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SCALIA AS PROCRUSTES FOR THE MAJORITY, SCALIA AS CASSANDRA IN DISSENT

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SCALIA AS PROCURSTES FOR THE MAJORITY, SCALIA AS CASSANDRA IN DISSENT (draft, forthcoming Jahrbuch des öffentlichen Rechts der Gegenwart 2016)

Mary Anne Case*

The late U.S. Supreme Court Justice Antonin Scalia was infamous for the prose style of his dissenting opinions, frequently and accurately described with adjectives such as “vitriolic,” “blistering,” “enraged,” “derisive,” “dyspeptic,” and, to put it mildly, “colorful.”¹ In a single not unrepresentative dissent, that in the Affordable Care Act (Obamacare) case of *King v. Burwell*, Scalia characterized the majority opinion, written by Chief Justice John Roberts, as “quite absurd,”² demonstrating that “[w]ords no longer have meaning,”³ “with no semblance of shame,”⁴ “not merely unnatural [but] unheard of,”⁵ “eccentric,”⁶ “bizarre,”⁷ “feeble,”⁸ full of “interpretive jiggery-pokery,”⁹ and “pure applesauce.”¹⁰ His description of opinions written by more liberal and more junior justices could be even more intemperate.¹¹

In this essay, I want to focus on another, less frequently remarked upon quality of Scalia’s dissents, which is their tendency to warn prophetically of the consequences that would follow from the logic of the decision just taken or the rule just articulated by a majority of his fellow justices, consequences denied or ignored at the time by the majority. In these dissents, Scalia behaves somewhat like the Trojan princess Cassandra, whose gift of prophecy came with the curse that she would not be believed, and whose clear-eyed warnings as a consequence went unheeded until the later point in time when what they predicted came to pass. Like Cassandra, Scalia is on the losing side of many of

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¹ I do not cite specific sources for these adjectives, because so many commentators so commonly applied them to Scalia opinions no single source stands out, as a Google search will confirm.

² 135 S. Ct. 2480, 2496 (2015).

³ Id. at 2497.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id. at 2498.

⁸ Id. at 2499.

⁹ Id. at 2500.

¹⁰ Id. at 2501.

¹¹ See e.g. *Michigan v. Bryant*, 562 U.S. 344, 389-94 (2011)(Scalia, dissenting)(calling an opinion by Justice Sotomayor using factual distinctions to limit the scope of one of his own decisions in an earlier Confrontation Clause case “a gross distortion of the facts [and] the law,” “utter nonsense,” and “unprincipled”). Given that his opinions became ever more vitriolic from year to year, he might have done well to heed the warning of Judge Fitzmaurice of the European Court of Human Rights against “debas[ing] the currency of normal speech, because there is then no way left to differentiate or distinguish, or to describe instances of truly” outrageous behavior. *Ireland v. UK*, Judgment of 18 January 1978 (Series A: v. 25)(separate opinion of Judge Fitzmaurice).

his prophecies –what he is predicting is the exact opposite of what he wants to see happen. Every battle, however, is necessarily both “lost and won,”¹² so that what is bad news for the Trojans is good news for the Greeks, and what Scalia sees as the catastrophic consequences of a decision are most welcome from the perspective of his ideological opponents. In describing what for him are the horrors that will follow from the majority’s logic, he often paints a prophetic picture which in time comes true, perhaps in part because of rather than in spite of his dramatic articulation of an opinion’s implications.

The essay will go on to use another Greek myth, that of Procrustes, to shed light on a tendency in Scalia’s majority opinions. Just as Procrustes forced his guests to fit snugly into an iron bed, stretching out their bodies or chopping off their limbs as necessary, so Scalia frequently forced all prior doctrine in a given area of law into the shape he needed for the new rule he announces in a majority opinion. As with Procrustes’s unfortunate guests, so with Scalia’s procrustean majority opinions, the result, I shall argue, is often that the operation is a success, but the patient dies: subsequent decisions, whether by courts or legislatures, tend to back away from the implications of the categorical rule Scalia had gone through such pains to fashion. The paradoxical result is that Scalia as Cassandra dissenting has sometimes been more effective in illuminating the path to results he deplors than Scalia as Procrustes has been in bringing about results he favors. This is so notwithstanding that Scalia in procrustean mode does his rhetorical best to minimize the innovative or controversial character of his holding for the majority, whereas Scalia in dissent seeks rhetorically to maximize the unprecedented and revolutionary character of the majority position to which he objects.

I. The Cassandra of Gay Rights

The clearest example of Scalia as Cassandra is in the progression of U.S. Supreme Court’s gay rights cases from *Romer v. Evans*¹³ through *Obergefell v. Hodges*,¹⁴ and it is these I will use to illustrate the phenomenon.¹⁵ In *Romer*, the Supreme Court struck down an amendment to the Colorado constitution that disadvantaged gays, lesbians, and bisexuals, without so much as mentioning its own prior precedent of *Bowers v. Hardwick*,¹⁶ which had upheld criminal penalties for homosexual sex. For Scalia, this was a “contradict[ion]” because “[i]f the Court [in *Bowers*] was unwilling to object to

¹² William Shakespeare, *Macbeth* 1.1.5.

