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A CONSERVATIVE LITERALIST - JUSTICE SCALIA'S LEGAL PHILOSOPHY AS SEEN THROUGH AUSTIN V. MICHIGAN CHAMBER OF COMMERCE AND TEXAS V. JOHNSON

BY

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Introduction

Save for the abortion issue, no case in recent years has caused such a public furor as Texas v. Johnson 105 L.Ed.2,342. There, of course, the Court said in an opinion by Justice Brennan that the State of Texas' interest in preventing breaches of the peace did not support its conviction of Johnson who burned the American flag as part of a peaceful political protest demonstration. The court concluded there was no threat to the peace of the community. In addition Brennan wrote: "Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression". (105 L.Ed.2,364)

The anger and hostility toward the Court expressed by public officials, the acrimonious debate over whether a Constitutional amendment was needed to right such a "wrong decision", the passage of a federal statute prohibiting desecration of the national symbol, the anguished outcry by patriotic groups, and the confusion, exasperation and frustration expressed by ordinary citizens have just begun to subside, despite the recent decision declaring unconstitutional the new federal statute to ban "flagburning"[1], by the same majority of the Supreme Court and the defeat in the House of the proposed constitutional amendment.

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This public outcry was accompanied by the astonishment of conservatives, liberals and professional court watchers at the makeup of the majority in both "flagburning" decisions. For there lo and behold were not only the new Justice Kennedy but Justice Antonin Scalia, joining Justice William Brennan's majority opinion. The two Reagan appointees had broken with the "conservative bloc" and had joined the "liberal" bloc's intellectual leader. Shock and dismay abounded, with particular attention given to Scalia.[2] For here was a man called by some "worse than Bork"[2], and whose record seemed to support those who questioned his position on cases involving the Bill of Rights.

This paper focuses on one recent case in the just completed term in an attempt to discover whether the Justice's position in Texas v. Johnson and the latest flagburning case are disparate from his philosophical jurisdictional bent.

The Justice

Although he has served but four terms, Scalia has already made an imprint on the court. An independent thinker, a man with a mission, a juristic loner, an intellectual gadfly[3], a Justice pursuing his own consistent intellectual agenda, he is one "whose constitutional theory and personal identity fuse.... the willing servant of a particular culturally induced interpretive world view and the carrier of lessons about what it means to approach the unruly world of constitutional adjudication as though it were amenable to such theoretical control."[4]

In the 1988 term he wrote the fewest opinions for the Court (1)[5] but by all odds the most concurrences (23)[5] His voting alignment patterns in the same term was predictable:

Kennedy	85%
Rehnquist	82%
White	78%
O'Connor	76%
Stevens	59%
Brennan	54%
Marshall	54%

Legislative history does not particularly concern

him and precedent does not have the highest priority in statutory or constitutional interpretation. Rather he is a textualist, a positivist, a formalist who sees the text often independent of historical or contemporary context. Perhaps, as Kanmar has suggested, his scholastic training has so moulded his intellectual apparatus that words themselves, logic, and verbal jousting, become central to his thought processes.

"I adhere to the text where the text is clear. Where the text leaves room for interpretation I am guided in what it means by our societal traditions, not by a show of hands. Hey, maybe I don't like the result either." [6] Thus Scalia, in First Amendment cases, looks at the text to arrive at its "plain meaning" and then interprets it in terms of traditional societal values rather than taking the "absolute" approach as did his great predecessor Hugo Black, whose constitutional world was rationalized and supported in terms of historical evidence to a greater extent than Scalia's.

Both men are positivists and textualists but Black was content to rely on <u>just</u> the text. Scalia on the other hand, despite his reliance on strict textual discipline, would depart from Black on issues like obscenity and cases involving national security, such as the Pentagon Papers case, and, if his record on the D.C. circuit is any indication, in libel cases as well. In other words, Justice Scalia is no civil libertarian. Nor is he a closet liberal in First Amendment speech issues. Rather as this analysis of the recent case will point out, where there is no conflict with the text and his definition of traditional values and his coherent rational approach to the law, Scalia will go along with the text and let the chips fall where they may.

Socioeconomic and political issues are irrelevant; the words and their implied values are determinative. Scalia exhibits neither the pragmatic skepticism of a Holmes nor the positive absolutism of a Black. He may come to the same conclusion as those legal giants but that result fits into a neat, logical system of jurisprudence and that system emphasizes the textual definition of value. Thus in the case to be discussed, the majority deals with such issues as corporate wealth, the interests of minority stockholders, the size of corporations, the impact of that economic power on political debate and how all this relates to a state statute limiting the amounts corporations may spend in political debate. True to his philosophy, Scalia treats all

this as unimportant to the issue of the meaning of the First Amendment in the particular case. Scalia considers merely the value and meaning of the First Amendment, not the realpolitique of the situation.

