REMARKS TO THE 2020 FEDERALIST SOCIETY NATIONAL LAWYERS CONVENTION

JUSTICE SAMUEL A. ALITO JR.*

INTRODUCTION

Good evening, everyone. I am very pleased to have this opportunity to speak to all of you who are attending the Federalist Society's Annual Lawyers Convention via the internet. I have given the Convention's keynote speech several times before, but on all those occasions, I spoke to a live audience at the big Convention dinner. By the time I got up to speak, there had been a cocktail hour. Everybody had had the chance to enjoy a glass of wine—or two—with dinner. And people were in a good mood. Those are optimal circumstances for a speaker. They tend to make the audience more receptive to any weak attempts at humor and generally more forgiving in its assessment of the speech.

Tonight, I am speaking to a camera, and that feels strange. And I wondered if anything could to be done to alleviate that. If any of you watched any regular season baseball games this year, you will have seen that there were no real fans in attendance. But in an effort to make the atmosphere seem a bit more normal, teams placed cardboard cutouts of fans in the seats and piped in recorded cheers. I thought about asking the organizers of the Convention to do something similar, but that would only make the setting more surreal. However, if any of you watching this would like to enjoy a beverage in the comfort of your homes, I hope you will feel free to

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do so. And I guess the upside of this set up is that if you feel the urge to throw rotten tomatoes, you will only damage your own screen.

THE FEDERALIST SOCIETY

If you have watched some of the events of this year's Convention, I hope you have found them informative and thought provoking. As in the past, they have featured speakers with a variety of views on important topics. Some of those watching tonight may be new to Federalist Society events and may have heard a lot of misinformation about the Society. So let me say a word at the outset about what the Society is, what it is not, and why I have been a member for many years.

Let me start with what it is not. It is not an advocacy group. Unlike other bar groups, it does not take a position on any issue. It does not propose legislation or lobby or testify before Congress or file briefs in the Supreme Court or any other court. It holds events, like this Convention, at which issues are debated and discussed, openly and civilly.

Anybody can join the Society, and anybody can attend events like this Convention. Most members of the Society are conservative in the sense that they want to conserve our Constitution and the rule of law. But members disagree about many important things.

The Society started in law schools in the 1980s and now has 200 law school chapters.[1] And the best law school deans have expressed appreciation of the Society's contribution to free and open debate. My colleague Elena Kagan is a prime example. When she was the dean of Harvard Law School, she spoke at a Federalist Society event

1. *See About Us*, FEDERALIST SOC'Y, http://www.fedsoc.org/about-us [https://perma.cc/V79S-NENU].

and reportedly began with these words: "I love the Federalist Society!"[2] And after some applause, she repeated: "I love the Federalist Society! [pause] But you are not my people."[3] That is a true expression of the freedom of speech that our Constitution guarantees and that we need to preserve. We should welcome rational, civil speech on important subjects even if we do not agree with what the speaker has to say.

Unfortunately, tolerance for opposing views is now in very short supply in law schools and in the broader academic community. When I speak with recent law school graduates, what I hear over and over is that they face harassment and retaliation if they say anything that departs from the law school orthodoxy. And many law school administrators and faculty members do little to prevent this. Under these circumstances, Federalist Society law school events are more important than ever.

I will have more to say about freedom of speech later, but at this point I want to express appreciation to the many judges and lawyers who stood up to an attempt to hobble the debate that the Federalist Society fosters. A move was afoot to bar federal judges from membership in the Society.[4] And if that had succeeded, the next logical step would have been to forbid them from speaking at law school events and other events sponsored by the Society. Four court of appeals judges—Amul Thapar, Andy Oldham, Bill Pryor, and Greg Katsas—prepared a letter that devastated the arguments of

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2. Jim Lindgren, *Elena Kagan: "I LOVE the Federalist Society! I LOVE the Federalist Society!"*, VOLOKH CONSPIRACY (May 10, 2010, 12:10 AM), http://volokh.com/2010/05/10/elena-kagan-i-love-the-federalist-society-i-love-the-federalist-society/ [https://perma.cc/X6XD-7RW4].

3. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 33 (2010) (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary).

