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Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia

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We live in a time of rhetorical excess. A U.S. Senator asks the attorney general to investigate the *New York Times* for treason, based upon its publication of news about the government's program to track terrorist finances.[1] A political ad portrays the Texas prosecutor who indicted Tom DeLay, the former House majority leader, as a snarling, vicious Rottweiler.[2] Campaigns are sullied with vicious attacks and groundless charges, even against war veterans who risked their lives in the nation's armed forces.[3] A prominent televangelist voices his support for the assassination of a foreign leader.[4] Politically, the country is sharply divided and color coded, with "red states" on one side of the national divide, and "blue states" on the other.

The nation traditionally looks to the courts for a less partisan, more rhetorically restrained mode of raising, debating, and resolving controverted issues. Judges are respected for their adherence to reasoned discourse; they are expected to decide legal issues based upon rational argument, serious reflection, and fidelity to the rule of law.

Written opinions of the Supreme Court in important constitutional cases influence not only the direction of the law, but the mood and tone of the nation's politics. Decisions that affect current societal controversies become part of the political discussion, sometimes a central part; consider how *Roe v. Wade* has dominated the broad public debate over abortion. In this sense, the rhetoric of the justices inevitably becomes politicized, that is, mixed into the brew of policy, law, partisan debate, statesmanship, and occasionally, leadership, that constitutes our political life.

In this essay, I set forth my view that one Justice, Antonin Scalia, has performed his role in a way that adds to the poisonous political atmosphere that now afflicts the nation. Further, his rhetoric serves to undermine the legitimacy and

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1. Byron Calame, *Secrecy, Security, the President and the Press*, N.Y. TIMES, July 2, 2006, § 4, at 10 ("Senator Jim Bunning of Kentucky called on the attorney general to investigate *The New York Times* for treason."). Rep. Peter King also joined in the call to prosecute the newspaper, and vitriolic comments were made by sundry others. *See* Howard Kurtz, *Piling on the New York Times with a Scoop; Story on Secret Program Further Rouses Critics*, WASH. POST, June 28, 2006, at C01.

2. Jonathan Weisman, *DeLay Uses Campaign Tactics to Fight Charges*, WASH. POST, Nov. 6, 2005, at A07.

3. Perhaps the lowest point was reached in the 2000 Republican presidential primary in South Carolina, where numerous rumors were spread about candidate John McCain, who had been captured and tortured during the Vietnam war:

> McCain was gay. McCain had fathered an illegitimate child with a North Vietnamese woman, which was why he had gotten special treatment from the Viet Cong. McCain had a black daughter. (McCain and his wife, Cindy, have an adopted daughter from Bangladesh). McCain voted for the largest tax increase ever. McCain's wife stole prescription drugs from a charity and abused them while she was supposedly caring for their four children. McCain was pro-abortion. McCain left his crippled first wife. McCain was a liar, a cheat, and a fraud.

CARL M. CANNON ET AL., BOY GENIUS: KARL ROVE, THE ARCHITECT OF GEORGE W. BUSH'S REMARKABLE POLITICAL TRIUMPHS 142 (2d ed. 2005).

4. Pat Robertson, the speaker, founded the Christian Coalition and in 1988 ran for the Republican nomination for President. Ron Hutcheson, *Televangelist Stirs the Pot Once More*, HOUSTON CHRON., Aug. 24, 2005, at A13.

stature of the judicial branch of government. Scalia's inflammatory words in opinion after opinion, often attacking the motives and honesty of the other Justices, make him seem more like a partisan political figure than a judge. Indeed, even political office holders often exercise more restraint, in an effort to appear "statesmanlike" in their rhetoric and self-presentation. But Scalia seems to embrace the political impact of the Court's work, playing the role of spokesman and advocate for the faith-based conservative political movement that emerged during the presidency of Ronald Reagan and that has risen to its greatest prominence in the Republican party under President George W. Bush.

Scalia's career on the Court illuminates the advantages that the position of Supreme Court Justice affords to a rhetorically unconstrained, politically fractious justice. The life tenure he enjoys as a federal judge insulates him from any accountability for his rhetorical excesses. He can publish his credo freely and be assured of the widest dissemination of his views through the official Supreme Court reports, the news media, and the worldwide web. He can use the Court as a "bully pulpit" while never having to face those Americans who are adversely affected by his words and by his exercise of the power of a Supreme Court Justice. He is free to choose to play to the particular audience of his choice; so long as he commits no impeachable offense, he pays no price for the disrespect he shows for the judiciary, or for the divisiveness he helps foster in the country. Once he frees himself of the traditional demands of "judicial temperament" that most judges impose upon themselves, he is rhetorically empowered as are few other actors in national politics.

In the following pages, I will first show how a Scalia dissent, written in his initial term on the Court, signaled his willingness right from the start to unfairly insult his colleagues and to denigrate the integrity of Supreme Court decision-making. I then discuss the rhetorical excesses of the following two decades, during which Scalia fosters and supports the "judge bashing" campaign of the political right wing of the Republican party, and does his best to strip the Court of its legitimacy as an essential and honorable national institution. I conclude with some thoughts as to what may be motivating him to speak and act as he does (and why he is almost certain to continue employing his divisive and alienating rhetoric for the rest of his stay on the Court).

I. IN THE BEGINNING

Justice Scalia took his seat on the Court on September 26, 1986. At his Senate confirmation hearing in the summer of 1986, he described himself as a "thoughtful moderate lawyer and judge,"[5] and won confirmation by a vote of

5. 13 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1986 ANTONIN SCALIA 178 (1989) (testimony of Aug. 5, 1986).