The Case

To illustrate Justice Scalia's philosophy and constitutional approach on the speech clause of the First Amendment, this paper will analyze the recent case in the 1989-90 term of Austin vs. Michigan Chamber of Commerce 108 L Ed. 2 652. [7] There, Michigan prohibited a corporation from using its funds for independent expenditures in support of or in opposition to any candidate in election for state office. The statute defined an independent expenditure as one not made at the direction or under the control of another person, or to a committee working for or against a candidate. The law allowed corporations to make such independent expenditures from only segregated funds used solely for political purposes. The statute specifically exempted the media. The defendant in the case was a non-profit corporation whose membership consisted of both profit and non-profit corporations with the former constituting 75% of the membership. All members contributed annual dues. The Chamber of Commerce sought to use its general treasury for a newspaper advertisement in favor of a specific candidate for the Michigan House of Representatives. The Federal District Court held the statute valid under the First Amendment and under the equal protection clause of the 14th. However the Sixth Circuit reversed on these grounds:

1. The Chamber was founded to disseminate economic and political ideas and it considered itself a non-traditional corporation.

2. Its expenditures did not pose a threat or appearance of corruption.

3. There was no compelling state interest justifying infringement of free speech.

In an opinion by Justice Marshall the Supreme Court reversed. Marshall was joined by his usual confederates - Justices Brennan, Blackman and Stevens and in addition by two so called "Conservative", members, Chief Justice Rehnquist and Justice White. This unusual grouping shows the inherent danger of attempting to label justices as liberal or conservative and to predict voting patterns. Rehnquist seldom, if ever, votes with the "liberal"

wing on First Amendment issues, while White, though more of a swing vote, tends to view issues very narrowly, including those cases involving the first amendment. So divided was the Court here that in addition to the dissenting opinion written by Justice Kennedy for himself and Justices O'Connor and Scalia, there were three concurring opinions by Brennan, Stevens and Scalia.

The Court's opinion noted that Michigan identified as a serious danger the significant possibility that corporate political expenditures could undermine the integrity of the political process and had implemented a narrowly tailored solution to that problem. "By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes the statute reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections."[8] Thus the State through this statute allowed corporations to express their political views while carefully eliminating the distortion that might be caused by corporate spending. The Court emphasized that the Act was "precisely targeted" to eliminate what it considered to be a legitimate state interest, i.e., the danger to political discourse. The majority concluded that "although we agree that expression rights are implicated in this case we hold that the Act is Constitutional because the provision is narrowly tailored to serve a compelling state interest."[9]

Scalia's Dissent

Justice Scalia disputed both the issues of a compelling state interest and the need to narrowly draw any limits on freedom of speech. The opinion is vintage Scalia - combative, colorful, pungent, independent, argumentative, appealing to the textual literalness of the First Amendment, scornful of the majority's attempt to refine a limitation on free speech and unwilling to consider that it is in society's interest to promote "fair" political debate. As is so often the case with dissenting and concurring opinions, there is a tendency to overstate ("Orwellian Censorship") since one is writing for oneself and appealing to a future day when the Court's opinion might be overruled.

"I dissent", states Scalia, because "Government, cannot be trusted to assure, through censorship, the fairness of political debate. This is incompatible with the absolutely central truth of

the first amendment ..... The object of the law we have approved today is not to prevent wrong doing but to prevent speech."[10] While not quoting Hugo Black or using Black's "absolute" approach Scalia comes very close to his position at least as far as political discourse in its rational form is concerned. "The Michigan statute is incompatible with the unrepealable wisdom of our First Amendment."[11] There is no such thing as too much speech. "A healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak and who may not."[12]

Yet he differs from Black since he accepts the compelling state interest test. And it is in this part of his opinion that he is particularly disdainful of the Court's analysis. Scalia simply sees no legitimate state interest. He sardonically questions the majority's argument of corporate wealth being used to corrupt the political process. Does one "think it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates?"[13] The mere fact of corporate wealth appears to be irrelevant to Scalia as far as First Amendment protection is concerned. "The advocacy of such entities .... that have 'amassed great wealth' will be effective only to the extent that it brings to the people's attention ideas while - despite the invariably self-interested and probably uncongenial source - strike them as true."[14]

The threat that the State of Michigan and the majority of the Court perceive in economic power having a negative impact on political debate is simply not supported by the philosophy of the First Amendment. Scalia is saying that the mere wealth of the speaker be it individual or corporation, is no basis for the compelling state interest test. "It is rudimentary that the State cannot exact as the price of special advantage (the corporate form), the forfeiture of First Amendment rights."[15] As to the question of whether corporations could "corrode" the political process by their use of funds, the Justice accuses the Court of equating corruption with unpopularity, with fear of the potential wrong to American society from powerful economic units taking direct part in the political debate..... For the first time since Justice Holmes left the bench, the court holds that a direct restriction upon speech is narrowly enough tailored if it extends to speech that has the mere potential for producing social harm."[16] Speech operates in a competitive setting and in this free-for-all environment, values and ideas which survive have passed a severe test.

