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## SCALIA ON ABORTION: ORIGINALISM . . . BUT, WHY?

*Robert Cassidy\**

### I. INTRODUCTION

Justice Antonin Scalia's rulings on abortion were, he always argued, grounded on his Originalist adherence to the Constitution, not his personal feelings or religious beliefs. Whether basing his judgments on the intent of the Founders in writing the text (as in early decisions), or on the ordinary meaning of the text for the late 18<sup>th</sup> century public (as in later decisions), Scalia always professed a devout obedience to the fixed meaning of the Constitution, as though it were a judicial Word of God.<sup>1</sup>

But, the Constitution was not, of course, taken by him as literally divine revelation. And that raises the question that is the focus of this examination of his juridical faith: Why should words written over 200 years ago in a radically different culture still bind our contemporary courts? To put it briefly, "Why Originalism?"

This attempt to answer that question will focus on Scalia's Supreme Court opinions on abortion, while complementing this with some of his other opinions, as well as his frequent extra-judicial pronouncements expressing his rationales for giving such constraining power to our country's original rules.

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<sup>1</sup> Antonin Scalia, address at the University of Chicago Law School (Sept. 16, 1986); *See* BRUCE MURPHY, *SCALIA: A COURT OF ONE* 109-11 (2015); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

I shall argue that his rationales are grounded on two determinative ethical imperatives: Consequentialism, i.e., the right action is that which will produce the better balance of beneficial consequences over harmful consequences;<sup>2</sup> and Contractualism, i.e., the right action is that which we are bound by duty to carry out.<sup>3</sup> To put it another way, he finds the answer to why he, as a Supreme Court jurist should obey the “original Constitution,” by looking in two complementary directions: As a Consequentialist, he looks to the future, and calculates the balance of benefits over harms from having an unchangeable written ordering of our governing rules. Only with such an absolute rule book will our society have the order, unity and continuity necessary for a stable society. And, as a Contractualist, he looks to the past, to the binding oath he took to preserve and defend the Constitution-as-written. This, he believes, preempts his right (and all proper jurists) to substitute his own views and values. For Scalia, these two defining ethical imperatives demand that the recent Supreme Court’s judicial creation of a purported Right to Abortion be overturned.

## II. OPINIONS ON ABORTION

### A. *Roe v. Wade*<sup>4</sup>

While Scalia did not join the Court until 13 years after *Roe v. Wade* was decided, it was the focal target for his attacks on the judicial activism which created a constitutionally protected right to abortion.<sup>5</sup> Justice Blackmun, who wrote the majority opinion, found a woman’s right to abortion in the “Right to Privacy” that Justice Douglas had discovered in the “penumbra of the Constitution” in the contraceptive case, *Griswold v. Connecticut*.<sup>6</sup> For Blackmun this right was ultimately grounded in the Fourteenth Amendment’s con-

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<sup>2</sup> *Consequentialism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/conseque/> (last visited May 24, 2016).

<sup>3</sup> *Contractualism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/contractualism/> (last visited May 24, 2016).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> See *id.*; see also *Justice Antonin Scalia*, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/the-current-court/justice-antonin-scalia/> (last visited May 24, 2016).

<sup>6</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

cept of personal liberty.<sup>7</sup> In what might be called “Inspirational Originalism,” the majority in both cases judged that such a right was implicit in the spirit of the Constitution.<sup>8</sup> Time after time Scalia objected to what he regarded as this subjective creating of new law, and counter-attacked with his “Textual Originalism,” as in a speech in 2002: “My difficulty with *Roe v. Wade* is a legal rather than a moral one. I do not believe—and no one believed for 200 years—that the Constitution contains a right to abortion.”<sup>9</sup> The basis for this charge was, of course, that there was nothing in the text of the Constitution (or in the two centuries of Supreme Court judgments) to ground a claim to such a purported right. Without an explicit license from the text or the tradition, justices should claim no judicial license to fabricate such a new right. His moral Contractualism demands that as officers of the court and obedient servants of the Law, judges are bound by an “enduring contract.”<sup>10</sup> And that constitutional contract, he proclaims, which does not mention an abortion right, gives the “federal government and, hence me, no power over the matter.”<sup>11</sup>

His major criticism of *Roe*, and all the subsequent pro-abortion decisions, builds on this point: The Constitution, by not explicitly empowering the federal government with authority to rule on this issue, has reserved that power to be exercised by the democratic processes of the various legislatures, which must, therefore, be respected by the nine unelected justices of the Court.

### B. Webster v. Reproductive Health Services<sup>12</sup>

A Missouri law had declared that life begins at conception, and therefore fetal life required legal protection by restricting access to abortion.<sup>13</sup> Specifically, it prohibited public employees and facilities from participating in non-life threatening abortions, and prohibited abortions after twenty weeks, unless the fetus was determined to

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<sup>7</sup> *Roe*, 410 U.S. at 153.

<sup>8</sup> *Id.* at 150.

<sup>9</sup> *Session Three: Religion, Politics and the Death Penalty*, PEWRESEARCHCENTER (Jan. 25, 2002), <http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/>.

<sup>10</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855-56 (1989).

<sup>11</sup> *Id.*

<sup>12</sup> 492 U.S. 490 (1989).