¹³ 517 U.S. 620 (1996).

¹⁴ 135 S.Ct. 2584 (2015).

¹⁵ Among other examples of this phenomenon is one I have discussed extensively in prior work, his observation in his lone dissent in *U.S. v. Virginia*, a case which mandated the admission of women to the hitherto all-male Virginia Military Institute (“VMI”) that, going beyond the less rigorous “standard elaboration of intermediate scrutiny,” Justice Ginsburg’s majority opinion held that “VMI’s single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court’s reasoning, a single woman) willing and able to undertake VMI’s program” so that as a constitutional rule “a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.” *United States v. Virginia*, 518 U.S. 515, 572-74 (1996) (Scalia, J., dissenting). For further discussion see Mary Anne Case, “The Very Stereotype the Law Condemns:” *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 *Cornell L. Rev.* 1447 (2000).

¹⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.’”¹⁷ Although there were good reasons for the Court to see Colorado’s Amendment 2 as constitutionally problematic even with respect to a class whose behavior could be criminalized,¹⁸ within a decade the Court, in *Lawrence v. Texas*¹⁹, agreed with Scalia that the “foundations of *Bowers* have sustained serious erosion from . . . *Romer*”²⁰ and the decision should be overruled. While it held in *Lawrence* that private, consensual, adult homosexual sex could no longer constitutionally be criminalized, the Court insisted its decision “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”²¹ Scalia’s response in dissent was:

Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.²²

He was proven right by degrees. In *United States v. Windsor*, the Court struck down the federal Defense of Marriage Act (DOMA), holding that the federal government could not constitutionally withhold recognition from those same-sex marriages recognized under state law, but ending by insisting, “This opinion and its holding are confined to those lawful marriages.”²³ Scalia responded:

I have heard such “bald, unreasoned disclaimer[s]” before. *Lawrence*, 539 U.S. at 604. When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with “whether the government must give formal recognition to any relationship that homosexual

¹⁷ *Romer*, 517 U.S. at 640 (Scalia, dissenting) (quoting *Padula v. Webster*, 261 U.S. App. D.C. 365, 822 F.2d 97). Of course, there are many problems with Scalia’s logic here, for example, that it is not sodomy, but same-sex desire, which is the behavior that defines the class of homosexuals. For further discussion see Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights* 79 *Virginia Law Review* 1643 (1993).

¹⁸ Because the language of Amendment 2 was so sweeping in its potential negative effects on gays, lesbians, and bisexuals, advocates and scholars have long argued that “no group, even of the most heinous felons convicted under the most unimpeachable of criminal laws, could constitutionally have the protection of the laws removed from them on so wholesale a basis as that found in Amendment 2.” Mary Anne Case, *Of “This” and “That” in Lawrence v Texas*, 2003 S. Ct. Rev 75, 93 (2004).

¹⁹ 539 U.S. 558 (2003).

²⁰ *Lawrence*, 539 U.S. at 576.

²¹ *Id.* at 578.

²² *Id.* at 604 (Scalia, dissenting)(emphasis in original).

²³ *U.S. v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

persons seek to enter." ... Now we are told that DOMA is invalid because it "demeans the couple, whose moral and sexual choices the Constitution protects," ... --with an accompanying citation of *Lawrence*. It takes real cheek for today's majority to assure us... that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here.²⁴

Scalia did acknowledge that the "scatter-shot rationales" of the majority opinion left many bases for distinguishing the right upheld in *Windsor* from a more general federal constitutional right to marriage for same-sex couples and urged lower courts to "take the Court at its word and distinguish away."²⁵ But, unlike Chief Justice Roberts, who devoted a substantial portion of his own dissent to shoring up those possible distinctions,²⁶ Scalia went on to dismantle them. In *Lawrence*, he had already engaged in some suggested editing of the language of Justice O'Connor's concurring opinion, to show how easily an argument about the criminalization of sodomy could be transformed into one concerning the recognition of same-sex marriage.²⁷ In his *Windsor* dissent, Scalia goes so far as to use the strikeout function to show how easily whole paragraphs of the majority's opinion could be edited to form part of an opinion constitutionalizing a nationwide right to same-sex marriage. For example:

Consider how easy (inevitable) it is to make the following substitutions in a passage from today's opinion...:

~~"DOMA's This state law's principal effect is to identify a subset of state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA this state law~~ contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities." ***
Similarly transposable passages -- deliberately transposable, I think -- abound.²⁸

Lower court judges were quick to take up Scalia's editorial suggestions²⁹ and more generally to adopt the view propounded in his dissent as to the logical inevitability

²⁴ Id. at 2709 (Scalia, dissenting). On the very same day it decided *Windsor*, the Court declined an opportunity to hold that there was a more general federal constitutional right to same-sex marriage, when it held that the proponents of California's Proposition 8, which had amended the state constitution to eliminate same-sex marriage, lacked standing to appeal because the opponents' victory in the trial court had been accepted by the state of California. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²⁵ *Windsor*, 133 S. Ct. at

²⁶ Id. at 2696 ff. (Roberts, dissenting).