98–0.[6] Few who have observed him over the last twenty years on the Court would use his own words to describe him. Other Justices have written strong, even impassioned opinions; Scalia writes ones aptly described as "incendiary,"[7] "strident,"[8] "scathing,"[9] and "drip[ping] with sarcasm and scorn."[10] Scholars have noted that his style is so abrasive that he has antagonized other Justices and diminished his effectiveness as an advocate with his colleagues on the Court.[11] His openly contemptuous dissent in one abortion case, *Webster v. Reproductive Health Services*, harshly criticized the concurring opinion of Justice Sandra Day O'Connor, at one point declaring that her opinion "cannot be taken seriously."[12] This is often cited as a preeminent instance of his alienating rhetoric,[13] which he puts in service to his far right-wing politics.

Justice Scalia's immoderate approach to opinion writing, and his dedication to the political goals of the religious right in American politics, appeared in his first term on the Court. The prime example is his dissenting opinion in *Edwards v. Aguilllard*,[14] a case decided at the end of the 1986–87 Term. Plaintiffs in *Edwards* challenged an anti-evolution statute enacted by the state of Louisiana.[15] The law required the state's public schools to "balance" the teaching of Darwin's theory of evolution with the teaching of "creation science."[16] The statute was the product of a long campaign by religious forces intent on limiting the

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6. *Id.* at viii.

7. Bernard E. Harcourt, *Foreword: "You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers [Raising Questions About* Lawrence, *Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 505 (2004).

8. DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF ANTONIN SCALIA, at xvii (1996).

9. Richard J. Lazarus, *Respondent: Rehnquist's Court*, 47 ST. LOUIS U. L.J. 861, 871 & n.64 (2003) (providing several examples).

10. TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 41 (2000).

11. *E.g.*, *id.* at 43 ("Scalia . . . seems decidedly more interested in aggressively defending his positions than in developing voting blocs . . . ."); Lazarus, *supra* note 9, at 869–72.

12. 492 U.S. 490, 532 (1989) (Scalia, J., dissenting).

13. *See* Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000). Professor Chemerinsky writes about Scalia: "I am greatly distressed by the message that his sarcasm and that his attacks on other Justices transmit to law students and to attorneys about how it is appropriate to speak and to talk to one another in judicial settings." *Id.* at 385. He sees a "meanness" to his rhetoric. *Id.*

    Scalia continued to mock O'Connor through the years, most recently in *McCreary County v. ACLU*. 125 S. Ct. 2722, 2757 n.8 (2005) (Scalia, J., dissenting) ("Nothing so clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence as Justice O'Connor's stirring concurrence in the present case."). His sarcasm about her "stirring" concurrence was based on his claim that she contradicted her own position by joining the majority in a prior case. *Id.*

14. 482 U.S. 578 (1987).

15. *Id.* at 580.

16. *Id.* at 581.

teaching of evolution because it conflicted with the biblical story of the sudden creation of life out of nothing.

The Court divided 7–2 in favor of striking down the statute as a violation of the First Amendment's establishment clause.[17] The majority opinion and a concurrence by Justice Lewis Powell canvassed the long history of attacks on evolution by religious fundamentalists, and found the preeminent purpose of the Louisiana statute was to promote sectarian beliefs about the origin and diversity of life.[18] Powell noted that the principal individuals and organizations producing "creation science" literature had committed themselves to a belief in the inerrancy of the Bible.[19] To pursue research on creation science at the Creation Research Society, for example, "a member must accept 'that the account of origins in Genesis is a factual presentation of simple historical truth.'"[20] These supposed "scientists" were not seeking answers; they had the answers, and were just generating "research" that would inevitably confirm them.

The State argued that the Act simply furthered its purported goal of protecting academic freedom by allowing all theories to be taught. Looking at the text of the law — which only advanced one theory (creationism) and hobbled the teaching of another (evolution) — the fundamentalist movement's historical opposition to evolution, and the legislative history of the statute, the Court readily concluded that the law hindered academic freedom.[21] The statute's real aim, the Court concluded, was not promoting a deeper understanding of science, but "discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism."[22]

Scalia's dissent, joined by Justice Rehnquist, stated his disagreement with a barrage of comments that denigrated the integrity of the rest of his colleagues on

17. *Id.* at 597. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

18. *Edwards*, 482 U.S. at 590, 603.

19. *Id.* at 602.

20. *Id.* Powell also quoted three other elements of the CRS statement of belief to which members must subscribe:

> [i] All basic types of living things, including man, were made by direct creative acts of God during Creation Week as described in Genesis. Whatever biological changes have occurred since Creation have accomplished only changes within the original created kinds. [ii] The great Flood described in Genesis, commonly referred to as the Noachian Deluge, was an historical event, world-wide in its extent and effect. [iii] Finally, we are an organization of Christian men of science, who accept Jesus Christ as our Lord and Savior. The account of the special creation of Adam and Eve as one man and one woman, and their subsequent Fall into sin, is the basis for our belief in the necessity of a Savior for all mankind. Therefore, salvation can come only thru [sic] accepting Jesus Christ as our Savior.

Id. (citing the information developed in McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1260 n.7 (D. Ark. 1982)).

21. *Edwards*, 482 U.S. at 587.

22. *Id.* at 589 (internal quotation marks and citation omitted).

the Court. He claimed "the Court today plainly errs"[23] because the Louisiana legislature's secular purpose in enacting the law "is so entirely clear."[24] The Court's rejection of an asserted secular purpose for the law was "facile."[25] The majority's conclusion, he wrote, "surpasses understanding."[26] That conclusion, he charged, was not based upon any evidence but rather was merely "an instinctive reaction"[27] to the Act, one based only upon the Court's "visceral knowledge" of the legislative intent.[28] Further, Scalia argued that "what the statute means and what it requires are of rather little concern to the Court."[29] Given that the majority opinion dwells at length on the statute's intent and its requirements, one can only wonder about the motives of Scalia in making such grossly inaccurate and needlessly offensive statements.

