GlobalResearch
Center for Research on Globalization

The Dissenting Jurisprudence of Antonin Scalia

Death of a Literalist

By Dr. Binoy Kampmark
Global Research, February 16, 2016
Region: USA
Theme: Law and Justice

"We mourn his passing, and we pray that his successor on the Supreme Court will take his place as a champion for the written Constitution and the Rule of Law." These words from Texas Governor Greg Abbott say much about the late Justice Antonin Scalia and his conservative dominance on the bench he made his own from 1986. The Constitution, treated as a substitute divinity, provided the late justice with a range of rationales for his judgments.

What was, then, the primary importance of Scalia?

The Constitutional text, or textualism, as it is sometimes called, provided him with what was meant to be some line in the sand. In sticking to the text, in so far as reasonable, aberrations might be avoided. Judicial hands might stay clean, above the fray. As Scalia noted in *Roper v Simmons* (2005) citing Alexander Hamilton's words to the citizens of New York, granting "life-tenured judges the power to nullify laws enacted by the people's representatives" would pose "little risk" as "[t]he judiciary… ha[s] neither the force or will but merely judgment."

Not so in the case of *Roper*, where a divided bench considered that the Constitution prohibits the execution of juveniles. Scalia thereby saw himself taking the barometric readings of a moral state of affairs – and it was specifically American and exceptioanlist. In taking this view on the "evolving standards of decency", the Court "thus proclaims itself sole arbiter of our Nation's moral standards – and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures." Unfortunately, someone was going to be doing the judging, whatever the outcome.

Scalia did have some scepticism about being able to know the original meaning behind the text. In a sense, he was not a true "originalist," in so far as he still permitted a degree of evolutionary intention, something which could only be gathered from previous judgments. Thus, *stare decisis*, that onerous and ever present doctrine that keeps judges in check and the law supposedly consistent, was evoked at stages to scold and chide other judges. Judges, Scalia was found quoting Hamilton in *Roper*, are "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."

Time and time again, he would find himself disagreeing with approaches that seemingly contradicted this stance. To that end, evolutionary approaches to nature of unions between couples – be there heterosexual or homosexual – were to be dismissed as revolutionary infractions of accepted doctrine. "Today's opinion," he expressed in *Lawrence v Texas* (2003), a decision striking down a Texas law criminalizing sex between two people of the same sex, "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."[1]

The caustic tone continued in *Obergerfell v Hodges* (2015), which saw Scalia attacking the finding by the majority that same-sex unions were a fundamental constitutional right. The dissenting judgment commences with a terse observation: "to call attention to this Court's threat to American democracy". Drawing on his own mystical concept of "the People's wisdom," he argued in a footnote in the decision that, "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."

Significantly, Scalia claimed to defer to the wisdom of Congressional and executive authority on subjects of a moral nature. Deciding on the protection of same-sex marriage was hardly within the province of judicial wisdom. His fellow judges, claimed Scalia in *Obergerfell*, had effectively ended a debate that had been going on since the ratification of the Fourteenth Amendment in 1868. "Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue."

Such a stance invariably came with its hazards, rendering a powerful arm of government less scrutinising than it might be. A Court's balancing act might invariably cancel out certain decisions of the executive. Justice Scalia would treat carefully on that score.

That said, Scalia was not necessarily hostile to the Fourth Amendment guarding against unreasonable searches and seizures, and the insurance of a search warrant based on probable cause. Given the rampant nature of the surveillance state, the decisions of *Kyllo v Unied States* (2001) and *United States v Jones* (2012) still rank as important considerations on intrusive technology.

Kyllo saw the Justice writing for the majority arguing that using a thermal-imaging device aimed at a private home from a public street to detect heat within its environs constituted a search within the meaning of the amendment.[2] As the judgment observed, "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained."

The Supreme Court in *Jones* similarly held that police needed to obtain a warrant to affix a GPS surveillance device to a car. To use such a tracking device, "and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment."[3]

Unfortunately, the post-Snowden questions on the legitimacy of dragnet surveillance conducted by the National Security Agency remain unanswered in the United States' highest forum, leaving Justice Scalia's successor a complicated, and challenging legacy.

Perhaps fittingly, Scalia has left a traumatic and speculative maelstrom in his wake, a polarising blast that has affected the entire GOP concerned that the Supreme Court is slipping out of its hands. President Barack Obama is expected to sit idle, allowing the Court to operate with eight justices. "We owe it to him and the Nation," claimed Ted Cruz, "for the Senate to ensure that the next President names his replacement." Hamilton's notion of a limited judge, indeed!

Dr. Binoy Kampmark *was a Commonwealth Scholar at Selwyn College, Cambridge. He lectures at RMIT University, Melbourne. Email: bkampmark@gmail.com*

Notes:

[1] https://www.law.cornell.edu/supct/html/02-102.ZD.html

[2] https://scholar.google.com/scholar_case?case=15840045591115721227&hl=en&as_sdt=6&as_vis=1&oi=scholarr

[3] https://www.law.cornell.edu/supremecourt/text/10-1259