²⁷ *Lawrence*, 539 U.S. at 601 (Scalia dissenting) (noting that O'Connor's "reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples" because it was hard to claim that "'preserving the traditional institution of marriage' is a legitimate state interest," as O'Connor did, when "preserving the traditional sexual mores of our society" no longer seemed to be a legitimate basis for upholding sodomy laws).

²⁸ *Windsor*, 133 S. Ct. at 2709-10 (Scalia, dissenting) (citations omitted).

²⁹ They also took up other arguments in his dissent. See e.g. *Kitchen v. Herbert*, at 755 F.3d 1193, 1220 (10th Cir. 2104) (quoting Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying

of an extension of the holding of *Windsor* to state marriage laws,³⁰ leading one scholar to suggest that Scalia's *Windsor* dissent paradoxically "might be remembered as the most influential opinion of his career."³¹ Indeed, nearly half of the many lower court decisions that struck down state same-sex marriage bans in the immediate aftermath of *Windsor* explicitly cited to Scalia's dissent and treated its reasoning as more persuasive than the qualifying language of the majority or of the Roberts dissent. Within two years, the Supreme Court proved Scalia's prophecies true, holding in *Obergefell v. Hodges* that the constitution did indeed require states "to license same-sex marriages [and] to recognize same-sex marriages performed out of State,"³² for the reason that he predicted, to wit that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."³³

It is worth noting that Scalia's comparatively dispassionate elaborations of the worrisome implications he sees in majority opinions such as those in the gay rights cases have had a much better track record in moving the Court in a direction he deplors than any of his more vitriolic dissents have had in moving the Court in a direction he favors. One might ask why Scalia engaged in this apparently perverse behavior – repeatedly drawing a road map to precisely the destination he does not want his colleagues on the Court to reach. Many have similarly asked why Scalia over time did not tone down, but only ratcheted up the level of invective in his dissents,³⁴ despite evidence it had never persuaded but may rather have alienated his colleagues.³⁵ Here again, he is like Cassandra, a prophet possessed, lacking full control of either the substance or the tone of utterances, but impelled to speak truth regardless of its consequences.

the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.").

³⁰ See e.g. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013) ("The court agrees with Justice Scalia's interpretation of *Windsor*").

³¹ Garrett Epps, *American Justice 2014: Nine Clashing Visions on the Supreme Court*, (Philadelphia: U. Penn. Press 2014) Kindle edition at location 720. Although other U.S. Supreme Court Justices, such as Oliver Wendell Holmes, are known for their influential dissents, in each case these other dissenters were sketching out an affirmative vision of what the result should be, whereas Scalia depicted what was for him, a nightmare vision.

³² *Obergefell*, 135 S.Ct. at 2593.

³³ *Id.* at 2602. Cf. *Windsor*, 133 S. Ct. at 2710 (Scalia, dissenting) ("[DOMA] This state law tells those couples, and all the world, that their otherwise valid ~~marriages~~ relationships are unworthy of federal state recognition. This places same-sex couples in an unstable position of being in a second-tier marriage relationship. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*").

³⁴ Scalia himself has often said he writes his dissents, not for his colleagues or lower court judges, but for law students, and implicit in that choice of audience may be a desire to write colorfully enough to attract their attention and that of case book editors who decide what snippets of opinions to include in the materials presented to students.

³⁵ Though it contained far fewer excoriating adjectives than many of his later dissents, his dissent criticizing Justice O'Connor's concurring opinion in the abortion case of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) for declining to reconsider the holding of *Roe v. Wade*, 410 US 113 (1973) was widely seen at the time as crossing an established line of civility and in retrospect as perhaps contributing to her joining a plurality explicitly reaffirming *Roe* years a few years later in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), exactly the opposite of the result he had hoped for.