4. *See* COMM. ON CODES OF CONDUCT, JUD. CONF. OF THE U.S., DRAFT ADVISORY OP. NO. 117 (Jan. 2020).

those who wanted to ban membership.[5] The letter was signed by more than 200 federal judges[6]—including judges appointed by every President going back to President Ford—and at least for now, the proposal is on hold. We should all express our thanks to these defenders of free speech.

TONIGHT'S TOPIC

The topic of this year's Convention is "The Rule of Law and the Current Crisis." And I take it that the title is intended primarily to refer to the COVID-19 crisis that has transformed life for the past eight months. The pandemic has obviously taken a heavy human toll—thousands dead, many more hospitalized, millions unemployed, the dreams of many small business owners dashed. But what has it meant for the rule of law?

I am now going to say something that I hope will not be twisted or misunderstood—but having spent more than twenty years in Washington, I am not overly optimistic. In any event, here goes: The pandemic has resulted in previously unimaginable restrictions on individual liberty. Now notice what I am not saying or even implying. I am not diminishing the severity of the virus's threat to public health. And putting aside what I will say in a few minutes about a few Supreme Court cases, I am not saying anything about the legality of COVID restrictions. Nor am I saying anything about whether any of these restrictions represent good public policy. I am a judge, not a policymaker.

All that I am saying is this, and I think it is an indisputable statement of fact: We have never before seen restrictions as severe, extensive, and prolonged as those experienced for most of 2020. Think of events that would otherwise be protected by the right to freedom of speech—live speeches, conferences, lectures, and meetings.

5. *See* Letter from Federal Judges to Robert P. Deyling, Assistant Gen. Counsel, Admin. Off. of the U.S. Cts. (Mar. 18, 2020), https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf [https://perma.cc/PY64-TP2P].

6. *See id.* at 8–23.

Think of worship services: churches closed on Easter Sunday, synagogues shuttered for Passover and Yom Kippur. Think about access to the courts. Or the constitutional right to a speedy trial. Trials in federal courts have virtually disappeared in many places. Who could have imagined that?

The COVID crisis has served as a sort of constitutional stress test. And in doing so, it has highlighted disturbing trends that were already present before the virus struck, trends that we must resist and reverse when the crisis is over.

THE ADMINISTRATIVE STATE

One of these trends is the dominance of lawmaking by executive fiat rather than legislation. The vision of early 20th century Progressives and the New Dealers of the 1930s was that policymaking would shift from narrow-minded elected legislators to an elite group of experts—in a word, that policymaking would become more "scientific." That dream has been realized to a large extent. Every year, administrative agencies, acting under broad delegations of authority, churn out huge volumes of regulations that dwarf the statutes enacted by the people's elected representatives.

And what have we seen in the pandemic? Sweeping restrictions imposed, for the most part, under statutes that confer enormous executive discretion. We had a COVID-related case from Nevada, so I will take the Nevada law as an example. Under that law, if the governor finds that there is "a natural, technological or man-made emergency or disaster of major proportions," the governor can "perform and exercise such . . . functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population."[7] To say that this provision confers broad discretion would be an understatement.

Now, again, let me be clear. I am not disputing that broad wording may be appropriate in statutes designed to address a wide

7. NEV. REV. STAT. § 414.070 (2019).

range of emergencies, the nature of which may be hard to anticipate. And I am not passing judgment on this particular statute. I want to make two different points. First, what we see in this statute and in what was done under it is a particularly developed example of where the law in general has been going for some time—in the direction of government by executive officials who are thought to implement policies based on expertise and, in the purest form, scientific expertise. Second, laws giving an official so much discretion can be abused. And whatever one may think about the COVID restrictions, we surely do not want them to become a recurring feature after the pandemic has passed. All sorts of things can be called an emergency or disaster of major proportions. Simply slapping on that label cannot provide the ground for abrogating our most fundamental rights. And whenever fundamental rights are restricted, the Supreme Court and other courts cannot close their eyes.