Concerning a key issue in the case, the meaning of academic freedom, Scalia charged his colleagues with "stubbornly misinterpreting" the term[30] and argued that they reached an "obviously erroneous" conclusion about its statutory meaning.[31] Justice Powell's reference in his concurring opinion to the dictionary meaning of the term is dismissed as "utterly irrelevant."[32] Scalia demeans the Court's effort to search the legislative history: "Had the Court devoted to this central question of the meaning of the legislatively expressed purpose a small fraction of the research into legislative history that produced its quotations of religiously motivated statements by individual legislators, it would have discerned quite readily what 'academic freedom' meant . . . ."[33] This passage contradicts his earlier assertion that the Court's assessment of legislative purpose was based upon "visceral knowledge" rather than a diligent search of the record — but when Scalia is excoriating his colleagues on the Court, apparently he cannot be bothered with such niceties as consistency, candor, and fairness.

Scalia ultimately declared the majority's decision to strike down the creation science statute "repressive,"[34] as if it were trying to censor the truth instead of protecting the integrity of science. In a crowning rhetorical effort, he dubbed the majority's decision a "*Scopes*-in-reverse." The connection to the infamous

23. *Id.* at 626 (Scalia, J., dissenting).

24. *Id.* at 635.

25. *Id.* at 634.

26. *Id.* at 629.

27. *Id.* at 634.

28. *Id.* at 610 (internal quotation marks and citation omitted).

29. *Id.* at 612.

30. *Id.* at 627.

31. *Id.* at 630.

32. *Id.* at 612 n.2.

33. *Id.* at 627.

34. *Id.* at 634.

Scopes case[35] had been first articulated in *Edwards* in the Fifth Circuit by Judge Thomas Gibbs Gee, dissenting from a denial of rehearing en banc.[36] Judge Gee wrote that the *Scopes* decision had allowed the state of Tennessee to forbid teaching evolution, "rejecting [the view] . . . of Clarence Darrow that truth was truth and could always be taught — whether it favored religion or not. By requiring that the whole truth be taught, Louisiana aligned itself with Darrow . . . ."[37] Scalia accepted Gee's preposterous idea that Louisiana's creation science statute promoted the kind of "truth" that biology teacher John T. Scopes and his lawyer Clarence Darrow were fighting for.

Scalia wrote that by ordering the teaching of creation science, the legislature was insuring that students would be guaranteed "freedom from indoctrination."[38] With this declaration, Scalia threw all pretension to judicial neutrality and intellectual honesty to the wind. None but the most devoted ideologue could twist the facts to make it appear that the opponents of "creation science" were on a mission to repress ideas and "indoctrinate" students. The truth was just the reverse; those pushing creationism were seeking to use the public schools to indoctrinate students with their religious beliefs. Scalia spun Gee's inane idea into a memorable phrase — "Scopes-in-reverse" — that has become part of the lexicon of the anti-evolution movement.[39] Articles supporting the teaching of "intelligent design" (the newest label for creationism[40]) have been circulated on the worldwide web, using the phrase "Scopes in reverse" to attack the efforts of evolutionists to keep the teaching of science free of biblical dogma. In fact, one article posted on the website of the Discovery Institute, the chief proponent of intelligent design, is actually titled *Scopes in Reverse*.[41] Scalia succeeded in using the bully pulpit of the Supreme Court to create a rallying cry for one of the most fervent political battles of his ideological ally, the religious right, in a cause that undermines both education and science.[42]

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35. Scopes v. State, 289 S.W. 363 (Tenn. 1927) (biology teacher convicted of violating anti-evolution statute). Defense attorney Clarence Darrow argued that the biblical story of creation could not be taken literally and taught as science. *See* Scopes Trial - Day 7 - UMKC School of Law, http://www.law.umkc.edu/faculty/projects/ftrials/scopes/day7.htm (last visited Feb. 12, 2007) (quoting day seven of the *Scopes* trial).

36. Edwards v. Aguillard, 778 F.2d 225 (5th Cir. 1985) (Gee, J., dissenting).

37. *Id.* at 226.

38. *Edwards*, 482 U.S. at 628 (Scalia, J., dissenting).

39. *Id.* at 634.

40. For a discussion of how the anti-evolution campaign changes its labels, but not its content see *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

41. Nancy Pearcey's article of this title appeared on the Discovery Institute News website. Nancy Pearcey, *Scopes in Reverse*, WASH. TIMES, July 24, 2000, at A17, *available at* http://www.discovery.org/scripts/viewDB/index.php?command=view&id=399.

42. Battles over the teaching of evolution continue, and have intensified since the 2004 re-election of George W. Bush. Jodi Wilgoren, *Politicized Scholars Put Evolution on the Defensive*, N.Y. TIMES, Aug. 21, 2005, at A1.

II. TWENTY YEARS OF DIVISIVE RHETORIC

Justice Scalia's twenty years on the Court have been marked by a harsh rhetoric that damages the reputation of the Court as a vital institution in American society, and that encourages and contributes to the "judge-bashing" political agenda of the far right-wing of the Republican party. It is an unacceptable and dishonorable role for a sitting member of the United States Supreme Court.

A. Undermining the Integrity of the Supreme Court

"The Court's notion . . . is nothing short of ludicrous. . . . It is beyond the absurd . . . ."[43]

"These distortions of the record [by the majority] are, of course, not harmless error: without them the Court's solemn assertion . . . would ring as hollow as it ought."[44]

"The Imperial Judiciary lives."[45]

"It is not reasoned judgment that supports the Court's decision; only personal predilection."[46]

"The Court's argument . . . is, not to put too fine a point on it, incoherent."[47]

"With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that 'the *First Amendment* mandates governmental neutrality between . . . religion and nonreligion.'"[48]

"Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."[49]

"The Court throws one last factor into its grab bag of reasons why execution of the retarded is 'excessive' in all cases: Mentally retarded offenders 'face a special risk of wrongful execution' because they are less able 'to make a persuasive showing of mitigation,' 'to give meaningful assistance to their counsel,'. . . . 'Special risk' is pretty flabby language . . . and I suppose a similar 'special risk' could be said to exist for just plain stupid people, inarticulate people, even ugly people."[50]

"Because I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent."[51]

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43. Lee v. Weisman, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

44. *Id.* at 640.