II. Formulating Categorical Rules While Leaving No Case Behind

Whether they are passionate raging or more dispassionate prediction, Scalia's dissents may have more lasting influence than his majority opinions. As longtime Court watcher Linda Greenhouse observed, even on those occasions when he did have the opportunity to "come close to achieving one of his jurisprudential goals, his colleagues have either hung back at the last minute or, feeling buyers' remorse, retreated at the next opportunity."³⁶ The two principal examples Greenhouse discusses are the Court's backing down from the proposition, articulated in Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*,³⁷ that even temporary restrictions on a land owner's right to develop property can amount to a taking for which the owner is entitled to compensation, and its similar retreat from his expansive interpretation of the Confrontation Clause in *Crawford v. Washington*.³⁸ Associated with the buyers' remorse in each of these cases may be precisely what Scalia himself was likely most proud of in each of them – that he used his majority opinion, not simply to decide the particular case, but to formulate a new categorical rule for a whole line of cases, together with newly formulated categorical exceptions to this rule.³⁹

Indeed, what distinguishes Scalia as a writer of majority opinions, I would argue, is less his adherence to interpretive approaches such as originalism or textualism, and more his commitment to "the rule of law as a law of rules,"⁴⁰ and his consequent aversion to the use of case-by-case adjudication or multifactor balancing tests in constitutional law.⁴¹ As he explained:

When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: "Well, that earlier case had nine

³⁶ Linda Greenhouse, Justice Scalia Objects, New York Times, March 9, 2011, available at http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/?_r=0.

³⁷ 505 U.S. 1003 (1992).

³⁸ 541 U.S. 36 (2003). It was Justice Sotomayor's distinguishing of *Crawford* to allow the admission into evidence of statements made by a dying person that led to Scalia's excoriation of her opinion in *Michigan v. Bryant*, quoted above in footnote 11.

³⁹ In his *Lucas* dissent, 505 U.S. at 1036, Justice Blackmun critically described this practice of Scalia's as follows:

Today the Court launches a missile to kill a mouse.... [I]t ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense).... I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case.

⁴⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. of Chicago L. Rev. 1175 (1989).

⁴¹ He seems to have attributed the same commitment to categorical rules to God. At the oral argument of a case in which a Muslim prisoner sought a religious accommodation under the Religious Land Use and Institutionalized Persons Act (RLUIPA) so that he could grow a beard, Scalia castigated the prisoner's attorney for offering the possibility of a half inch beard as a reasonable compromise between prison regulations and the religious prescription of a full beard, saying, "religious beliefs aren't reasonable,... religious beliefs are categorical. You know, it's God tells you. It's not a matter of being reasonable. God be reasonable?" Transcript of Oral Argument, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 5398229, at *5.

factors, this one has nine plus one." Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.⁴²

His willingness to tolerate an error, even injustice, in an individual case in the interests of enunciating and abiding by clear rules⁴³ even led him so far as to suggest that the actual innocence of a criminal defendant under sentence of death might by itself be an insufficient basis for a court to reopen his case.⁴⁴ This puts him squarely at one extreme of the arc of a pendulum that has swung for a millennium in Anglo-American law between rules and standards, law and equity, the forms of action and the Chancellor's foot. Far from seeing the charge of formalism as a criticism, Scalia exclaimed, "Long live formalism. It is what makes a government a government of laws and not of men."⁴⁵

For Scalia, textualism facilitated formalism, and he was quick to point out that "[e]very issue of law [he] resolved as a federal judge is an interpretation of text - the text of a regulation, or of a statute, or of the Constitution."⁴⁶ He therefore inveighed against carrying over into the judicial interpretation of legislative texts, including constitutions, "the *attitude* of the common-law judge - the mindset that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'"⁴⁷

For what he saw as the regrettable persistence of this common-law mindset, Scalia blamed in the first instance American legal education, which continued to inculcate in law students an "image of the great judge" as

the man (or woman) who has the intelligence to know what is the best rule of law to govern the case at hand, and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule - distinguishing one prior case on his left, straight-arming another one on his right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he

⁴² Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. of Chicago L. Rev. at 1178.

⁴³ As he said with respect to a famous contract law case, "if you think it is terribly important that the case came out wrong, you are not yet thinking like a lawyer-or at least not like a common lawyer. That is really secondary. Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *The Tanner Lectures on Human Values* (Princeton University 1995) at 82. The Tanner Lectures were subsequently published in book form, with several commentaries, as *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press 1997).

⁴⁴ See *Herrera v. Collins*, 506 U.S. 390, 428 (1992)(Scalia, concurring)(noting "the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate" and suggesting that only "an executive pardon," not a judicial remedy, would properly be mobilized in such a case).

⁴⁵ Scalia, *Common-Law Courts in a Civil-Law System* at 100.

⁴⁶ *Id.* at 88.

