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The Supreme Court and Religious Liberty
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Critique of Justice Scalia's Hobby Lobby opinion

"It's not personal, Sonny, it's strictly business."
– Michael Corleone (Al Pacino), "The Godfather"

Justice Scalia touches on many of his familiar themes in his concurring opinion in Hobby Lobby (as I have imagined it): Originalism, textualism, attacks on colleagues, attacks on Congress, attacks on precedent, arrogance, humor, irony and impeccable logic.

At his best, Scalia very effectively analogizes and distinguishes cases when analyzing the case at hand. Here, he rightly points out that the controlled substance laws at issue in *Smith* and *Raich* are very different types of laws than the Affordable Care Act. Criminal drug laws and the health care mandate are worlds apart in their purpose, scope, and application. In distinguishing the laws and their factual applications, Scalia effectively lays the groundwork for his reasoning in Hobby Lobby. Because a criminal law of general application is so different from the healthcare mandate, the difference in his conclusions in *Smith* and Hobby Lobby are not inconsistent. Thus, his refusal to grant a judicial exemption for the use of illegal drugs is consistent with his granting of an exemption from the contraception mandate in Hobby Lobby.

On the other hand, the ease with which he finds grounds for a judicial exemption in Hobby Lobby, compared to the absoluteness of his refusal in *Smith*, is suspicious, regardless of how well he distinguishes the cases. In *Smith*, he built an almost

insurmountable barrier for a judicial exemption to a generally applicable law: In order for the Court to bend, the law would have to implicate a “hybrid” set of constitutional rights. “The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.” *Employment Div. v. Smith*, 494 U.S. 872, 881 (U.S. 1990).

Prof. Herald called Scalia’s opinion in *Smith* a “reworking of the law with no intellectual honesty whatsoever.” Maybeth Herald, lecture on Constitutional Law at Thomas Jefferson School of Law (April 7, 2014). In his Hobby Lobby opinion, “my” Scalia conveniently ignores any inconsistencies with the *Smith* ruling. No hybrid rights are at stake in Hobby Lobby, and a law of general applicability is still a law of general applicability, as the *Smith* version of Scalia might have it. Therefore, my Scalia deflects weaknesses in his argument by attacking his colleagues on the Court and members of Congress he dislikes. He wants to blow up RFRA; he wants to blow up the ACA. With so many bombs and flame-throwers going off at once, one might be distracted from the breaks in his syllogism. Scalia is a master deflector: He calls the Court a “bulldozer,” but he would raze decades of Establishment Clause jurisprudence if given the chance (*Lee v. Weisman*, 505 U.S. 577, 631-632 (1992)); he calls the Court “illiberal,” while at the same time espousing retrograde conservative views (*United States v. Virginia*, 518 U.S. 515, 567 (1996)); he calls the Court “Orwellian,” while he redefines terms to suit his ends. (*Dickerson v. United States*, 530 U.S. 428, 461 (U.S. 2000)). Scalia believes in the rule of law, but the rule of law according to Scalia.

Scalia compounds intellectual dishonesty with arrogance and abusiveness. He clearly relishes his bully pulpit, bashing on his colleagues on the Court and Congress whenever he gets the chance. Scalia rejects reliance on legislative history to discern the meaning of the law, but this does not stop Scalia from pulling out legislative history when he wants to tear into Congress members he dislikes. See *McConnell v. FEC*, 540 U.S. 93, 261 (2003). Mirroring this exercise in his *McConnell* opinion, I have Scalia pull out the legislative record from the Religious Freedom Restoration Act in order to ridicule the congressmen who spearheaded the act. Scalia was so thoroughly dissed for his opinion in *Smith*, I gave him the opportunity here to settle a few scores. Like Michael Corleone, when he says it's all about business, it's really personal. Scalia's favorite kicking-dogs on the Court are now retired, and Scalia doesn't seem to have settled on whom he dislikes the most on the current Court. So he took this opportunity to kick on David Souter some more. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 741 (1994)

Scalia dishes out the abuse in equal servings with his wit and humor. Thus, I give him an abundance of one-liners and ironic rejoinders, drawing from his rich, colorful library of opinions. My Scalia is an exaggerated Scalia, but hopefully not a parody. Scalia is an outstanding writer, and I believe his opinions have literary value – a quality that makes him so engaging as well as caustic. On my Web site, I have assembled an anthology of some of Scalia's more entertaining passages – at least the ones that stand out to me: <http://sagelaw.us/law/scalia.htm>

Scalia's arrogance and occasional abusiveness make him an easily dislikable character – but not thoroughly so. He is not Richard III. Scalia appears more sympathetic when viewed through the lens of value-framing and value-analysis. One recalls Scalia's

lament, “The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.” *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting). When Scalia directly appeals to values, and the loss of values, it is easier to understand what motivates him and what makes him so angry. America has changed considerably during Scalia’s 78 years: The America that Scalia was born into aspired to civil religion rather than diversity and multiculturalism; abortion was not considered a “fundamental” constitutional right, and the use of illegal drugs was not glorified in popular culture. Scalia is a triumphalist Catholic and an unapologetic American in the mold of Theodore Roosevelt. His values derive from these sources, and they thoroughly motivate him. Thus, when Scalia sees people disregarding and disrespecting these “old” values, he lashes out.

Scalia’s legal conclusions are more easily explainable when viewed through a value-frame. While his holdings in *Smith* and *Hobby Lobby* might seem inconsistent legally and logically, his opinions in these cases are entirely consistent with his values. His religious tradition does not involve the ingesting of psychedelic drugs, and the American cultural tradition, at least until very recently, leans toward prohibition. Scalia’s values are aligned accordingly. His recent loosening in this area marks an interesting shift. See Oral argument of Justice Scalia, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (No. 04-1084), Trans. LEXIS 48, 6-7 (2005). Scalia’s religious tradition also staunchly opposes abortion, as do the Greens of *Hobby Lobby*. Scalia’s alignment with the Greens is thoroughly consistent with his values and thoroughly unsurprising – regardless of what legal method he chooses to arrive at his conclusion.

The problem with a value-based outlook, for a Supreme Court justice, is that the judicial method requires logic and the rigorous application of the law, not the application of one's personal values, as Scalia himself points out. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 863. (1989). Thus, Scalia is stuck in a quandary – between his deepest-held values and his role as a justice. Perhaps if Scalia were more honest about the importance of his values – and the real quandary he must attempt to reconcile – it would be easier to accept his views and find wisdom in his opinions. Indeed, more honesty from the Court, generally, would help enable us, as Americans, to better sort out these issues that we all face together.