

SCALIA FORUM PRESENTATION

Restoring the Republic: Antonin Scalia, Limited Government, and Public Life*

The Honorable Mike Johnson[†]

Good evening, everyone. Dean Randall: thank you for that introduction. It is a privilege to be here along with so many great friends, as we remember the life and legacy of Justice Antonin Scalia. Secretary Scalia, Father Paul, Chris, Mary Clare, and Maureen: thank you for allowing us to join you this evening as we honor the memory of your father and your husband. He has meant so much to all of us.

Justice Scalia was, and continues to be, one of the most important figures in the history of the Supreme Court. The course of legal history and legal philosophy is different because of this great man. There is a distinct “before” and “after” in our jurisprudence because of Justice Scalia. No one articulated our textualist and originalist principles better than he did. He made the Court better and has inspired generations of law students and attorneys, including me. And as the grandson of Sicilian immigrant Nunzio Messina, I always loved that Justice Scalia was our nation’s first Italian-American to serve on the Supreme Court.

I’ll never forget the first time I met him in person. It was early in my career, when I was a staff attorney at the Alliance Defense Fund, and I was with a small group of fellow constitutional law litigators on a visit to the Court. Justice Scalia was scheduled to meet with us for about fifteen minutes, but he graciously gave us an extra half hour. After his remarks, he allowed us to ask questions. I sheepishly raised my hand and asked: “Sir, many of us are alarmed by the constant overreach of the federal government. Would you comment about the future of the Tenth Amendment, and our prospects of preserving states’ rights?” He scowled as if it were the most ridiculous thing he’d ever been asked. I cannot recall his exact words, because I was so unnerved by his reaction, but he exclaimed something to the effect of: “Forget your silly pipe dream! It’s too late! That ship has already sailed!” I had nightmares about that exchange for about ten years.

* This Essay is a lightly edited version of Speaker Johnson’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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We never had to wonder where Justice Scalia stood. His confidence, wit, and precision were unmatched. And everyone here knows the law better and has a greater appreciation for the Constitution because of his influence.

Tonight, I want to spend a few minutes touching on something that Justice Scalia often emphasized. On one occasion, thirteen years ago, he and Justice Breyer were testifying before the Senate Judiciary Committee on the role of judges under the Constitution.¹ He observed that most people answering the question, “What makes America the freest country in the world?” will point to our Bill of Rights.² They will talk about our right to free speech, or our right against unreasonable searches and seizures—and these are great things.³ But Justice Scalia noted that many countries also have Bills of Rights, some with even better language than ours.⁴ Many socialist countries have rights articulated on paper, but those rights are what Scalia and James Madison called mere “parchment guarantee[s].”⁵ While Americans have our rights articulated on paper, what makes the United States the freest country in the world is the organization of our government—it is the structure we have created to protect our precious freedoms.

We do not have a centralized power that acts as judge, jury, and executioner.⁶ Rather, from the time of our country’s founding, we latched onto the separation of powers with three branches of government, safeguarded by checks and balances.⁷ The American Congress is unique among global legislative bodies because we have a meaningful bicameral system, and it is difficult to pass laws through both chambers.⁸ Right now, with slim margins, it is difficult to pass laws in just one chamber. Lawmaking is a fight, and it requires persuasion and compromise. Leader McConnell and I are going back and forth right now on whether important bills—legislation about big questions—will be approved by both chambers. But it is a good thing that we have to think long and hard, engage in thoughtful and difficult debate, and meet in conferences over how we are going to pass legislation.

¹ See *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary, 112th Cong.* (2011).

² See *id.* at 6 (statement of Hon. Antonin Scalia, Associate Justice, The Supreme Court of the United States) (referring in this instance to conversations with law students when he asks: “What do you think is the reason that America is such a free country?”).

³ *Id.*

⁴ See *id.* at 6–7.

⁵ *Id.* at 7. Justice Scalia explained that not only James Madison, but our Framers generally, discussed in 1787 the “parchment guarantee” and the importance of structure in our Constitution. *Id.*

⁶ Cf. *id.* at 6–7 (noting that the constitution of the Soviet Union, despite appearing to guarantee extensive freedoms, “did not prevent the centralization of power in one person or in one party”).