⁴⁷ *Id.*

reaches his goal: good law. That image of the great judge remains with the former law student when he himself becomes a judge, and thus the common-law tradition is passed on and on.⁴⁸

What Scalia here characterizes as heroic “broken-field running through earlier cases” is precisely the phenomenon I would characterize instead as procrustean fitting of prior precedent into the rigid form of “the best rule of law to govern the case at hand.”⁴⁹ If I am describing this phenomenon in a constitutional rather than a common law case, am I being more true to Scalia’s own commitments by characterizing it negatively, as analogous to the destructive work of a villain like Procrustes rather than to the heroic success of a star athlete?⁵⁰ If I am right that Scalia’s majority opinions in constitutional cases frequently do what he deplors, is he suffering from the delusion of which he accuses other American lawyers and judges, whom he sees as failing to take account of the changed nature of their tasks in what he characterizes as their new, democratically determined, civil law system? Perhaps, but the situation is somewhat more complicated because Scalia’s procrustean tendencies are most clearly on display in cases that, although they may be constitutional, do not, by his own account, involve the interpretation of constitutional text because they depend on the incorporation doctrine, a doctrine he sees as having developed without a legitimate basis in constitutional text.

To make this clear requires spelling out something that most American lawyers, including Supreme Court justices, tend to gloss over, although they know it perfectly well: When the U.S. Constitution was ratified in the eighteenth century, its Bill of Rights (including the First Amendment, with its protections for speech, religion, and press, the Fifth Amendment’s protections for property, and the various protections for criminal defendants) was seen to operate only as against the federal government. To the extent the several states also were under a constitutional obligation to protect, for example, the freedom of speech, this obligation would only derive from their respective state constitutions. Only over the course of the century and a half since the ratification of the Fourteenth Amendment in the aftermath of the Civil War did the Supreme Court come to hold that most of the provisions of the Bill of Rights also applied to the states. The process by which this was done was not wholesale, but piecemeal and gradual, with separate cases over time considering each provision and occasionally rejecting

⁴⁸ Id. at 85. Note that there is an important distinction Scalia sometimes elides between arriving at the “most desirable resolution” in “the case at hand” and arriving at “the best rule of law to govern” it. Elsewhere Scalia observes that “sticking close to those facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common law.” Scalia, *The Rule of Law as a Law of Rules* at 1177. This is not the methodology used by Scalia, whose goal is always to constrain the discretion of future judges, including himself, see id. at 1179, through the formulation, wherever possible, of a rule which rises above individual factual considerations.

⁴⁹ Of course, as explained in the prior footnote, one can engage in broken field running around prior precedent merely to score a goal in the case at hand, not to formulate a general rule governing a class of cases, but, like Procrustes, Scalia wants an iron bed ready to house, not just this evening’s visitors, but a host of guests yet to arrive.

⁵⁰ I might also call it fancy dancing, to use a differently gendered metaphor, occupying a middle ground between admiration and condemnation.

incorporation of a particular right as against the states.⁵¹ While First Amendment free speech protections were recognized as incorporated early in the twentieth century,⁵² for example, it took until the new millennium for the same to be held true of the Second Amendment right to keep and bear arms.⁵³

The textual hook for incorporation of provisions of the Bill of Rights against the states became the Due Process Clause of the Fourteenth Amendment. This technically makes the incorporation of Bill of Rights protections a form of substantive due process, the same doctrinal category which led to such controversial protections as those for economic liberties in the *Lochner*⁵⁴ era and for abortion in *Roe v. Wade*⁵⁵ and its progeny. Scalia was in general no fan of substantive due process, seeing it as oxymoronic because “by its inescapable terms” the Due Process Clause “guarantees only process.”⁵⁶ “To say otherwise,” according to Scalia, “is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.”⁵⁷ Yet he “acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’”⁵⁸

Because neither text nor original meaning, but only *stare decisis*, the cumulative weight of precedent, grounds the law applying provisions of the Bill of Rights to the states, a judge deciding a case involving an incorporated provision is necessarily acting as a common law judge, without access to a civil-law-style alternative to the methodologies of the common law. Such a judge must of necessity “distinguish precedent[s]... until (bravo) he reaches his goal: good law,”⁵⁹ even if this means “attacking the enterprise with the Mr. Fix-it mentality of the common-law judge,” which Scalia warned was “a sure recipe for incompetence and usurpation.”⁶⁰

III. Fitting Free Exercise Doctrine into a Procrustean Bed

With these background considerations in mind, let me now turn to a detailed analysis of one major Scalia opinion that fits the procrustean pattern I have identified,⁶¹ the free

⁵¹ The as yet unincorporated provisions include certain procedural rights related to trial by jury. See *McDonald v. Chicago*, 561 U.S. 742 (2010) at footnote 13 and 14.

⁵² See *Gitlow v. N.Y.*, 268 U.S. 252 (1925).

⁵³ See *McDonald v. Chicago*, 561 U.S. 742 (2010).

⁵⁴ See *Lochner v. N.Y.*, 198 U.S. 45 (1905), was among the earliest and most prominent of a series of cases, since overruled, constitutionalizing aspects of freedom of contract.

⁵⁵ 410 U.S. 113 (1973).

⁵⁶ Scalia, *Common-Law Courts in a Civil-Law System* at 99.