45. Planned Parenthood v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting).

46. *Id.* at 984.

47. *Weisman*, 505 U.S. at 636 (Scalia, J., dissenting).

48. McCreary County v. ACLU, 125 S. Ct. 2722, 2750 (2005) (Scalia, J., dissenting) (citations omitted).

49. Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting).

50. *Id.* at 352.

51. Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

"The result [of the Court's decision] will be to crown arbitrariness with chaos."[52]

"[The Court majority is] vandalizing . . . our people's traditions."[53]

"[T]he Court . . . lays waste a tradition . . . . As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test . . . ."[54]

"The Court's portrayal . . . is so false as to be comical."[55]

These are some of the derisive comments appearing in Scalia dissents.[56] He conveys his own point of view with apodictic certainty; to him, constitutional questions have clear answers, and those who cannot see those answers as he does deserve only contempt.[57] Thoughts expressed by opposing opinion writers, often writing for a majority of the Court, are ludicrous, irrational, absurd, false, and incoherent. His metaphors are as dismissive as his adjectives. The "bulldozer" he conjures up (in *Lee v. Weisman*) conveys the harsh image of a blunt force, without thought or nuance, brutishly knocking existing structures down.[58] The phrase "lays waste" also conveys mindless destruction, like the ravages of an invading army in enemy territory.[59]

His voice is that of a scolding, autocratic father, fed up with some wayward children. His patience is sorely tried. As an authoritarian figure, he seems to feel that part of his role is to administer corrective and, at times, painful discipline. In his role as a judge, he is of course confined in his power to carry out the needed chastisement; all he can really do is verbally assail his judicial colleagues. And this he does, with gusto. As Professor Mark Tushnet drily observes, "[f]illing the official reports with statements that your opponents are the equivalent of fools and liars doesn't improve the quality of public discourse."[60]

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52. *Id.* at 630.

53. J.E.B. v. Alabama, 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

54. *Weisman*, 505 U.S. at 631–32 (Scalia, J., dissenting).

55. Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).

56. An extensive account of Scalia's intemperate prose appears in Marie A. Failinger, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy, Justice Scalia*, 34 U. TOL. L. REV. 425 (2003).

57. His dissent in *Gonzales v. Oregon*, 126 S. Ct. 904, 926–40 (2006), illustrates the point well. A majority of the Court found the U.S. Attorney General did not have the power under a federal statute to prohibit doctors from prescribing drugs for use in physician-assisted suicide. Scalia's opinion said the Attorney General's authority was "clearly valid"; the Court's views on the various sections of the statute, regulations and precedents were "demonstrably false," "irrelevant," "manifestly erroneous," "embarrassingly inapplicable," "obviously inapt," and "not remotely plausible." The Court's reasoning was at various points "sophistic" and "strikingly irrelevant to the case at hand"; it "makes no sense"; and Scalia's own interpretation "could not be clearer."

    Despite all this certitude, six justices rejected Scalia's view; only two justices joined his dissent.

58. *See supra* note 54 and accompanying text.

59. *See supra* note 54 and accompanying text.

60. MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 151 (2005). Richard J. Lazarus puts the matter this way: "He [Scalia] openly ridicules their legal

But degrading the quality of public discourse is the least of Scalia's offenses. What makes his rhetorical expression ominous, and not merely rude, is the consistent effort, intended or not, to undermine the essential integrity and legitimacy of the Court's work. His dissents characterize majority decisions of the Court as not just wrong, but without principle. His criticism generally extends beyond the supposedly low quality of other Justices' ideas, to their disreputable motives. He accuses other Justices of transforming their own political views into constitutional law, and of exercising "raw judicial power"[61] to accomplish their ends. They manipulate the law, invent constitutional doctrines, and impose their personal preferences.

Justice Scalia's drumbeat of criticism of fellow justices undermines the Supreme Court as a unique institution. Given the presence every term of controversial matters on the Court's docket, much depends upon the public perception that the Court is rendering principled decisions.[62] While constitutional decision-making is inevitably about politics, it is important to the Court's standing in the eyes of Americans that the Court itself not be seen as *politicized* in its decision making. As reporter Linda Greenhouse correctly reminds us, "[u]nlike the other branches, which replenish their political capital periodically when officeholders face the voters, the Court's credibility depends on the public's belief that its members are engaged in principled judging . . . ."[63] Scalia's accusations portray the Court as an unprincipled, thoroughly politicized body, making the Court unworthy of the public's intangible, but essential, good will. Scalia's rhetoric encourages Americans to reject the image of the Court, built up over two centuries, as an institution dedicated to preserving the fundamental principles of the Constitution.

Respect for the Court can exist even amid controversy over substantive outcomes. But respect is jeopardized by attacks on the integrity of the Justices and charges that they are purely political in their motives, and entirely subjective in their judgments. Scalia does not seem to recognize that there is a line between normal criticism of the legal conclusions of other Justices, based upon competing visions of the Constitution, and reckless criticism of the fundamental integrity of judicial decision-making itself. The Court cannot hold an honored place in American society if a significant part of the American public comes to accept Justice Scalia's wanton attacks.

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reasoning, casts doubt on their morality, and even sometimes appears to call into question both their intellectual capacity and personal integrity." Lazarus, *supra* note 9, at 871.

61. Utah v. Evans, 536 U.S. 452, 513 (2002) (Scalia, J., dissenting).

62. *Casey*, 505 U.S. at 866 (joint opinion of O'Connor, J., Kennedy, J., and Souter, J.); Linda Greenhouse, *Name-calling in the Supreme Court: When the Justices Vent Their Spleen, Is There a Social Cost?*, N.Y. TIMES, July 28, 1989, at B10.