⁷ See THE FEDERALIST NO. 47 (James Madison).

⁸ See *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

The tug-of-war inherent in our system was by design.⁹ Even though the size and scope of the government today has far exceeded the Founders' original intentions, we still have an opportunity to rein it in and restore the essential principle of limited government.¹⁰ The separation of powers ensures the people can change policy through our elections. If we do not like what is happening, we can choose new representatives. In America, we have the fortune of not governing by fiat. Montesquieu taught that every government should have the power to make laws, engage with foreign nations, and enforce and interpret the nation's laws.¹¹ And he divided that latter power between the executive and the judicial branches because the judicial branch cannot be both the enforcer *and* the judge of laws.¹² When judges are given the power to impose policy, tyranny soon follows.¹³

Right now, we need judges who apply the law as it is written, and not as they want it to be. Justice Scalia said that it was the “oldest and most commonsensical interpretive principle” that “words mean what they conveyed to reasonable people at the time they were written.”¹⁴ Judges should not have the power to change words in statutes or in the Constitution, or infuse words with the meanings they want. Judges are supposed to interpret our laws as written, based on history, tradition, and precedent.¹⁵ If there is to be a change in our laws, it is the people, through their duly elected representatives, who must act.

One of the greatest threats to the American experiment today is the centralization—and inevitable abuse of power—in the executive branch.¹⁶ Over the years, Congress has gradually, and oftentimes willfully, surrendered much of its lawmaking responsibility to the administrative state.¹⁷ Now, instead of having consistency and predictability, we have wild swings in rulemaking and in legal interpretations from one administration to the next.¹⁸ Even worse, instead of expecting the

⁹ See, e.g., THE FEDERALIST NOS. 47, 48 (James Madison).

¹⁰ See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 313, 327 (2013) (Roberts, C.J., dissenting).

¹¹ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 173 (Thomas Nugent trans., Batoche Books 2001) (1748).

¹² *Id.*

¹³ *Id.*

¹⁴ ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15–16 (2012).

¹⁵ See, e.g., *United States v. Rahimi*, 144 S. Ct. 1889, 1896–1903 (2024) (applying this concept of interpretation to a federal firearms statute); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126–34 (2022) (applying a similar rule of interpretation to a New York State firearms law).

¹⁶ See *City of Arlington v. FCC*, 569 U.S. 290, 312–15 (2013) (Roberts, C.J., dissenting).

¹⁷ See *id.* at 327.

¹⁸ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2287–88 (2024) (Gorsuch, J., concurring).

Executive Branch to merely enforce our laws, the people now see the government engaged increasingly in the weaponization of key agencies, and even the political targeting of conservatives.¹⁹ In some cases, the people see the government ignore the law altogether.²⁰

At the same time, we are seeing a dangerous loss of faith in our mediating institutions. Church attendance and belief in God are rapidly declining.²¹ Marriage rates are down, and single parenthood rates are the highest ever.²² Crime is through the roof.²³ Too many schools are indoctrinating rather than educating.²⁴ Fewer young men are going to college.²⁵ The institutions necessary to build virtue and instill a sense of duty in each of us are eroding, and there is a palpable sense around the country that the very foundations of our republic are in jeopardy. In a moment of crisis like this, what are we to do?

In times of great peril, we will do well to hold fast and work to restore and rebuild those foundations. Justice Scalia was a great model for that, and not only in his professional endeavors, but in his personal life. He was a patriot who studied government and our Constitution, and he spent his life in public service. He also loved and prioritized his family first. Because of his legacy and extraordinary influence, there are more American lawyers and judges who are opposing judicial activism, and more law students who are studying originalism.²⁶ In recent years, we have secured numerous legal victories and overturned egregious judicial precedent, in large measure because of Justice Scalia's reasoning and precedent.²⁷ We

¹⁹ See, e.g., Eliana Johnson, *Conservative Group Uncovers New Roots of the IRS Scandal*, NAT'L REV. (May 19, 2015, 8:00 AM), <https://perma.cc/NQC8-8LZD>; Todd Zywicki, "Operation Choke Point", WASH. POST: THE VOLOKH CONSPIRACY (May 24, 2014, 2:17 PM), <https://perma.cc/H5VY-TMS7>.