⁵⁷ Scalia, *Common-Law Courts in a Civil-Law System* at 99.

⁵⁸ *McDonald v. Chicago*, 561 U.S. 742 (2010). During the oral argument of *McDonald*, he even waved away the possibility of shifting incorporation to a potentially more secure textual foundation, that of the Privileges and Immunities Clause of the Fourteenth Amendment, leading some conservative legal academics to accuse him of betraying his principles. See Josh Blackman and Ilya Shapiro, *Is Justice Scalia Abandoning Originalism?* DC Examiner March 9, 2010, available at <https://www.cato.org/publications/commentary/is-justice-scalia-abandoning-originalism>.

⁵⁹ Scalia, *Common-Law Courts in a Civil-Law System* at 85.

⁶⁰ *Id.* at 99

⁶¹ For another see e.g. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

exercise of religion case *Employment Division v. Smith*,⁶² in which he goes to heroic lengths to leave no case behind on his path to announcing a categorical rule. *Smith* involved the incorporation of the First Amendment's religion clauses as against the states, an incorporation so thoroughly accomplished that despite the technical inaccuracy of such a classification, it is typically referred to without qualification as a First Amendment case. Indeed, the very first sentence of Scalia's opinion reads simply: "This case requires us to decide whether the *Free Exercise Clause of the First Amendment* permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."⁶³

Smith, a native American drug counselor, lost his job because he had engaged as a member of the Native American Church in the ritual sacramental consumption of the hallucinogen peyote, whose use the state of Oregon had criminalized without providing an exemption for religious use, although a number of other states and the federal government had provided such an exemption in their own drug laws. Over the course of the quarter century before the *Smith* case, the free exercise cases decided by the U.S. Supreme Court applied a test first set out in another unemployment compensation case, *Sherbert v. Verner*,⁶⁴ requiring that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." If the action could not be so justified, the Court had held, a religiously motivated objector would be constitutionally entitled to an exemption from the government action. Although few who brought exemption claims before the Supreme Court were ultimately successful, standard-like language requiring narrow tailoring to achieve a compelling governmental interest suffused the cases during this quarter century period.

Scalia, of course, preferred rules to standards, he hated balancing tests, and he took the occasion of having been assigned the majority opinion to set out a categorical rule for free exercise claims. Reaching back to *Reynolds v. U.S.*⁶⁵, a foundational nineteenth century case involving unsuccessful attempts by Mormons in the Utah territory⁶⁶ to claim a religious exemption from laws criminalizing polygamy, Scalia declared that, from the time of *Reynolds*, "subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"⁶⁷ This was the constitutional rule he held to be applicable to all free exercise exemption claims. Scalia's characterization of *Reynolds* itself was indisputably correct. That case had proclaimed:

⁶² *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872(1990).

⁶³ *Id.* at 874.

⁶⁴ 374 U.S. 398 (1963) *Sherbert* had lost her job when, as a Seventh Day Adventists, she had refused to work on her Saturday sabbath; state law explicitly protected those who were Sunday observers.

⁶⁵ *Reynolds v. United States*, 98 U.S. 145 (1878)

⁶⁶ Because Utah was then a territory of the federal government, not a state, *Reynolds*, unlike *Smith*, was indeed a First Amendment case in the strict sense.

⁶⁷ *Smith*, 440 U.S. at 879 (quoting *U. S. v. Lee*).

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . [To permit] a man [to] excuse his practices to the contrary because of his religious belief . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.⁶⁸

But to support the proposition that “the record of more than a century of our free exercise jurisprudence” established “that an individual’s religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate,”⁶⁹ he began, bizarrely, not with *Reynolds*, but with a quotation from a case that had been overruled on other grounds within a few years of having been decided, *Minersville School District v. Gobitis*.⁷⁰ Indeed, citations to *Gobitis* bracketed Scalia’s discussion of *Reynolds*, without any mention by Scalia that *Gobitis* had been in so many words “overruled,”⁷¹ let alone that it is “widely . . . viewed as one of the Court’s great constitutional mistakes.”⁷² Although the Court in *Gobitis* had upheld a compulsory flag salute by schoolchildren against a claim for religious exemption by young Jehovah’s Witnesses in 1940, by 1943, with the U.S. in the throes of the Second World War and concerns raised about the similarity of the pledge gesture to the “Nazi-Fascist salute,”⁷³ the Court had reversed course and held it to be a violation of free speech protections to compel students to salute the flag and recite a pledge of allegiance, regardless of whether their objections to doing so were religiously grounded.

