saucer" to the boiling passions of the more directly representative lower chamber.[18] More bluntly, we are often the place where bad ideas go to die. The Framers knew that in the heat of the moment, majorities could make some very bad and potentially permanent decisions.[19] And over time, the Senate's rules have evolved to reflect that understanding by requiring broad cooperation for nearly everything—even turning the lights on.[20]

Our rules preserve a space where the minority will always have a voice and an influence—where cooperation, not factionalism, is the coin of the realm. They guarantee that the Senate is still the one place in America where a minority actually has the power to slow down the train from time to time. Of course, this reality is invariably exasperating to two groups of people: the base of both political parties, and whichever party holds a majority in the House. For one thing, legislation that passes the House in

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13 *See, e.g*, *From James Madison to Thomas Jefferson, 19 March 1787*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/82TF-N4U8 (reproducing correspondence from Madison to Jefferson on the eve of the Constitutional Convention).

14 *Id.*

15 In particular, the interests of smaller states. *See About the Senate & the U.S. Constitution: Equal State Representation*, U.S. SENATE, https://perma.cc/B8EG-YBRA.

16 *Rule of Representation in the Senate, [29 June], [30 June] 1787*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/GYV6-DQFY.

17 THE FEDERALIST NO. 62 (James Madison).

18 *See Senate Created*, U.S. SENATE, https://perma.cc/4UTR-4WCH ("George Washington is said to have told Jefferson that the framers had created the Senate to 'cool' House legislation just as a saucer was used to cool hot tea.").

19 *See id.*

20 *See* SENATE COMM. ON RULES & ADMIN., SENATE MANUAL, S. DOC. NO. 110-1, Rule XV, at 204 (2008) (prescribing rules for the operation of the system of legislative buzzers and signal lights in the Senate wing of the Capitol).

a matter of hours can take weeks or even months to pass the Senate. And once a compromise is reached, the final product is rarely, if ever, satisfying to the people at the far ends of the ideological spectrum. Meanwhile, whenever power shifts from one party to another, an astonishing epiphany typically takes place among members of the new minority: the party that once decried the minority as a backward group of obstructionists suddenly decries the new majority as a populist horde of heavy-handed opportunists.

But, of course, this would be to miss the entire purpose of the U.S. Senate. At its best, the Senate is a workshop where thorny challenges are faced squarely and addressed with durable solutions. That is what happened in 1964 when the two parties forged a difficult alliance to pass the Civil Rights Act.[21] At our best, we are the body that protects the people's right to a say in what goes on in Washington. We are the ones who guarantee that they are heard. Even if the democratic majority does not like our ideas or those of our constituents, the answer is not to take away the right of millions of Americans: to shut down their representatives' ability to influence legislation through amendments.

Protections for the Senate minority give all kinds of citizens and states a meaningful voice. And eliminating those rights means nothing less than silencing them for failing to conform with the current majority's preferences. This is exactly why I fought so hard during the last Congress to preserve the filibuster. We're talking about a defining characteristic—what makes the Senate *the Senate*. And on that, I won't budge an inch.

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Now, you all do not need me to tell you how the judiciary works. But I would like to draw some through-lines that connect our respective institutions as essential protectors of the rights of the minority. And in this regard, there is no greater protection than the *individual* rights enumerated in the Constitution. I am a judicial conservative. That means I treat the Constitution and statutes cautiously, and with respect, as they were written, and that I like jurists who do the same.

But judicial conservatism also means holding a healthy regard for the doctrine of separation of powers. It means insisting that the role of the judiciary—however enlightened—is to interpret the law as it is written, and not to act as a super-legislature and substitute its own judgment for that of our duly-elected representatives. Of course, as we all know, upholding the original intent of the Constitution sometimes means upending the democratic will of the people. Judge Diane Sykes of the Seventh Circuit points out that "[r]estraint is indeed a judicial virtue."[22]

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[21] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

[22] Diane S. Sykes, *Minimalism and Its Limits*, 2014–2015 CATO SUP. CT. REV. 17, 34 (2015).

But she also insists that "[t]he Court's primary duty, in short, is not to minimize its role or avoid friction with the political branches, but to try as best it can to get the Constitution right."[23]

Perhaps no one understood this order of priority better than the man whose name is on this building. When Justice Scalia said his aim was to follow the Constitution wherever it took him—even if he disagreed politically with the outcome—he meant it.[24] We saw that when he voted to uphold the constitutional right of protestors to burn the American flag.[25] Did he know his position was unpopular? Sure. Many of the people's elected representatives said so loudly at the time![26] But he also knew that is what the Constitution required of him. Justice Scalia knew, in his own words: "The whole purpose of the Bill of Rights is to protect individuals against the wishes of the people . . . ."[27] He knew that the First Amendment exists to protect the expression of political views, regardless of who or how many people hold them— to protect the profession of religious faith, no matter who or how many people share it. These rights do not exist to protect what is popular. They exist precisely to protect what is not.