<sup>13</sup> *Id.*

be not viable.<sup>14</sup> Justice Rehnquist's plurality opinion diluted *Roe*'s strict scrutiny test of abortion restrictions;<sup>15</sup> and O'Connor's concurring opinion introduced an alternative, the "Undue Burden Test," to judge such restrictions.<sup>16</sup>

Scalia chastised the Court for not having the courage to completely overturn *Roe*, prolonging what he labeled its "self-awarded sovereignty."<sup>17</sup> But, his major objection is a pragmatic Consequentialist judgment that this will prolong the public controversy, thereby disrupting the nation and imposing enormous pressure on the Court to become not the servant of the law but of the tides of popular opinion. And, with prophetic acuity, he warned that justices would inevitably become merely the instruments of the political parties.

A year later in another opinion requiring either two parent notification or a judicial by-pass for a minor, Scalia strenuously objected to the Court's cacophony of partially concurring and partially dissenting judgments.<sup>18</sup> Again he vehemently protested about both the constitutionally unauthorized arrogation of such self-anointed authority to create an "Abortion Code," and also the legal anarchy that would be caused by the absence of any objective grounds for resolving arguments over these intensely held opinions.<sup>19</sup>

### C. **Planned Parenthood of Southeastern Pennsylvania v. Casey**<sup>20</sup>

The Court in *Casey* reviewed a Pennsylvania abortion law that required parental notification, a twenty-four hour waiting period and spousal notification.<sup>21</sup> Here, much to Scalia's indignation, the Court continued to inflict a "death by a 1000 qualifications" on *Roe*, but was not quite willing to apply the coup de grace. Justice O'Connor's plurality opinion eliminated *Roe*'s trimester scheme for controlling abortion restrictions and made the "Undue Burden" test

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 546-48 (Burger, J., dissenting).

<sup>16</sup> *Id.* at 530 (O'Connor, J., concurring).

<sup>17</sup> *See supra* note 5.

<sup>18</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

<sup>19</sup> *Id.*

<sup>20</sup> 505 U.S. 833 (1992).

<sup>21</sup> *Id.* at 833.

the official standard.<sup>22</sup> The Court then rejected spousal notification as not passing the new test.<sup>23</sup> But, the majority could not bring themselves to forthrightly overturn *Roe*, justifying this tepid stare decisis on the Consequentialist grounds that society had had almost 20 years of being ruled by *Roe*, and that radical change in society's established order undermined the protection of all individual rights.<sup>24</sup> As O'Connor intoned in the opening sentence of her opinion, "Liberty finds no refuge in a jurisprudence of doubt."<sup>25</sup>

In his dissent, Scalia was, of course, outraged at this latest exercise of "The Imperial Judiciary . . . ."<sup>26</sup> He proclaimed the Court's duty to step aside and let the democratically elected legislatures decide such strongly held and conflicted issues. Not only did this fulfill the obligation of officers of the court to follow the letter of the law "based on text and tradition,"<sup>27</sup> but it would also produce the best societal consequences respecting the diversity of views and values in the land, and giving all participants, "even the loser, the satisfaction of a fair hearing and an honest fight."<sup>28</sup> Summing up his Contractualist and Consequentialist arguments, he wrote: We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.<sup>29</sup>

### III. SUMMARY

Justice Scalia constantly insisted that his own personal views and values played no part when he assumed the responsibilities of a judge. Indeed, he asserted that he would not vote to invalidate either a state law restricting abortion or one permitting abortion on demand.<sup>30</sup> Rather, he claimed that his rulings were preemptively determined by the text of the Constitution, which gave no authority over this issue to the Court. The two grounds for this view, as he argued in numerous opinions and speeches, were first that his (and all judges') duty to follow obediently the Constitution as written. This Con-

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<sup>22</sup> *Id.* at 837.

<sup>23</sup> *Id.* at 837-38.

<sup>24</sup> *Id.* at 846-88.

<sup>25</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 844 (1992).

<sup>26</sup> *Id.* at 995 (Scalia, J., dissenting).

<sup>27</sup> *Id.* at 999.

<sup>28</sup> *Id.* at 996.

<sup>29</sup> *Id.* at 1002.

<sup>30</sup> *See supra* note 5.

tractualist argument was complemented by his strong Consequentialist concern about the dire harm if judges' own diverse and shifting values were allowed to constantly remake the law of the land in their own images. Such judicial subjectivism would undermine the essential continuity and unity that a civil society needs in order to endure. For Justice Scalia, his oft proclaimed adherence to the original text of the Constitution was demanded by both his sense of being duty-bound to follow the letter of the law, and also by his social utilitarian belief in the need for a grounding authority from the nation's past to preserve and protect its future.

#### IV. FINAL NOTE

It is most striking after this survey of Justice Scalia's opinions that, with only one exception (the "shudder of revulsion" he felt for partial birth abortion), he makes no comments about the rightness or wrongness of abortion.<sup>31</sup> He does not express his own moral judgments of a woman's rights to reproductive choice, nor of the rights of the fetus to life. This he tells us repeatedly is not the job of the judge. With clear parallels to the Separation Theory of Justice Holmes, he does not describe his job as doing justice (or advocating any other moral values), but rather of devoutly applying the law.<sup>32</sup> Critics, of course, have claimed that "his law" and the theories that ground it are covertly shaped by his personal moral values. But, on the record, Justice Scalia insists that, to borrow another metaphor, he is only an umpire: He should not make the rules. He must only apply them.

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<sup>31</sup> *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting).

<sup>32</sup> FREDRICK R. KELLOGG, OLIVER WENDELL HOLMES, JR., *LEGAL THEORY, AND JUDICIAL RESTRAINT* (2011).