Scalia was able to take the bulk of the text of his own rule, categorically requiring even the religious objector to “comply with a ‘valid and neutral law of general applicability,’” verbatim from a recently decided case, *United States v. Lee*,⁷⁴ which had denied an Amish employer’s claim for exemption from the Social Security tax. The difficulty Scalia faced was that, while *Lee* may have lost, the Court had upheld the constitutional claim of another Amish claimant, *Yoder*, to be exempt from a neutral and generally applicable law requiring him to send his young children to school until the age of sixteen.⁷⁵ Moreover, among the previously successful free exercise claimants before the Supreme Court in the decades immediately preceding *Smith* had been three raising claims to unemployment compensation, including *Sherbert*, the very first Supreme Court case to mandate as a constitutional matter⁷⁶ an accommodation for those whose religious exercise is burdened by government. To make good his categorical rule, Scalia had either to overrule or to distinguish these cases. He chose a procrustean fitting of these cases

⁶⁸ *Reynolds v. United States*, 98 U.S. at 167-8, quoted in *Smith*, 440 U.S. at 879.

⁶⁹ *Smith*, 440 U.S. at 879.

⁷⁰ *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

⁷¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642(1943).

⁷² Michael McConnell, John H. Garvey, & Thomas C. Berg, *Religion and the Constitution*, 2d Edition (New York: Aspen 2006), 144.

⁷³ *Barnette*, 319 U.S. at 627, footnote 3.

⁷⁴ See *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982). *Lee*, like *Reynolds*, did not involve incorporation, but federal action and hence the First Amendment proper. It is worth noting that all of the cases Scalia had to distinguish heroically in order to establish that the general rule was the one he quoted from *Lee* did involve incorporation of the First Amendment against the states.

⁷⁵ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁷⁶ Legislatures had previously granted, and the Court had applied, statutory accommodations.

into his framework, making the startling claims that the Supreme Court had “never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”⁷⁷ and “never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.”⁷⁸ Unemployment compensation schemes, he argued, involved “individualized governmental assessment of the reasons for the relevant conduct” and the Court’s “decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Particularly because *Smith* was itself an unemployment compensation case, this distinction was far from persuasive, so Scalia emphasized that Smith lost his job because Oregon criminalized peyote use, whereas the successful claimants’ conduct had all been legal.

This still left Scalia with a need to distinguish *Wisconsin v. Yoder*, which had not only “excused [the Yoders] from compliance with the otherwise valid” school attendance law, but “invalidated [the] governmental action” of imposing a fine on the Yoder parents for the misdemeanor of not continuing to send their children to school. Scalia’s solution was to invent a new category of “hybrid rights” claims. He insisted that just as some other successful free exercise claimants had paired their religious claims with free speech claims, Yoder’s victory depended on a combination of religious and parental rights claims. Scalia’s emphasis on the parental rights component of Yoder’s case was particularly odd given his view that the “theory of unenumerated parental rights underlying [*Yoder* and the two other parental rights cases cited in *Smith*] has small claim to *stare decisis* protection.”⁷⁹

His efforts did not impress the lower courts, who, in the decades since *Smith* have been presented with a number of cases making “hybrid rights” claims and not only rejected all of them, but even rejected the very notion such a claim could ever be viable. The contrast between the lower court judges’ receptivity to the Cassandra-like case for same-sex marriage in Scalia’s *Windsor* dissent and their complete dismissal of his procrustean hybrid rights analysis, which one representative lower court opinion called “completely illogical,”⁸⁰ could not be more stark.

Courts did apply the categorical rule Scalia proclaimed in *Smith*, but academic commentators, activists, and practitioners raised so many objections to it that *Smith* became “one of the most heavily criticized constitutional decisions of recent times.”⁸¹

⁷⁷ *Smith*, 440 U.S. at 879.

⁷⁸ *Id.* at 883.

⁷⁹ *Troxel v. Granville*, 530 U.S. 57, 92(2000)(Scalia, dissenting)(“Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children -- two of them from an era rich in substantive due process holdings that have since been repudiated. See *Meyer v. Nebraska*, 262 U.S. 390... (1923); *Pierce v. Society of Sisters*, 268 U.S. 510... (1925); *Wisconsin v. Yoder*, 406 U.S. 205.. (1972)”).

⁸⁰ See *Kissinger v. Bd of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir.1993).

⁸¹ McConnell, et al., *Religion and the Constitution* (2d Ed.2006) at 145. I should disclose that, unlike many other academic commentators, I have always thought that *Smith* was correctly decided, that the passage of the Religious Freedom Restoration Act in response to *Smith* was a mistake, and that the problem with

Within three years of the decision a broad coalition of civil liberties and religious rights groups representing a vast variety of faith traditions and political persuasions, from the American Civil Liberties Union to the Traditional Values Coalition, persuaded a nearly unanimous U.S. Congress to pass a statute dubbed the Religious Freedom Restoration Act of 1993 (RFRA) whose announced “purpose” was “to restore the compelling interest test as set forth in *Sherbert v. Verner*, ... and *Wisconsin v. Yoder*... and to guarantee its application in all cases where free exercise of religion is substantially burdened.”⁸² The Court, which did not take kindly to what it saw as a usurpation of its prerogatives, saw RFRA as violative of both the separation of powers and the principles of federalism and held that Congress lacked power to impose RFRA on the states.⁸³ Nevertheless, RFRA remains applicable to the federal government, approximately half the states have additionally passed so called mini-RFRAs of their own, and aspects of RFRA have successfully been imposed by Congress on the states through the Religious Land Use and Institutionalized Persons Act (RLUIPA).