63. Greenhouse, *supra* note 62.

B. Supporting the Right-Wing Campaign Against the Judiciary

Scalia's cutting rhetoric helps feed his political followers' intense distrust of the federal courts, including the Supreme Court. When he asserts that his colleagues are engaged in power politics, substituting raw judicial power where law should govern, and offering only absurd rationales for their decisions, he feeds the suspicions of those who see the judiciary as the enemy. When he charges that in deciding controversial social issues, the Court's members act as partisans in the "culture wars,"[64] he similarly ratchets up the animosity of those who feel that only rank judicial partisanship explains those Court opinions with which they disagree.

Scalia seems most vitriolic in decisions involving the "hot button" issues that roil the political landscape. In one dissent, Scalia charged that his colleagues on the Court had "largely signed on to the so-called homosexual agenda."[65] By falsely charging the majority of the court with taking sides on the entire range of issues that are raised by homosexual advocates (the "homosexual agenda"), Scalia invited the public to include the Court as a partisan entity in one of the most intense cultural disputes of our time. Similarly, during the course of a dissent in a case involving an aspect of juror qualification in a death penalty case, Scalia accused the Court of opposing the People of the United States "*in its* [the Court's] *campaign against the death penalty.*"[66] "Campaigns" are associated with political groups, not courts, and Scalia implies his colleagues are political actors with broad agendas that run contrary to the will of the people.

Scalia's rhetoric makes certain, in fact, that the Court's decisions will be a prominent element in the culture wars he writes about. He may add a reference to popular culture just to suggest that those who disagree with him are acting in accord with that culture. In *Locke v. Davey*,[67] seven members of the Court upheld a Washington state law that funded student scholarships but excluded studies for devotional theology. Scalia's dissent tarred the majority by observing, "[o]ne need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction."[68] He noted that the Court was supposedly "so quick to come to the aid of other disfavored groups" (citing *Romer v. Evans*, a case involving discrimination against homosexuals).[69] Thus he linked the majority in *Locke* to his political "culture wars" theme, implying they shared the "trendy disdain" for religion that he claimed (citing no evidence) existed in soci-

64. *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

65. Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

66. Morgan v. Illinois, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting) (emphasis added).

67. 540 U.S. 712 (2004).

68. *Id.* at 733 (Scalia, J., dissenting).

69. *Id.* (citing *Romer*, 517 U.S. at 635).

ety. Interestingly, the author of the majority opinion in *Locke* was William Rehnquist, hardly a slave to trendy popular culture. With little logic but much political artfulness, Scalia had smeared the majority with a grossly inaccurate anti-religious accusation.

Media reports of the Court's decisions on controversial social issues savor conflict between the Justices, and Scalia provides conflict to spare, with fiery rhetoric and dire predictions of what the consequences of the majority opinion will be. In his dissent from the Court's decision eliminating criminal sodomy laws, he wildly predicted the judicial invalidation of laws against prostitution, bigamy, bestiality, adult incest, and same-sex marriage.[70] No sober legal observer expects these results, and the Court majority in *Lawrence* expressly disclaimed any such intentions.[71] But his predictions were reported in the nation's newspapers and commented upon in editorials,[72] and caught the attention (and helped fuel the outrage) of those political activists implacably opposed to rights for homosexuals.

Televangelist Pat Robertson, for example, echoed Scalia in saying the Court's ruling "opened the door to (laws legalizing) homosexual marriage, bigamy, . . . prostitution and even incest."[73] According to newspaper accounts, the Reverend Jerry Falwell claimed "that the ruling could set the nation down a slippery slope in which courts might approve bestiality, prostitution and the use of narcotics."[74] Ken Connor, president of the Family Research Council, referred to the case as "classic judicial activism arrogance," adding, "[t]his opens the door to bigamy, adult incest, polygamy and prostitution." He understood the majority to be sanctioning anything done in private, "[n]otwithstanding the public health issues involved when you have sexual relations, for example, between a mother and an adult son."[75] Many of the activists on the political right cited Scalia in voicing their conclusions, like the director of the conservative political group, Concerned Women for America, who remarked, "Justice Scalia is correct: The Supreme Court has become a wrecking ball against the moral order."[76]

These people spread Scalia's overheated rhetoric and hyperbole to their followers. Of course they add their own commentary, but his stature and prestige

70. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

71. *Id.* at 578.

72. *See, e.g.*, Michelle Mittelstadt, *Repeal of Sodomy Ban Echoes Across U.S. 2003 Ruling on Texas Statute Frequently Cited in Sexual Privacy Cases*, DALLAS MORNING NEWS, Mar. 12, 2005, at 29A; Patty Reinert & Armando Villafranca, *Court's Decision Viewed as Step Toward Equal Treatment for Gays*, HOUS. CHRON., June 28, 2003, at A3; David G. Savage, *High Court's Term Ends*, L.A. TIMES, June 27, 2003, at 1.

73. Joan Biskupic, *Court's Opinion on Gay Rights Reflects Trends*, USA TODAY, July 18, 2003, at 2A.

74. Neil A. Lewis, *Conservatives Furious Over Court's Direction*, N.Y. TIMES, June 27, 2003, at A19.

75. *Id.*

76. Biskupic, *supra* note 73.

help them to deliver their own ideological messages. In turn, they praise Scalia for his role in promoting their cause. On occasion, Scalia accepts speaking engagements with these groups. He attended one fundraising dinner for the Urban Family Council, a group that advocates against gay rights, and was introduced as a leading defender of "the virtues and values of life, of family, of marriage."[77] Council founder William Devlin rhapsodized: "Speaking of people who stand for the truth, one of my heroes — as many of you probably have said the same thing, that you've always admired him from afar — is Justice Antonin Scalia."[78] Scalia spoke at this dinner while a gay rights case was pending in the Supreme Court (albeit not one the group was involved with), and generated some criticism for his appearance before such a partisan group.[79]

Scalia advances his political views in off-the-Court speeches that sometimes appear unseemly, if not improper. He missed Chief Justice Roberts' swearing-in in order to give a speech to the lawyers of the Federalist Society,[80] a key conservative organization which has played a major role in engineering the appointment of strict conservatives to the federal courts.[81] He spoke to another audience on his belief that the words "under God" were perfectly appropriate in the Pledge of Allegiance, when a pending case challenging the Pledge was soon to reach the Supreme Court.[82] Scalia felt obliged to recuse himself in the matter.[83] His drive to press his political views, in a speech he was not obligated to give, and which interfered with his participation in a case before his court, demonstrated his eagerness to play the role of a political actor publicly campaigning for his particular views.