So the judiciary protects the *enumerated* rights of the minority. And the Senate protects the *political* rights of the minority. At least, that is how it is supposed to play out. You all know what can happen when judges venture beyond their task of protecting *enumerated* rights. This sort of trespassing can pervert the Framers' intent in any number of ways: from (1) over-extending the prohibitions of the Eighth Amendment, as in *Furman v. Georgia*;[28] to (2) hijacking the Fourteenth Amendment, as in *Roe v. Wade*;[29] to (3) stretching substantive due process to the extreme in the *Lochner* Era, as in *Allgeyer v. Louisiana*,[30] *Adkins v. Children's Hospital*,[31] or of course, *Lochner v. New York*.[32]

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23 *Id.*

24 *See* ANTONIN SCALIA: MEMORIAL TRIBUTES IN THE CONGRESS OF THE UNITED STATES, S. DOC. NO. 114-12, at 4 (2016) (statement of Sen. Mitch McConnell).

25 Texas v. Johnson, 491 U.S. 397, 418–20 (1989).

26 *See* Sara Fritz, *Angry Congressmen Vow New Laws to Protect Flag*, L.A. Times (June 23, 1989), https://perma.cc/NM5Z-88AZ (noting widespread condemnation of the *Texas v. Johnson* decision by members of Congress, as well as a Senate resolution expression "profound disappointment" in the Supreme Court's ruling).

27 ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WILL LIVED 231 (Christopher J. Scalia & Edward Whelan eds., 2017).

28 *See* Furman v. Georgia, 408 U.S. 238 (1972).

29 *See* Roe v. Wade, 410 U.S. 113 (1973).

30 *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

31 *See* Adkins v. Child.'s Hosp., 261 U.S. 525 (1923).

32 *See* Lochner v. New York, 198 U.S. 45 (1905).

At the same time, judges are capable of bestowing tremendous wisdom in the appropriate interpretation of enumerated rights—from *Heller*[33] to *Janus*[34] to *Citizens United*.[35]

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Now, as the courts protect enumerated rights, the Senate protects political rights. Under the Senate's rules, the tremendous power to throw sand in the gears—to confound a majority's agenda—is what tends to drive legislative outcomes toward moderation. The minority's power to threaten forward progress is what forces the majority to give the minority a seat at the table on the most consequential decisions. And wise minorities exercise this power to tremendous effect. Just think of pro-life protections like the Hyde Amendment that are often added to even the most massive and contentious spending bills.[36]

Of course, sometimes it becomes necessary for a Senate minority to actually follow through on its threats. Sometimes, the minority has to stand on principle and just say "No." Take the case a few years ago of the sweeping left-wing power grab of our nation's election laws and political speech rights.[37] It was an extraordinarily bad idea with the rather Orwellian title, the "For the People Act."[38] Well, Senate Republicans just said "No." I am tremendously proud that Senators on both sides of the aisle have rejected attempts to eliminate this essential minority power. And I am proud that we serve alongside fellow constitutional officers who are willing to stand up to majorities in their own distinct way on the federal bench.

Taking the long view: the courts guard freedoms, and the Senate guards the courts. We take a heavier dose of the Nation's political passions so that judges can remain above them. So that judges do not have to serve at the pleasure of angry majorities. So that judges can do justice—nothing more, and nothing less.

The system laid out by our Constitution is both elaborate and beautifully simple. And the mutually reinforcing roles of the Senate and courts in this system are among the Framers' most inspired designs.

Thank you all very much.

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33 *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

34 *See* Janus v. AFSCME, 138 S. Ct. 2448 (2018).

35 *See* Citizens United v. FEC, 558 U.S. 310 (2010).

36 *See generally* EDWARD C. LIU & WEN W. SHEN, CONG. RSCH. SERV., IF12167, THE HYDE AMENDMENT: AN OVERVIEW (2022), https://perma.cc/M6X9-RL2G.

37 *See generally* REPUBLICAN STAFF OF H. COMM. ON THE JUDICIARY, 117TH CONG., AN UNPRECEDENTED AND UNCONSTITUTIONAL POWER GRAB: HOW DEMOCRATS ARE ABUSING THE CONSTITUTION TO NATIONALIZE ELECTIONS (2021).

38 For the People Act of 2021, H.R. 1, 117th Cong. § 1.