

TRIBUTE TO JUSTICE ANTONIN SCALIA

Good afternoon, and thank you for the invitation to join in this celebration.

I was introduced to you as the Emerson Spies Professor of Law at the University of Virginia. Few of you will recognize that name, but Emerson Spies was a mainstay of our faculty in the mid-twentieth century and the Dean of our law school from 1975 through 1980.

At a memorial service following Emerson's death in 1990, his friend and former colleague on the Virginia faculty, Nino Scalia—by then Justice Scalia—gave the principal remarks. Emerson, said Nino, was not a variable person, not someone who takes on the hue of those he is with, not someone who looks different to different observers. No, said Nino, Emerson's colors were "bright and clear—and they neither changed nor were ever dissembled."

The same words might be said of the man who spoke them. Justice Scalia's colors are bright and clear, and they neither change nor are ever dissembled.

Critics, of course, delight in finding the discrepancies in a judge's work, instances in which the judge may be said to have strayed from the announced criteria of decision. And, inevitably, they succeed.

Perfect consistency is a false expectation, and not only because of human fallibility. There are also important differences in the content and structure of constitutional provisions, not to mention variations in the contexts in which constitutional questions arise. Perhaps most destructive of the hope for a unified-field theory of constitutional law is the confusing and contradictory overlay of precedent. Too often, fidelity to the best understanding of a constitutional guarantee *and* to the Court's prior constructions of it is a logical impossibility.

Any unitary approach or methodology—if sufficiently specific to be meaningful—will encounter cases where it simply does not work, where it leads to outcomes that are absurd or silly. And a practical judge, confronted with that prospect, will opt for good sense rather than rigorous consistency.

That said, Antonin Scalia is the most nearly consistent of our judges. He cares more about methodology than is usual among judges, worries more about fidelity to the law laid down, feels himself more closely bound by external sources, and is more dedicated

to a vision of constitutional law as something distinct and apart from constitutional politics.

The bright, clear colors of Scalia's jurisprudence are well known. First and foremost is the text—the words used, in their plain meaning, as authority and as external constraint. There is also respect for tradition—American tradition—as a guide to decision when the text is not clear. And also, it must be said, there are decisions where the anchors to text and history seem strangely tenuous. These and other elements of Justice Scalia's jurisprudence will be charted here by wiser heads than mine.

I want to add just a thought on what seems to me the animating vision behind Scalia's jurisprudence. Perhaps unusually among Supreme Court Justices, Scalia is informed by an awareness of the fragility of human achievement, by a sharp distrust of easy promises about a better world, by a keen appreciation of what we have to lose.

Unfortunately, no word in our language does full justice to this perspective. There is *pessimist* of course, but anyone who knows Antonin Scalia knows that's all wrong. He is a *happy* warrior—a man of vitality, warmth, charm, and magnetism. Even when you are infuriated by his opinions—and most of us sometimes are—it's hard to resist his zest for intellectual combat, his delight in pungency of expression, his love of a good joke. In this sense, there is no hint of the “pessimist” in Nino Scalia.

But he *is* deeply skeptical about the capacity of judges to work improvements in the world—skeptical not merely about the legitimacy of judicial efforts to shape the future, but more fundamentally about their ability to get it right.

Thirty-five years ago, Alexander Bickel warned against the *idea of progress* and its beguiling attraction for our nation's judges.¹ He warned against the too-easy confidence that heartfelt beliefs are harbingers of future wisdom. He counseled against the temptation to abandon constraint in the quest for a better world.² He urged judges not to seek vindication in the future but to rely instead on the less-ambitious virtues of analytic coherence, principled judgment, and fidelity to the law laid down.³

Here, it seems to me, we near the core of Scalia's judging. It is not merely that he doubts the *authority* of judges to make bets on

1. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

2. See *id.* at 173–75.

3. See *id.* at 81.

the future; he doubts their *capacity* to do so with anything like consistent success. The qualities of a statesman may be, as Edmund Burke said, “[a] disposition to preserve and an ability to improve,”⁴ but for Justice Scalia only the former is in the province of the judge.

Insofar as one can learn the man from his opinions, Justice Scalia believes that the advances of civilization are hard-won and must be carefully guarded, that the lessons of long experience should not be lightly cast aside, that reform carries risk of loss, and that good intentions do not guarantee good results. He knows that untold suffering has flowed from utopian visions and that even the soft utopias of the 1960s have had their costs. In this sense—and it is a rather particular sense—he is more modest than most judges, and a better democrat.

Justice Scalia’s alertness to the risks of constitutional innovation may seem to some to be at odds with the American spirit. It is less exhilarating than that heady confidence in our own foresight that has often graced (and sometimes afflicted) our young nation. Yet there is wisdom in Scalia’s approach, and it is the better for being time-tested. If even the most ardent of the Justice’s admirers may be permitted to doubt that a Court of nine Scalias would be ideal, we should all be thankful for having the one.

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4. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 181 (Thomas H.D. Mahoney ed., 1955) (“A disposition to preserve and an ability to improve, taken together, would be my standard of a statesman. Everything else is vulgar in the conception, perilous in the execution.”).