Scalia makes every effort to insure his politically volatile statements are media-friendly. His writing is eminently quotable. He laces his public statements and opinions with doses of mockery, humor, and insult.[84] He effectively

77. Richard A. Serrano & David G. Savage, *Scalia Addressed Advocacy Group Before Key Decision*, L.A. TIMES, Mar. 8, 2004, at A1.

78. *Id.*

79. *Id.*

80. *See* Editorial, *The Over-the-Top Justice*, N.Y. TIMES, Apr. 2, 2006.

81. *See generally* Jason DeParle, *Nomination for Supreme Court Stirs Debate on Influence of Federalist Society*, N.Y. TIMES, July 31, 2005, at A12.

82. *See* Charles Lane, *High Court To Consider Pledge in Schools; Scalia Recuses Himself From California Case*, WASH. POST, Oct. 15, 2003, at A1. The case is *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

83. *Elk Grove*, 542 U.S. 1; Lane, *supra* note 82.

84. One observer writes that Scalia "is the voice of a conservative populist: combative, humorous, and sharply critical of the media and of the legal establishment atop which he sits." Charles Lane, *Once Again, Scalia's the Talk of the Town; Justice Renders Frank Out-of-Court Opinions on 2000 Presidential Election, 'Sicilian' Gesture*, WASH. POST, Apr. 15, 2006, at A02.

deploys expressions of alarm. He supplies a rare mix of legal analysis, emotional pique, and ideological fervor.[85] His public appearances sometimes

> gain attention less for his considered legal views than for his combative off-the-cuff comments and gestures. In February, he said only "idiots" would believe the Constitution must change with society. Several of his colleagues are on record as saying the Constitution should indeed change with society. In March, he said it was "crazy" to believe foreigners captured in a war are entitled to a full jury trial. That was a couple of weeks before the Supreme Court took up such a case.[86]

David Forte, a commentator sympathetic to Scalia's views, admits that the Justice's "disparagement of his colleagues' views has sometimes verged on the personal insult" and that "[i]t is doubtful that his style has won many votes from his fellow Justices."[87] Forte nevertheless defends Scalia's rhetoric as that of a necessary prophet:

> The prophetic role of Justice Scalia is to speak to the age, as is the role of all prophets. He speaks less to his own — the courts and the legal fraternity — and more to those in other parts of our political system. He casts up a dire warning that not only has the Supreme Court in many ways removed the Constitution from the Framers, it is also removing the democratic process from the people and their representatives. His words are on the edge of the apocalyptic: If the Republic is to stand, the Republic must take heed.[88]

Forte correctly sees Scalia as addressing his political allies, rather than engaging in normal judicial interaction on the Court. If the Republic is about to fall for the reasons that Scalia cites in his opinions, his extreme rhetoric suits the times. But prophets who proclaim the end is nigh are often wrong, and many who see the apocalypse coming if the world does not heed their words are properly regarded as rash eccentrics, rather than as visionary seers. Forte's defense of Scalia, in any event, is consistent with the analysis here of his rhetoric as politically charged and extreme.

Scalia's provocative rhetorical tactics are not only politically divisive, but dangerous in a time of extreme advocacy that already characterizes and divides the society. Stirring up resentments with "red meat" rhetoric — for example, condemning the Court in *McCreary County v. ACLU* for its supposed "hostil-

85. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 566 (Scalia, J., dissenting) (one of his most vehement dissents).

86. David G. Savage, *Scalia to Congress: Butt Out of Court's Use of Foreign Law*, L.A. TIMES, May 19, 2006, at 9.

87. David Forte, *Illiberal Court: The United States Supreme Court is Engaged in the Process of Undermining Democracy*, NAT'L REV., July 29, 1996, at 40.

88. *Id.*

ity to religion,"[89] when the Justices were conscientiously struggling to find the proper relationship between church and state — gives support and comfort to those who see the judiciary as their cultural enemy. Justice Harry Blackmun, when similarly accused of harboring "a latent hostility" toward religion in an Establishment case[90] sixteen years earlier (by Justice Anthony Kennedy, in an opinion joined by Justice Scalia), replied that

> nothing could be further from the truth . . . . Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause. . . . A secular state, it must be remembered, is not the same as an atheistic or antireligious state.[91]

Justice Scalia's repetition of the hostile-to-religion accusation in 2005 is a reckless taunt that helps to create a favorable climate for the religious right's attack on individual judges and on the Court as an institution. People who already believe God is on their side in a war against godless secularists hardly need to be given a judicial target for their rage. Conservative hysteria focused on the courts has produced conferences entitled "Confronting the Judicial War on Faith"[92] and panel discussions on "Remedies to Judicial Tyranny."[93] These conferees are not isolated voices operating on the fringes of American politics. They lead well known conservative organizations and draw support from powerful political leaders like former House Majority Leader Tom DeLay and U.S. Senator John Cornyn.[94]

One speaker at the "War on Faith" conference denounced the "radical, secularist relativist judiciary."[95] Another conference speaker, lawyer-author Edwin Vieira, approvingly cited Josef Stalin's slogan, which he explained "worked very well for him, whenever he ran into difficulty: 'no man, no problem.'"[96] Vieira's speech advocated the impeachment of the main target of his ire, Supreme Court Justice Kennedy, but his choice of words and their source chillingly demonstrate the violence that now infects right-wing advocacy against judges.