Scalia had warned prophetically in *Smith*:

The rule respondents favor [deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order] would open the prospect of . . . required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.”⁸⁴

Although it took the better part of two decades for anything like his parade of horrors to come marching in with full force, the past several years have seen RFRA mobilized as a new front in the sexual culture wars. Hundreds of successful cases, including several to have reached the Supreme Court, were brought on behalf of for profit corporations and religious non-profits⁸⁵ challenging as a burden on free exercise the Affordable Care Act mandate that employers include full coverage of contraceptives among the health insurance benefits they provide their employees. At the state level, objectors to same-sex marriage, from cake bakers and florists to county clerks such as Kentucky’s Kim Davis have raised RFRA claims or lobbied for new state RFRAs. In her dissenting opinion to *Hobby Lobby*, the first of the contraception mandate cases to reach the Supreme Court, Justice Ruth Bader Ginsburg mustered a parade of horrors under RFRA even longer

Scalia’s opinion in *Smith* was not the categorical rule he announced, but the fancy dancing he engaged in to leave no previously decided case behind in affirming that rule. I would have overruled *Yoder*, which I thought was wrongly decided from the start. See Mary Anne Case, Why “Live-And-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights, 88 U.S.C. L. Rev. 463, 469 (2015).

⁸² 42 U.S.C. §§ 2000bb (b)(1).

⁸³ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁸⁴ *Smith*, 440 U.S. at 888-9 (citations omitted).

⁸⁵ See e.g. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

than Scalia's in *Smith*.⁸⁶ As Scalia himself pointed out at the oral argument of *Hobby Lobby*, one reason for this longer list was that RFRA had gone beyond the "pre-*Employment Division v. Smith* law" in that the "compelling State interest test in the prior cases was never accompanied by a least restrictive alternative" as it was under RFRA.⁸⁷

In light of RFRA, how should we evaluate the success of Scalia's procrustean efforts to impose a rigid rule on free exercise cases in *Smith*? On the one hand, in rejecting a constitutional right to religious exemptions from generally applicable laws in *Smith*, Scalia made clear that he was not ruling out the possibility of exemptions, merely "leaving accommodation to the political process," even though this would "place at a relative disadvantage those religious practices that are not widely engaged in."⁸⁸ Scalia's willingness to leave the rights of minorities to the political process (and perhaps his expectation that they will lose in this process) unites his announced approach in both the gay rights cases discussed above and the religious accommodation cases. But in neither set of cases does he get what he wants. As to gay rights, over Scalia's protests that the result is a "threat to American democracy"⁸⁹, the Court constitutionalized the vision he dissents conjured up. As to religious accommodation, Scalia expected that the legislature would at most enact rule-like categorical exemptions for certain narrowly specified religiously motivated activities.⁹⁰ He thought he had killed the compelling governmental interest test for religious exemptions by contorting it to fit in his procrustean bed in *Smith*. But far from remaining safely dead, the test rose up again stronger than ever, this time with democratic warrant and well nigh limitless scope in the form of RFRA. The very thing he found "horrible to contemplate" to wit "that federal judges will regularly balance against the importance of general laws the significance of religious practice," the legislature from whom he had hoped for clear rules had now commanded. To borrow a metaphor Scalia used concerning another judge –made test used in religion clause cases, "[I]ike some ghoulish figure in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried,"⁹¹ the compelling interest test for religious exemptions rose up to haunt him.

In evaluating Scalia's legacy, then, one must take account of what for him were the perverse consequences of both his procrustean majority opinions and his Cassandra-like dissents, each of which can ultimately be reckoned failures in that, despite his best efforts, the approaches he wished to suppress prevailed and the law moved in exactly the opposite direction from the one in which he was seeking to drive it.

⁸⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804 (2014)(Ginsburg, dissenting).

⁸⁷ *Sebelius v. Hobby Lobby Stores, Inc.*, 2014 U.S. Trans. LEXIS 47 at *7.

⁸⁸ *Smith*, 440 U.S. at 890.

⁸⁹ *Obergefell*, 135 S.Ct at 2626 (Scalia, dissenting).

⁹⁰ He certainly did not expect or welcome RFRA. As he said at the oral argument of *Holt v. Hobbs*, 13-6827 at 26, "bear in mind, I would not have enacted this statute."

⁹¹ *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398(1993) (Scalia, concurring in the judgment)(referring to the *Lemon* test for the Establishment Clause).