TRIBUTE TO JUSTICE ANTONIN SCALIA

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

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

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

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

Let me add one illustration of my non-diva point. In 1999, Nino Scalia and I both made several presentations at a nationwide conference of lawyers and judges in New Zealand, including a de-

bate with each other.[1] Despite the jet lag and the very lengthy proceedings over several days, after we had finished our own contributions we both sat in the audience listening to the remainder of the program. Other so-called "featured speakers" from overseas left after their own remarks, so I told Nino that I was pleasantly surprised to see him sitting through all the ongoing proceedings, including some that dealt with purely local issues. In response, he expressed what was also my reason for remaining: "It's important," he said, "to demonstrate my respect for all the other participants, and also for the conference organizers."

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

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

1. Some of the conference presentations were published in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW (Grant Huscroft & Paul Rishworth eds., 2002). *See, e.g.*, Antonin Scalia, *The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?*, *in id.* at 19; Nadine Strossen, *Liberty and Equality: Complementary, Not Competing, Constitutional Commitments*, *in id.* at 149. For transcript excerpts from the conference, see Ian Binnie, Antonin Scalia, Hilary Charlesworth, Elizabeth Evatt, Grant Huscroft & Nadine Strossen, *A Dialogue on Rights*, 1999 N.Z. L. REV. 547.

2. *See generally* Fred Friendly Seminars, http://www.fredfriendly.org/.

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

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

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

I still prize the letter that Nino sent me after one of our first meetings, since it is so emblematic of the mutual respect we share for one another, despite our deep differences in views. He paid a big compliment to me and the ACLU, but he could not resist qualifying it with a parenthetical little dig—all in good humor, to be sure. I am going to share the key sentence from this letter with you, since it also precisely conveys *my* view about *him*. As he wrote, referring to both me and the ACLU: "I admire you for consistently adhering to your (often incorrect) principles."[4]

Justice Scalia had a similar response when I wrote him last summer to tell him that one of the biggest rounds of applause at the ACLU's Membership Conference in June, 2004[5] was for his dissent in the *Hamdi* case,[6] which was joined by Justice Stevens and expressed the strongest endorsement of robust individual rights and limited executive power in the War on Terror. I also want to note that one of the ACLU's conference participants who was most enthusiastic about Justice Scalia's opinion—a striking repudiation of the Court's last decision involving the unjustified incarceration of U.S. citizens on alleged national security grounds[7]—was Fred Kore-

4. Letter from Antonin Scalia, Assoc. Justice, Supreme Court of the United States, to Nadine Strossen, Professor of Law, New York Law Sch. (on file with author).

5. *See* David Sarasohn, *ACLU: On the March Again*, OREGONIAN, July 11, 2004, at F1.

6. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

7. Korematsu v. United States, 323 U.S. 214 (1944) (permitting the internment of U.S. citizens on grounds of national security).

matsu. Sadly, this human rights hero died just two weeks ago, on March 30, 2005.[8] So, Justice Scalia's *Hamdi* opinion was a capstone to Fred's lifelong crusade for equal justice for all, even—if not especially—during national security crises.

When I passed on to Nino this praise from the ACLU Membership Conference for his *Hamdi* opinion, he responded by dismissively describing us civil libertarians as "sunshine originalists."[9] Of course, Nino, from my perspective, you originalists are "sunshine civil libertarians!"

In contrast with his strong protection of individual rights in the *Hamdi* case, Justice Scalia stubbornly refuses to acknowledge the Constitution's implicit respect for individual freedom of choice on matters ranging from abortion,[10] to gay rights,[11] to even his own right to send his children to Catholic schools.[12] That latter stance is an excellent example of—to paraphrase the letter describing me and the ACLU that I quoted earlier—Justice Scalia's consistent application of his incorrect principles. But despite his blind spot about implied rights, Nino does unflinchingly and eloquently defend many rights that the Constitution explicitly protects, having written or joined some of the Court's most forceful, important opinions enforcing the First Amendment's Free Speech Clause,[13]

8. Richard Goldstein, *Fred Korematsu, 86, Dies; Lost Key Suit on Internment*, N.Y. TIMES, Apr. 1, 2005, at C13.

9. Letter from Antonin Scalia, Assoc. Justice, Supreme Court of the United States, to Nadine Strossen, Professor of Law, New York Law Sch. (on file with author).

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

11. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586–90 (2003) (Scalia, J., dissenting) (arguing that a state may prohibit with constitutional impunity sexual conduct that it finds "immoral and unacceptable"); Romer v. Evans, 517 U.S. 620, 636, 640 (1996) (Scalia, J., dissenting) (calling "unassailable" past holdings that states may criminalize homosexuality).

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

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

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

I cannot resist adding how I wish that he would equally strongly enforce other rights that are explicitly protected under the Bill of Rights, such as the First Amendment's Free Exercise[16] and Establishment Clauses[17] and the Eighth Amendment's prohibition on cruel and unusual punishment.[18] But he is still quite young—at least by Supreme Court standards—so I have not given up hope that his future opinions might show even greater consistency in sup-

prohibiting candidates for judicial election from announcing their views on public issues violates the First Amendment); R.A.V. v. St. Paul, 505 U.S. 377 (1992) (Scalia, J.) (holding that a city ordinance prohibiting bias-motivated expression is facially invalid under the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (Brennan, J.) (upholding the right to burn a United States flag as an expression of political speech).

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

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

16. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (Scalia, J.) (holding that the Free Exercise Clause does not apply to neutral general laws that burden sincerely held religious beliefs and associated practices). For criticism of this opinion, see Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 465–73 (1997) (criticizing *Smith* for departing from a "long line of precedent," for sterilizing the Free Exercise Clause and crippling its ability to protect members of minority religious groups, and for being inconsistent with Justice Scalia's stated theories and concerns).

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

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

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

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

19. Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES, Apr. 10, 2005, Sec. 6, at 28, *adapted from* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

him!" Likewise, the same analysis would apply—and the protestors would have had no right to drown out invited speakers, thus preventing invited audience members from hearing these speakers—if the event had been organized by the ACLU Lesbian and Gay Rights Project and the demonstrators outside had been shouting, "Down with gay rights and the ACLU! Up with Justice Scalia's dissent in *Lawrence v. Texas*!"

21. *See* Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427 (1997) (adapting Prof. Strossen's contribution to this Jewish Theological Seminary dialogue).

22. *See* Texas v. Johnson, 491 U.S. 397 (1989).

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

Nino Scalia's warm and ebullient personality has won him many friends, across the ideological spectrum. To cite one prominent example, Ruth Bader Ginsburg refers to him as her closest friend on the Court, and, as I hope you all know, before she became a judge, she was the founding Director of the ACLU Women's Rights Project, one of the ACLU's General Counsel, and a member of our National Board of Directors. *Reason* magazine recently interviewed me for an article about the Supreme Court and asked who my all-time favorite Justice was, in terms of opinions and ideas overall. I know you will not be surprised that my answer to that particular question was not Antonin Scalia.[23] However, I would have chosen him in response to many other important questions, including: "With which Justice would you want to spend an evening, or share a platform?"

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

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23. *Who Should Reign Supreme?*, REASON, July 2005, *available at* http://www.reason.com/0507/fe.an.who.shtml.

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