The caustic tone Scalia adopts both reflects and influences the discussion of the judiciary outside of the legal profession, in society at large. Scalia's language has contributed to what Republican Senator Lindsey Graham of South Carolina

89. McCreary County v. ACLU, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting).

90. Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting).

91. *Id.* at 610–11 (majority opinion).

92. Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

93. *Id.*

94. *See id.*

95. *Id.*

96. *Id.*

has identified as the "poisonous political atmosphere" now surrounding the judiciary.[97] Criticism of the courts has become harsh, disrespectful, and even threatening to judges who do not adhere to right-wing ideology. A former president of the American Bar Association ("ABA"), Robert J. Grey, Jr., observed that in the midst of the national focus on the Terri Schiavo case,

> many commentators and observers . . . crossed the line in using this tragedy to needlessly, gratuitously, and viciously attack the dedicated men and women who serve as America's judges. . . . While it is appropriate . . . to debate the societal challenges and dilemmas brought to light by Terri Schiavo's case, there is no need for personal attacks on the judges in this case. They are not killers as some have called them, nor are they activists bent on pushing an ideological agenda.[98]

(Justice Scalia has not called his judicial colleagues killers, but "pushing an ideological agenda" seems to fit.)

Conservative political office holders and interest groups have lined up to insult the judiciary. James Dobson, leader of Focus on the Family and a key player in Republican party politics, summed up much of the vitriol when he called the Supreme Court majority "unelected and unaccountable and arrogant and imperious and determined to redesign the culture according to their own biases and values, and they're out of control."[99] He calls Justice Kennedy "the most dangerous man in America."[100] Congressmen have added to the din, threatening to punish courts by restricting jurisdiction over specific cases, cutting budgets, and creating a new inspector general to oversee the federal judiciary.[101] At a recent annual meeting, the ABA felt it imperative to respond by condemning the persistent harsh attacks on the judiciary. The ABA's House of Delegates unanimously adopted a resolution decrying "attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government."[102] A report submitted by the State Bar of Texas noted the "severe and

97. *ABA Leaders Counter Recent Assaults on Attorney-Client Privilege, Respect for Judges*, 74 U.S.L.W. 2091, 2092 (2005) (quoting Sen. Lindsey Graham).

98. Keith Maristuen, *Commentary: President's Message: Juries, Vigilantes & Terri Schiavo: We Need to Stop Tide Against Judicial System*, MONT. LAW., Apr. 2005, at 4 (quoting Grey).

99. Charles Babington, *Frist Urges End to Nominee Filibusters*, WASH. POST, Apr. 25, 2005, at A01.

100. Jason Deparle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1; Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42.

101. *See Bill Limits Pledge Rulings to State Courts*, N.Y. TIMES, July 20, 2006, at A17 (House of Representatives passes bill prohibiting federal courts from ruling on constitutional validity of Pledge of Allegiance); Maurice Possley, *Lawmaker Prods Court, Raises Brows; Demands Longer Term in Chicago Drug Case*, CHI. TRIB., July 10, 2005, at 1.

102. *ABA Leaders Counter Recent Assaults on Attorney-Client Privilege, Respect for Judges*, *supra* note 97.

unprecedented attacks on judges" whose decisions are unpopular.[103] "[J]udges have been the target of unjustified criticism simply because decisions conflict with the personal philosophies and beliefs of those who attack them."[104]

Shortly after her retirement from the Supreme Court, Justice Sandra Day O'Connor gave a speech at Georgetown University in which she warned of the danger posed by those in positions of power in this country who are denouncing the courts. "We must be ever vigilant against those who would strong-arm the judiciary," she said. Destroying the independence of the judicial branch of government would have the most serious consequences: "It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings."[105]

She noted the words of former Republican leader Tom DeLay. Following the federal courts' refusal to override what the state courts in Florida decided in the Terri Schiavo case, DeLay said: "The time will come for the men responsible for this to answer for their behavior."[106] He later derided "an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the president [sic]."[107]

Justice O'Connor also noted that federal judges had received death threats, and she condemned the statement of a Republican Senator that linked violence against judges to their unpopular judicial decisions. The Senator was John Cornyn of Texas, who said after the murder of a judge in Georgia and the killings of two members of another judge's family in Illinois, "I wonder whether there may be some connection between the perception in some quarters . . . where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up to the point where some people engage in violence."[108] The Senator made it seem that violence was a predictable and understandable response to politically unpopular court decisions. Replying to the outrage his comment sparked, he later expressed regret that his comments might be taken as suggesting that violence against judges was justified.[109]

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103. *Id.* (quoting the Texas report).

104. *Id.* (quoting the Texas report).

105. Justice O'Connor's office did not release the text of her speech. A report on it was broadcast by National Public Radio. *See Justice O'Connor Decries Republican Attacks on Courts* (NPR radio broadcast Mar. 10, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5255712. Reports of the speech also appeared in various newspapers. *See* Julian Borger, *Former Top Judge Says US Risks Edging Near to Dictatorship*, GUARDIAN, Mar. 13, 2006, *available at* http://www.guardian.co.uk/frontpage/story/0,,1729656,00.html.

106. Borger, *supra* note 105.

107. *Id.*

108. *Id.*

109. *See* Cynthia Tucker, *Fiery Rhetoric Could Explode*, ATLANTA J. CONST., Apr. 10, 2005, at F6.