JACOBSON V. MASSACHUSETTS

So what have the courts done in this crisis? When the constitutionality of COVID restrictions has been challenged in court, the leading authority cited in their defense is a 1905 Supreme Court decision called *Jacobson v. Massachusetts*.[8] The case concerned an outbreak of smallpox in Cambridge, and the Court upheld the constitutionality of an ordinance that required vaccinations to prevent the disease from spreading.[9]

Now, I am all in favor of preventing dangerous things from issuing out of Cambridge and infecting the rest of the country and the world. It would be good if what originates in Cambridge stayed in Cambridge. But to return to the serious point: it is important to keep *Jacobson* in perspective. Its primary holding rejected a substan-

8. 197 U.S. 11 (1905).
9. *See id.* at 12–13, 31.

tive due process challenge to a local measure that targeted a problem of limited scope.[10] It did not involve sweeping restrictions imposed across the country for an extended period. And it does not mean that whenever there is an emergency, executive officials have unlimited, unreviewable discretion.[11]

A HIERARCHY OF RIGHTS

Just as the COVID restrictions have highlighted the movement toward rule by experts, litigation about COVID restrictions has pointed up emerging trends in the assessment of particular individual rights. This is especially evident with respect to religious liberty. It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right. And that marks a surprising turn of events.

Consider where things stood in the 1990s. To me at least, that does not seem like the Jurassic Age. When a Supreme Court decision called *Employment Division v. Smith*[12] cut back sharply on the protection provided by the Free Exercise Clause of the First Amendment,[13] Congress was quick to respond. It passed the Religious Freedom Restoration Act[14] to ensure broad protection for religious liberty. The law had almost universal support. In the House, the vote was unanimous.[15] In the Senate, it was merely 97-3.[16] And the bill was enthusiastically signed by President Clinton.[17] Today, that wide support has vanished. Some of our cases illustrate this same trend.

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10. *See id.* at 12, 24, 26–28, 38–39.

11. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting from denial of application for injunctive relief).

12. 494 U.S. 872 (1990).

13. *See id.* at 878, 881–85.

14. Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

15. *See* 139 CONG. REC. 9,687 (1993) (House voice vote).

16. *See* 139 CONG. REC. 26,416 (1993) (Senate vote).

17. *See* Remarks on Signing the Religious Freedom Restoration Act of 1993, 1 PUB. PAPERS 2000 (Nov. 16, 1993).

THE LITTLE SISTERS OF THE POOR

Take the protracted campaign against the Little Sisters of the Poor, a religious institute of Catholic nuns. The Little Sisters are women who have dedicated their lives to caring for the elderly poor, regardless of religion.[18] They run homes that have won high praise. Here are some of the testimonials filed in our Court by residents of their homes:

> Carl Bergquist: The Little Sisters "do everything to make us happy . . . . I feel I'm part of the family and that's a great feeling . . . . They will keep you alive ten years longer than anyplace else because they love you."[19]
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> Carol Hassell: "In a nutshell I would say this about the Little Sisters: a little bit of heaven fell from . . . the sky one day and landed in my apartment."[20]

Despite this inspiring work, the Little Sisters have been under unrelenting attack for the better part of a decade. Why? Because they refuse to allow their health insurance plan to provide contraceptives to their employees.[21] If they did not knuckle under and violate a tenet of their faith, they faced crippling fines, fines that would likely have forced them to shut down their homes.[22]

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18. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375 (2020).

19. Brief for Residents and Families of Residents at Homes of the Little Sisters of the Poor as Amici Curiae Supporting Petitioners at 1–2, *Little Sisters of the Poor*, 140 S. Ct. 2367 (Nos. 19-431 & 19-454) (first omission in original).

20. *Id.* at 3.

21. *See Little Sisters of the Poor*, 140 S. Ct. at 2376.

22. *See* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1167 (10th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); 26 U.S.C. § 4980D(b)(1) (imposing fine of $100 per employee per day for employers offering health plans that do not meet statutory and regulatory requirements); Complaint at 32 ¶ 150, Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225 (D.

The Trump Administration tried to prevent that by adopting a new rule.[23] But the States of Pennsylvania and New Jersey, supported by twenty other states and the District of Columbia, challenged that new rule.[24] The Little Sisters won their most recent battle in the Supreme Court last summer—I should add by a vote of 7 to 2.[25] But the case was sent back to the Court of Appeals.[26] Not only that, the rule adopted by the Trump Administration may be rescinded. And the Little Sisters' legal fight goes on and on.