Fairness, or merit, or equity are not necessarily part of the rules. There seems to be no difference between the wealthy individual and the modern corporation. Nor is there an assumption that wealth in and of itself should be considered as adversely affecting political debate. If wealth equals power so be it. That is part of our free system of government. "Under the Court's analysis of corruption by immense aggregation of wealth virtually any thing the Court deems politically undesirable can be turned into political corruption - by simply describing its effects as politically "corrosive" which is close enough to corruption to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor."[17]

It is anathema to Scalia to calibrate political speech to the degree of public opinion that supports it. What particularly annoyed Scalia was the general prohibition of corporate free speech activity by Michigan and not merely limiting independent expenditures above a certain amount or some other specific guidelines as long as the guidelines were reasonable and content neutral. As an example, in the case of Ward v Rock 105 L.Ed.2, 661, Scalia joined the majority which held that New York City's law requiring sponsors of park bandshell concerts to use sound - amplification equipment and sound technicians provided by the City was valid under the First Amendment as a reasonable regulation of place and manner of speech. The Michigan statute was not reasonable, was not narrowly tailored, because its rationale was the economic power of speech and thus it was aimed at the thought and content itself.

Conclusion

Scalia's position in Johnson and Eichman, appears to be consistent with his overall philosophy of constitutional interpretation. Once he acepted flag burning as expressive conduct, once he determined that there was no breach of the peace, Scalia sought the text and found protection for Johnson and Eichman. While the emphasis in Austin was on speech in its traditional sense (rational political discourse), Scalia was able to make the leap to find the extreme conduct of flag burning minus concurrent violence, as political expression and, thus protected. As abhorrent as the act was the Constitution shields it from attack by the State.

Endnotes

1. United States v. Eichman 110 L.Ed.2,287

2. See David Kaplan "Scalia Was Worse Than Bork", New York Times, April 19, 1987 p. 23. "Compared to Judge Bork, Antonin Scalia, who was confirmed 98-0, was not much better and ocasionally was much worse. While his writings as a law professor were not as prolific or pungent, several articles nonetheless revealed similar hostility to the courts as an anti-majoritarian institution. In one, written shortly before his appointment to the appeals court, Professor Scalia skewered affirmative action as "the most evil fruit of a fundamentally bad seed.

It is generally felt that Scalia sailed through the Senate hearing as well as the Senate itself because of the preceding rancorous debate over the promotion of Justice Rehnquist to Chief Justice and also because of their contrasting personalities. Scalia is warm, charming and outgoing, the father of nine and a natural for television exposure.

3. Scalia's colleague, Chief Justice Rehnquist, notes what is obvious to all who attend the public sessions of the Supreme Court. "He has... a reputation for incisive and persistent questioning of attorneys during oral argument." See, Rehnquist, The Supreme Court, Morrow, 1987, p. 259. In this he reminds one of the late Justice Frankfurter who was notorious for his questioning of counsel and lecturing his colleagues. Perhaps it was the teacher in both Justices; Frankfurter at Harvard and Scalia at Chicago.

4. See the recent article, George Kanmar, The Constitutional Catechism of Antonin Scalia, 9 Yale Law Journal, April 1990, No.6, at pp. 1299-1300. In this article Professor Kanmar's central point is, as his clever title would indicate, that Scalia..."as a pre Vatican II Roman Catholic absorbed very early a particular formalistic vision of how one perceives and evaluates the world, as well as a particular literalistic view of what one does with texts. Moreover by virtue of being an American Catholic interested in public affairs, Scalia also faced certain curturally complicated pressures as he sought to accommodate his personal moral views with his worldly participation, a conflict whose pragmatic resolution both drew upon and influenced his larger sense of the relationship between legal form and legal substance." Ibid p. 1300.

5. The statistical material is from Harvard Law Review, November 1989, pp. 394 and 395.

6. Kanmar, supra, footnote of p. 1319.

7. Austin v. Michigan Chamber of Commerce, 108, L.Ed.2, 652 at 670.

8. Ibid, p. 661.

9. Ibid, p. 677.

10. Ibid, p. 688.

11. Ibid, p. 687.

12. Ibid, p. 678.

13. Ibid, p. 680.

14. Ibid, p. 680.

15. Ibid, pp. 683-684.

16. Ibid, pp. 680-681.

17. Ibid.