III. WHY DOES HE DO IT?

All of the current right-wing rancor directed at the courts may help answer an intriguing question about Justice Scalia: What is the advantage to him of his rhetorical excesses? Scholars have noted that Scalia is not a coalition-builder on the Court.[110] Perhaps he hopes to prevail, over time, by his political activism from the bench, generating outside pressure to change the Court from the two political branches and from the politically active citizenry who agree with him. In his two decades as a Justice on the Court, Scalia has remained popular among archconservatives, while other conservative Justices like Anthony Kennedy, Sandra Day O'Connor, and David Souter lost favor in that political world.[111] Scalia, but not the others, has been held up as a model Supreme Court Justice, with admirers posting his opinions on websites and collecting his dissents in a book.[112] As a leading figure in a popular and radical American social movement — one that holds him up as exemplar of a staunch conservative judge — Scalia is operating on a stage much vaster than any of his colleagues. To the true believers in the movement, he is the heroic upholder of the conservative faith. The other Justices, having reached the pinnacle of the legal profession, are heroic to those in that profession; Scalia is heroic in the larger and more committed world of political activists.

In that world, expression of empathy for others is a weakness. Justice Kennedy has seen the attack machine directed against himself, after his opinion in *Lawrence v. Texas*[113] exhibited humane concern for the dignity of homosexuals condemned to criminal status by state anti-sodomy laws. Advocacy in today's conservative movement is a blood sport that requires decimating the opposition. Political opponents are at best enemies, at worst sinners and traitors. Scalia's brand of take-no-prisoners rhetoric gives him prestige, notoriety, and adulation in this political universe. Given these rewards, perhaps by his own lights he is doing his job exactly right. If his colleagues on the Court do not care for his

110. Lazarus, *supra* note 9, at 869 (explaining that Scalia is the "paradigmatic example of the anti-strategic Justice").

111. *See* Milbank, *supra* note 92; Ramesh Ponnuru, *Sandra's Day: Why the Rehnquist Court has been the O'Connor Court, and How to Replace Her (Should it Come to That)*, NAT'L REV., June 30, 2003 (describing that Scalia and Thomas are "conservative heroes on the Court" and that conservatives "have never much cared for" O'Connor); Ramest Ponnuru, *Empty Souter*, NAT'L REV., Sept. 11, 1995 (explaining that Souter "has established a record that does not please conservative Republicans").

112. Scalia's dissenting opinion in *McCreary* appeared on the website of the conservative Family Research Council. *See* Family Research Council, Special Publication: Justice Scalia's Dissent in the Supreme Court's Ruling for McCreary v. ACLU, http://www.frc.org/get.cfm?i=EF05F51#EF05F51 (last visited Jan. 24, 2007). For a collection of Scalia's dissents see SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE (Kevin A. Ring ed., 2004). It was reviewed by Steven Martinovich under the headline, "The Law's Greatest Advocate." *See* Steven Martinovich, *The Law's Greatest Advocate*, http://www.enterstageright.com/archive/articles/0105/0105scaliadissents.htm (last visited Jan. 24, 2007).

113. 539 U.S. 558 (2003).

mockery, sarcasm, and insulting rhetoric, and if he cannot pull together a majority for a compromise position that will get some but not all of what he wants, so be it; that appears to be a price he is perfectly willing to pay.[114]

There is an irony worth noting in all of this. Scalia's own words, directed at others, often reveal himself. He accuses other Justices of pushing their own preferences, of being crusading knights, of representing the opinions of an elite group, of taking sides in the culture wars. Yet he seems to be one of the most pugnacious participants in the culture wars, and the one most willing to take sides and, rhetorically speaking, to give no quarter in the battles he fights. He is a crusader for his preferred constitutional outcomes, which regularly coincide with his political views.[115] He is part of a powerful political elite, with influential friends (as the flap over his duck hunting trip with Vice President Dick Cheney[116] revealed). His opinions touching on cultural issues dear to the religious faction of the Republican party have made him a virtual, and virulent, spokesman for the political right. His rhetorical style is not just distemper; it is political agitation.

IV. CONCLUSION

Justice Scalia's self-description at his confirmation hearing as a "thoughtful moderate lawyer and judge"[117] was miles from the truth. His two decades on the Supreme Court have been marred by a politically charged advocacy that has done untold damage to the Court.

Justice Scalia shows little restraint in his attacks on other Justices, accusing them of acting without reason or legal justification and instead, enshrining their political preferences into constitutional law. In his opinions, he denigrates opposing viewpoints, and the opponents themselves, in a way more akin to partisan political speech-making than open-minded judicial decision making. Like the outsider critics of judges, he creates a world of sharp dichotomy, with a distinct "them-and-us" quality. He is a faithful interpreter of the law; they manipulate the law. He follows the Constitution; they invent false constitutional doctrines.

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114. Scalia has expressed pleasure in writing his irate dissents:

> To be able to write an opinion for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender — that is indeed an unparalleled pleasure.

Lincoln Caplan, *Forget the Tone. It's Dissent That Matters*, WASH. POST, July 6, 2003, at B01 (quoting a Scalia lecture).

115. *See* Chemerinsky, *supra* note 13.

116. *See* Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 914–15 (2004). Scalia has long been connected to the elite ranks of the conservative movement. *See* Sidney Blumenthal, *A Well-Connected Conservative; Scalia Was a Think Tank Scholar in 1977*, WASH. POST, June 22, 1986, at A16.

117. *See* 13 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS, *supra* note 5, at 178.

He applies the Constitution as written; they read their personal preferences into the document. He has no political agenda; they take sides in the culture wars.

At a time when conservative movement leaders speak rancorously of the judiciary and seek to punish judges for opinions they disagree with, his rhetorical tactics lend his support and encouragement to the damaging political effort to weaken the judiciary as a co-equal branch of government. Ultimately, he undermines the Court as an institution by impugning the integrity of the Justices and inciting profound disrespect for their decision-making.

A lawyer expressing himself as Scalia repeatedly does would be held in contempt. His membership on the Court shields him from suffering any consequences from his undignified advocacy. But the true victims of his rhetorical excess are the Court itself, as an essential element of our constitutional democracy, and the independent judiciary that he encourages his right-wing allies to despoil.

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