STORMANS, INC. V. WIESMAN

Here is another example from our cases: The State of Washington adopted rules requiring every pharmacy to carry every form of contraceptive approved by the U.S. Food and Drug Administration and requested by customers, including so-called morning-after pills, which can destroy an embryo after fertilization.[27] A pharmacy called Ralph's was owned by a Christian family.[28] Opposed to abortion, they refused to carry abortifacients.[29] If a woman came to the store with a prescription for such a drug, the pharmacy referred her to a nearby store that was happy to provide it.[30] And there were more than thirty such stores within five miles of Ralph's.[31] But to the State of Washington, that was not good enough. Ralph's had to provide the drugs itself or get out of the State.[32]

Colo. 2013) (No. 1:13-cv-02611-WJM-BNB), ECF No.1 (describing fines under § 4980D as "financially ruinous" for the Little Sisters Homes).

23. *See Little Sisters of the Poor*, 140 S. Ct. at 2377–78.

24. *See* Brief for Massachusetts et al. as Amici Curiae Supporting Respondents, *Little Sisters of the Poor*, 140 S. Ct. 2367 (Nos. 19-431 & 19-454).

25. *See Little Sisters of the Poor*, 140 S. Ct. at 2372–73.

26. *See id.* at 2386.

27. *See* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433, 2435–36 (2016) (Alito, J., dissenting from the denial of certiorari).

28. *See id.* at 2433.

29. *See id.*

30. *See id.*

31. *See id.* (citation omitted).

32. *See id.* at 2434.

MASTERPIECE CAKESHOP

One more example. Consider what a member of the Colorado Civil Rights Commission said to Jack Phillips, the owner of Masterpiece Cakeshop, when he refused to create a cake celebrating a same-sex wedding.[33] She said that freedom of religion had

> "been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, . . . we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use . . . to use their religion to hurt others."[34]

You can easily see the point. For many today, religious liberty is not a cherished freedom. In their view, it is often just an excuse for bigotry, and it cannot be tolerated even when there is no evidence that anyone has been harmed. And the cases I just mentioned illustrate the point. As far as I am aware, not one employee of the Little Sisters has come forward and demanded contraceptives under the Little Sisters' plan.[35] There was no risk that Ralph's referral practice would have deprived any woman of the drugs she sought—and no reason to think that Jack Phillips' stance would deprive any same-sex couple of a wedding cake. The couple that came to his shop was given a free cake by another bakery,[36] and celebrity chefs have jumped to the couple's defense.[37]

A great many Americans disagree with the religious beliefs of the Little Sisters, the owners of Ralph's, and Jack Phillips, and of course that is their right. The question we face is whether our society will

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33. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

34. *Id.* at 1729 (citation omitted).

35. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2387 (2020) (Alito, J., concurring).

36. *See* Appendix to Petition for a Writ of Certiorari at 291a, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); *id.* at 6.

37. *See* Brief for Chefs, Bakers, and Restaurateurs as Amici Curiae Supporting Respondents at 1–2, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

be inclusive enough to tolerate people with unpopular religious beliefs. Over the years, I have sat on cases involving the rights of members of many religious minorities—Muslim police officers whose religion required them to have beards,[38] a Native American who wanted to keep a bear for religious reasons,[39] a Jewish prisoner who tried to organize a Torah study group.[40] Catholic nuns and other traditional Christians deserve no less protection.

A Harvard law professor provided a different vision of a future America. He candidly wrote:

> "The culture wars are over; they lost, we won. . . . [T]he question now is how to deal with the losers in the culture wars. . . . My own judgment is that taking a hard line ('You lost, live with it') is better than trying to accommodate the losers . . . . [T]aking a hard line seemed to work reasonably well in Germany and Japan after 1945."[41]

Is our country going to follow that course? To quote a popular Nobel laureate, "It's not dark yet, but it's getting there."[42] And COVID restrictions have highlighted this trend.

SOUTH BAY AND *CALVARY CHAPEL*

Over the summer, the Supreme Court received two applications to stay COVID restrictions that blatantly discriminated against houses of worship.[43] One was from California and one was from Nevada. In both cases, the Court allowed the discrimination to

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38. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

39. *See* Blackhawk v. Pennsylvania, 381 F.3d 202, 204–05 (3d Cir. 2004).

40. *See* Ben-Levi v. Brown, 136 S. Ct. 930, 930 (2016) (Alito, J., dissenting from the denial of certiorari).

41. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016) (emphasis omitted), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/RJG4-74VK].

42. BOB DYLAN, *Not Dark Yet*, *on* TIME OUT OF MIND (Columbia Records 1997).

43. *See* Petition for Writ of Certiorari Before Judgment, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (No. 19A1070); Emergency Application for Writ of Injunction, S. Bay United Pentecostal Church et al. v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044).

stand.[44] The only justification given was that we should defer to the judgment of governors because they have the responsibility to safeguard the public health.[45]

Consider what that deference meant in the Nevada case. After initially closing the State's casinos for a time, the Governor opened them up and allowed them to admit 50% of their normal occupancy limit.[46] And since many casinos are enormous, that is a lot of people. Not only did the Governor open up the casinos, he made a point of inviting people from all over the country to visit them.[47] So if you go to Nevada, you can gamble, drink, and attend all sorts of shows to your heart's content. But here is what you cannot do: If you want to worship at a church, synagogue, or mosque and you are the fifty-first person in line, sorry, you are out of luck. Houses of worship are limited to fifty attendees.[48] The size of the building does not matter. Nor does it matter if you wear a mask and keep more than six feet away from everybody else. And it does not matter if the building is carefully sanitized before and after a service. The State's message is this: Forget about worship and head for the slot machines or maybe a Cirque du Soleil show.

Deciding whether to allow this disparate treatment should not have been a tough call. Take a quick look at the Constitution. You will see the Free Exercise Clause of the First Amendment.[49] You will not find a Craps Clause or a Blackjack Clause or a Slot Machine

44. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.) (denying application for injunctive relief); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.) (denying application for injunctive relief).

45. *See S. Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring in denial of application for injunctive relief).

46. *See Calvary Chapel*, 140 S. Ct. at 2605–07 (Alito, J., dissenting from denial of application for injunctive relief).

47. *See* John Sadler, *Nevada Gyms, Movie Theaters, Churches Can Reopen Friday; Casinos Get OK for June 4*, LAS VEGAS SUN (May 26, 2020), https://lasvegas-sun.com/news/2020/may/26/nevada-gyms-movie-theaters-churches-reopen-casinos/ [https://perma.cc/8U4D-KUSP].

48. *See Calvary Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting from denial of application for injunctive relief).

49. U.S. CONST. amend. I.

Clause. Nevada was unable to provide any plausible justification for treating casinos more favorably than houses of worship. But the Court nevertheless deferred to the Governor's judgment, which just so happened to favor the State's biggest industry and the many voters it employs.

FDA v. ACOG

If what I have said so far does not convince you that religious liberty is in danger of becoming a second-class right, consider a case that came shortly after the Nevada case.[50] The FDA has long had a rule providing that a woman who wants a medication abortion must go to a clinic to pick up the drug. The idea is that it is important for the woman to receive instruction about the drug at that time. This rule was first adopted in 2000 during the Clinton Administration, and it has been on the books ever since.[51]

A few weeks ago, a federal district judge in Maryland issued an order prohibiting the FDA from enforcing this rule any place in the country.[52] Enforcement, he found, would interfere with the right of women to obtain abortions. Why? Because some women, fearful of contracting COVID if they left their homes, would hesitate about making the trip to a clinic.[53] Now, when the judge made this decision, the governor of Maryland, presumably advised by public health experts, had apparently concluded that Marylanders could safely engage in all sorts of activities outside the home—such as visiting an indoor exercise facility, a hair or nail salon, and the State's casinos.[54] If deference was appropriate in the California and Nevada cases, then surely we should have deferred to the federal

50. Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 578 (2021).

51. *See* Am. Coll. of Obstetricians & Gynecologists v. Food & Drug Admin., 472 F. Supp. 3d 183, 190 (D. Md. 2020).

52. *See* Am. Coll. of Obstetricians and Gynecologists v. Food & Drug Admin., No. 8:20-cv-01320-TDC, Doc. No. 92 at 2 (D. Md. July 13, 2020).

53. *See* 472 F. Supp. 3d at 211–17.

54. *See* Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10, 12–13 & n.* (2020) (Alito, J., dissenting).

Food and Drug Administration on an issue of *drug* safety. But no, in this instance, the right in question was the abortion right, not the right to religious liberty, and the abortion right prevailed.

