

Upon receiving this proposed resolution two days ago I circulated it to my colleagues so that I might learn from them their reaction and thereby speak not only in my own name but to the best of my ability in that of the other members of the tenure track faculty at the Antonin Scalia School of Law. Allow me to share the sentiments of those who have responded:

We are enormously proud of the success of our new Dean Henry Butler in securing for us the largest gift ever received by the University, and many orders of magnitude large than anything the law school has received. We are equally pleased and proud that the law school will bear the name of a great jurist, Antonin Scalia.

We are deeply offended by this proposed resolution. It is a most divisive and un-collegial act. It is ironic that the drafters of this resolution use the phrase “comfortable home for individuals with a variety of viewpoints”, while in this very act displaying their intolerance for those who cherish conservative values.

Let me now respond to the substance of their claims.

The heart of the resolution’s case against Justice Scalia is the bald assertion that Justice Scalia made “numerous public offensive comments about various groups –including people of color, women, and LGBT individuals”.

I would have thought that such a bold accusation would be supported by several illustrations,-- or maybe one. Curiously no such illustration is offered. Scalia sat for a third of a century on the bench. Surely the authors of this resolution could have found some quote for the Senate to chew on. Don’t worry I will provide one.

Here is the flavor of his “offensive” statements. This from the introduction to his dissenting opinion in the recent same sex marriage case Obergefell:

I join THE CHIEF JUSTICE’s opinion in full. I write separately to call attention to this Court’s threat to American democracy. The substance of today’s decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact— and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

If you found that language or legal theory offensive as distinguished from legally incorrect, as do some of my colleagues, then we have nothing to talk about. We are simply operating in different cognitive and moral universes.

This assertion that Scalia is guilty of “numerous public offensive comments” is something lifted from the curriculum of the Joseph Goebbels school of political discourse; repeat a scurrilous defamatory lie often enough and it becomes the truth.

I did not know Justice Scalia. I met him twice and found him to be a charming, kind, highly intelligent, and very funny man. On the law school website you will find remembrances of various colleagues who knew him better. Perhaps you would give more weight to the words of a liberal icon, Justice Ruth Bader Ginsburg:

“Toward the end of the opera *Scalia/Ginsburg*, tenor Scalia and soprano Ginsburg sing a duet: ‘We are different, we are one,’ different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve. From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation. Justice Scalia nailed all the weak spots—the ‘applesauce’ and ‘argle bargle’—and gave me just what I needed to strengthen the majority opinion. He was a jurist of captivating brilliance and wit, with a rare talent to make even the most sober judge laugh. The press referred to his ‘energetic fervor,’ ‘astringent intellect,’ ‘peppery prose,’ ‘acumen,’ and ‘affability,’ all apt descriptions. He was eminently quotable, his pungent opinions so clearly stated that his words never slipped from the reader’s grasp.

..... It was my great good fortune to have known him as working colleague and treasured friend.”

And when learning that we had agreed to name the law school after her treasured friend, Justice Ginsburg said it was “a fitting tribute.” It is my hope that she will give a speech in his honor at the naming ceremony.

I am prepared to respond to other points in the resolution but I do not wish to take more of your time. This resolution is not worthy of consideration. The Dean, the law school, and the University administration have nothing to apologize for in this matter. This is an occasion for praise and

celebration not lamentation. Legitimate disagreements about the law do not constitute intolerance and to make such arguments betrays a lack of knowledge about the nature of law.