²⁰ See, e.g., Memorandum from Manhattan Dist. Att'y Alvin L. Bragg, Jr. to All Staff, Achieving Fairness & Safety (Jan. 3, 2022), <https://perma.cc/4VPM-W2CU> (advising his staff of new policies and procedures, including a mandate to refuse prosecuting criminal offenses such as trespass, aggravated unlicensed operation, resisting arrest, and prostitution, among others).

²¹ See PEW RSCH. CTR., MODELING THE FUTURE OF RELIGION IN AMERICA 7–8, 13 (2022).

²² See Stephanie Kramer, *U.S. Has World's Highest Rate of Children Living in Single-Parent Households*, PEW RSCH. CTR. (Dec. 12, 2019), <https://perma.cc/7M3W-9GWA>.

²³ See, e.g., Rafael A. Mangual, *Cities Got Deadlier in 2020: What's Behind the Spike in Homicides?*, MANHATTAN INST. (Apr. 5, 2021), <https://perma.cc/246J-7RQ7>.

²⁴ See, e.g., ZACH GOLDBERG & ERIC KAUFMANN, SCHOOL CHOICE IS NOT ENOUGH: THE IMPACT OF CRITICAL SOCIAL JUSTICE IDEOLOGY IN AMERICAN EDUCATION 1–3 (2023).

²⁵ See, e.g., Richard Fry, *Fewer Young Men Are in College, Especially at 4-Year Schools*, PEW RSCH. CTR. (Dec. 18, 2023), <https://perma.cc/X4WD-FRP5>.

²⁶ See *How Antonin Scalia Changed America*, POLITICO MAG. (Feb. 14, 2016), <https://perma.cc/4Q9P-HCE2> (collecting the opinions of legal thinkers on Justice Scalia's legacy, including his originalist influence on law students, legal scholars, and judges).

²⁷ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243, 2272, 2275, 2279 (2022); *id.* at 2301–02, 2304 (Thomas, J., concurring); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2200–01 (2023) (Thomas, J. concurring); *id.* at 2219 (Gorsuch, J., concurring); *id.* at 2222 (Kavanaugh, J., concurring).

need more Americans who fight for our principles like he did. We need Americans who love their families like he did, and who treat political and ideological opponents like he did.²⁸ We need more Americans to live faithfully, as he did.²⁹ As a Christian, especially, I am inspired by Justice Scalia's unwavering faith. In 2005, while speaking to the Knights of Columbus in Baton Rouge, he shared these words that I'll leave you with tonight: "Have the courage to have your wisdom regarded as stupidity. Be fools for Christ. And have the courage to suffer the contempt of the sophisticated world."³⁰

We need more men and women of courage today: courage to do the right thing, courage to fight for the principles that established our country, and courage to live faithfully. This room is full of men and women who are demonstrating the same courage as Justice Scalia, and it is my prayer that through his example, and yours, that many more will come behind us, and that through this law school many more men and women will carry on the legacy of our great Justice Antonin Scalia. Thank you, and God bless.

²⁸ Anastasia Boden & Elizabeth Slattery, *What We Can Learn from Antonin Scalia and Ruth Bader Ginsburg's Friendship*, PAC. LEGAL FOUND. (Feb. 11, 2022), <https://perma.cc/F2LG-MAS9>.

²⁹ See generally ANTONIN SCALIA, *ON FAITH: LESSONS FROM AN AMERICAN BELIEVER* (2019).

³⁰ See Ariane de Vogue, *Scalia and the Friars: A Look at His Views on Religion and the Law*, CNN (Feb. 19, 2016, 6:08 AM), <https://perma.cc/5YCS-XAER>.