FREE SPEECH

The right to the free exercise of religion is not the only once-cherished freedom that is falling in the estimation of some segments of the population. Support for freedom of speech is also in danger, and COVID rules have restricted speech in unprecedented ways. As I mentioned, attendance at speeches, lectures, conferences, conventions, rallies, and other similar events has been banned or limited. And some of these restrictions are alleged to have included discrimination based on the viewpoint of the speaker.

Even before the pandemic, there was growing hostility to the expression of unfashionable views. And that, too, was a surprising development. Here is a marker: In 1972, the comedian George Carlin began to perform a routine called "Seven Words You Can Never Say on Television."[55] Today, you can see shows on your TV screen in which the dialog seems at times to consist almost entirely of those words. Carlin's list seems like a quaint relic.

But it would be easy to put together a new list called "Things You Can Never Say If You Are a Student or Professor at a College or University or an Employee at Many Big Corporations." And there would not be just seven items on that list. Seventy times seven would be closer to the mark. I will not go down the list, but I will mention one that I have discussed in a published opinion. You cannot say that marriage is a union between one man and one woman.[56] Until very recently, that is what the vast majority of Americans thought. Now, it is considered bigotry.

That this would happen after our decision in *Obergefell* should not have come as a surprise. The opinion of the Court included words

55. GEORGE CARLIN, *Seven Words You Can Never Say on Television*, *on* CLASS CLOWN (Little David/Atlantic Records 1972).

56. Obergefell v. Hodges, 576 U.S. 644, 741–42 (2015) (Alito, J., dissenting).

meant to calm the fears of those who cling to traditional views on marriage. But I could see—and so did the other Justices in dissent—where the decision would lead. I wrote the following: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[57] That is just what is coming to pass. One of the great challenges for the Supreme Court going forward will be to protect freedom of speech. Although that freedom is falling out of favor in some circles, we need to do whatever we can to prevent it from becoming a second-tier constitutional right.

THE SECOND AMENDMENT

Of course, the ultimate second-tier constitutional right in the minds of some is the Second Amendment right to keep and bear arms. From 2010, when we decided *McDonald v. City of Chicago*,[58] until last term, the Supreme Court denied every single petition asking us to review a lower court decision that rejected a Second Amendment claim. Last year, we finally took another Second Amendment case, and what happened after is interesting.[59]

The case involved a New York City ordinance. The City makes it very inconvenient for a law-abiding resident to get a license to keep a gun in the home for self-defense.[60] But the Second Amendment protects that right, and if a person is going to have a gun in the home, there is broad agreement that the gun owner should know how to use the gun safely, and that the best way to acquire and maintain that skill is to go to a range every now and then. The New York City ordinance, however, prohibited a lawful gun owner from

57. *Id.* at 741.

58. 561 U.S. 742 (2010).

59. *See* N.Y. State Rifle & Pistol Ass'n, Inc., v. City of New York, 140 S. Ct. 1525 (2020).

60. *See id.* at 1529-30 (Alito, J., dissenting).

going to any range outside city limits.[61] There were only seven ranges in the entire city, and all but one were largely restricted to members and their guests.[62] There were other ranges that lay just outside the City.[63] So why could a city resident not go to one of those ranges? The City had no plausible explanation.

But that did not stop it from vigorously defending its rule.[64] Nor did it stop the district court or the Second Circuit from upholding it.[65] Once we granted review, however, the City suddenly saw things differently. It quickly repealed the ordinance and said that doing so did not make the city any less safe.[66] In the place of the old ordinance, it adopted a new, vaguer one that still did not give gun owners what they wanted.[67] But the City nevertheless asked us to dismiss the case before it was even briefed or argued.[68]

And when we refused to do that, the City was miffed.[69] Five United States Senators who filed a brief in support of the city went further.[70] They wrote that the Supreme Court is a sick institution and that if the Court did not mend its ways, well, it might have to be "restructured."[71] After receiving this warning, the Court did exactly what the City and the Senators wanted. It held that the case was moot and said nothing about the Second Amendment.[72] Three of us protested—but to no avail.[73] Now, let me be clear. I am not

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61. *See id.* at 1530.
62. *See id.*
63. *See id.* at 1530–31.
64. *See id.* at 1531.
65. *See id.* at 1532.
66. *See id.* at 1532–33.
67. *See id.* at 1532–35.
68. *See id.* at 1532.
69. *See id.* at 1532–33.
70. *See id.* at 1528; Brief for Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae Supporting Respondents, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280).
71. Brief for Senator Sheldon Whitehouse et al., *supra* note 70, at 18.
72. *See N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1533 (Alito, J., dissenting).
73. *See id.* at 1527 (Alito, J., dissenting, joined in full by Gorsuch, J., and in part by Thomas, J.).

suggesting that the Court's decision was influenced by the Senators' threat. But I am concerned that the outcome might be viewed that way by those with thoughts of bullying the Court.

THREATS TO THE COURT

This little episode, I am afraid, may provide a foretaste of what the Supreme Court will face in the future. And therefore, it cannot simply be brushed aside. The Senators' brief was extraordinary. I could say something about standards of professional conduct. But the brief involved something even more important. It was an affront to the Constitution and the rule of law. Let us go back to some basics. The Supreme Court was created by the Constitution, not by Congress.[74] Under the Constitution, we exercise "the judicial Power of the United States."[75] Congress has no right to interfere with that work any more than we have the right to legislate.[76] Our obligation is to decide cases based on the law. And it is therefore wrong for anybody, including members of Congress, to try to influence our decisions by anything other than legal argumentation.

That sort of thing has often happened in countries governed by power, not law. I will mention a story I was told about a supreme court justice from one such place recounted. The court in question was considering a case that was very important to those in power. When the justice looked out the window, he saw a tank pull up and point its gun toward the court. The message was clear: Decide the right way or the courthouse might be—shall we say—restructured. That was a crude threat, but all threats and inducements are intolerable. Judges dedicated to the rule of law have a clear duty. They

74. *See* U.S. CONST. art. III, § 1.

75. *Id.*

76. *See* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) ("The separation of powers, among other things, prevents Congress from exercising the judicial power."); Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) ("It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.").

cannot compromise principle or rationalize any departure from what they are obligated to do. And I am confident that the Supreme Court will not do so in the years ahead.

CONCLUSION

When we look back at the history of the American judiciary, we can easily recall many judges who were fierce in their dedication to principle. And one who is especially dear to the Federalist Society springs immediately to mind. I am referring to Justice Antonin Scalia. Nino was one of the law professors who helped the Society get started. And during his long judicial career, his thinking influenced generations of young lawyers. He left his mark in many ways. Perhaps above all else, he is renowned for his advocacy of two theories of interpretation: "originalism," the idea that the Constitution should be interpreted in accordance with its public meaning at the time of adoption—and "textualism," which is essentially originalism applied to statutes.

To see the extent of his influence, consider these two statements by Justice Kagan: "We are all originalists."[77] And "We're all textualists now."[78] These statements do not mean that all jurists are in complete agreement about how the Constitution and statutes should be interpreted. But what they mean is that a lot of the debate about constitutional and statutory interpretation now takes place *within* the framework of originalism and textualism, or at least using the language of those two theories. And going forward, a lot of the debate among Justice Scalia's admirers will probe his understanding of these theories.

I wish he were still with us for this next exciting phase, but he is not. So we will have to do this on our own. I will not go deeply into this subject now, but I will say that we have seen the emergence of

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77. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010).

78. Justice Elena Kagan, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 17, 2015).

what I believe are erroneous elaborations of Justice Scalia's theories. And I look forward to friendly and fruitful debate about what originalism and textualism should be understood to mean.

As I discussed tonight, the COVID crisis has highlighted constitutional fault lines. I have criticized some of what the Supreme Court has done, but I do not want to leave you with a distorted picture. During my 15 years on the Court, a lot of good work has been done to protect freedom of speech, religious liberty, and the structure of government created by the Constitution. All of this is important. But in the end, there is only so much that the judiciary can do to preserve our Constitution and the liberty it was adopted to protect. As Learned Hand famously wrote: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can . . . do much to help it."[79] For all Americans, standing up for our Constitution and our freedom is work that lies ahead. It will not be easy work. But when we meet next year, I hope we will be able to say that progress was made. At that time, I trust, we will be back together in the flesh. Until then, I wish you all the best.

79. Learned Hand, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dilliard ed., 3d ed. 1960).