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Playing Favorites? Justice Scalia, Abortion Protests, and Judicial Impartiality

Daniel A. Farber†

Justice Oliver Wendell Holmes, Jr. famously identified a foundational commitment of First Amendment law as "the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[1]

In a series of cases involving abortion protesters,[2] Justice Scalia accused the majority of the Court of breaching that fundamental constitutional commitment. He charged the Court with blatantly flouting existing doctrine in cases involving abortion protests[3]—and doing so because of bias against the views of abortion protesters. In a 1994 case, he said that the lower court decision "departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal"—"[b]ut the context here is abortion."[4] Twenty years later he repeated the same refrain: "Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents."[5]

These two cases did not stand alone. In one intervening case, Scalia bitterly contended that the Court's treatment of the case should come as no surprise because "[w]hat is before us,

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1. United States v. Schwimmer, 279 U.S. 644, 654–55 (1929).

2. McCullen v. Coakley, 134 S. Ct. 2518 (2014); Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997); Madsen v. Women's Health Center, 512 U.S. 753 (1994).

3. I will use the term "anti-abortion protests" to include all expressive activities by anti-abortion advocates at abortion clinics or the homes of clinic personnel, including picketing, leafleting, sidewalk counseling, and physical interference with access.

4. *Madsen*, 512 U.S. at 785, (Scalia, J., dissenting).

5. *McCullen*, 134 S. Ct. at 2541 (Scalia, J., dissenting).

after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice."[6] In a fourth abortion protest case, Scalia lamented that the decision was "contrary to the most fundamental principles of separation of powers."[7]

The majority did not respond in kind, but an observer might have wondered whether Scalia's vehement opposition to abortion might not have been coloring his own view of the cases. Ironically, given Scalia's accusations of partiality in the abortion protest cases, a 2013 statistical study concluded that Scalia himself was far more likely to uphold the speech rights of conservative speakers than liberal ones, though the study has been subject to some methodological criticisms.[8]

Taking a closer look at the abortion protest cases can shed light on these disputes over judicial bias in First Amendment cases. It can also shed light on two important aspects of Scalia's work: his rhetorical style, which regularly featured scathing attacks on the motives or competence of other Justices;[9] and his insistence that his own decision-making adhered to rigorous, objective methods of analysis.[10]

In reexamining the four abortion protest cases, my goal is not to decide whose views of the doctrinal issues were correct. Rather, it is to assess whether Justice Scalia or the majority stepped outside normal bounds in ways that might indicate bias. At the risk of eliminating suspense about the results of the inquiry, there seems to be more evidence of partiality on the part of Justice Scalia in these cases than on the part of his opponents. As a prelude to that analysis, I will begin by

6. *Hill*, 530 U.S. at 741 (Scalia, J., dissenting).

7. *Schenck*, 519 U.S. at 394.

8. *See* Todd E. Pettys, *Free Expression, In-Group Bias, and the Court's Conservatives: A Critique of the Epstein-Parker-Segal Study*, 63 BUFFALO L. REV. 1, 3 (2015). As the title indicates, Pettys offers a critique of the study. He argues that the results are suspect due to possible coding errors by the authors of the study.

9. *See, e.g.*, Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 399–400 (2000). As other observers put it, Justice Scalia "often seems to regard his colleagues with the disdain that one would reserve for people considered unquestionably inferior in intellectual or reasoning abilities." DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 208 (1996).

10. *See* Laurence H. Tribe, *The Scalia Myth*, NY REV. OF BOOKS (Feb. 27, 2016), http://www.nybooks.com/daily/2016/02/27/the-scalia-myth/.

sketching the basic First Amendment doctrines governing these cases. I will then turn to an in-depth examination of the four cases, and end with some brief thoughts about the implication of the findings.

I. THE DOCTRINAL BACKDROP

The four abortion protest cases involve disputes over the appropriate First Amendment standard and whether that standard was correctly applied. A quick tour of the relevant doctrine is necessary to understand these disputes. The crucial doctrinal distinction is between regulations of speech unrelated to content (the subject of Section A) and regulations based on content (discussed in Section B).

A. CONTENT-NEUTRAL REGULATIONS OF EXPRESSION

The leading case governing content speech regulations is *United States v. O'Brien*.[11] The defendant had burned his draft card in front of a large crowd as a protest against the Vietnam War. He was convicted for willfully burning the card. The Court upheld the conviction, reasoning that the government needed to ensure that draft cards would be available when someone needed to check a person's draft status. In his opinion for the Court, Chief Justice Warren announced the following principle: "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[12] To rearrange the terms a bit, the *O'Brien* rule is that a content-neutral regulation is valid if it is narrowly tailored to a significant government interest. In a concurring opinion, Justice Harlan suggested an additional requirement, that the regulation avoid "entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate."[13]

11. 391 U.S. 367 (1968).
12. *Id.* at 377.
13. *Id.* at 388 (Harlan, J., concurring).

A refinement of the *O'Brien* test was applied in *Ward v. Rock Against Racism*.[14] Because of a series of noisy concerts in Central Park, New York City adopted an ordinance requiring musicians to use city sound equipment and a government sound technician. The Court applied the following three-part test:

1. The regulation must be justified "without reference to the content of the regulated speech."

2. It must be "narrowly tailored to serve a significant governmental interest."

3. Finally, it must leave open "ample alternative channels for communication of the information."[15]

The first two elements are derived from Warren's opinion in *O'Brien*, the third from Harlan's concurrence. The Court readily concluded that the government's interest in noise control was content-neutral, and that the regulation was a reasonable method of keeping the noise level under control.

The Court emphasized in *Ward* that the "narrow tailoring" requirement does not require the government to use the very least restrictive alternative. A content-neutral regulation is not invalid because there is some imaginable alternative that a judge likes better. Rather, the government need only to show that its regulatory interest "would be achieved less effectively" without the regulation.[16] "To be sure," the Court added, "this standard does not mean that a time, place, or manner of regulation may burden substantially more speech than is necessary to further the government's legitimate interests."[17] Putting these remarks together, the upshot seems to be that a regulation is too broad if it could achieve the government's purposes effectively while covering *substantially* less speech.

United States v. Grace[18] illustrates how this approach is applied to demonstrations in public spaces. *Grace* involved a federal statute that prohibited leafleting or picketing on the sidewalks surrounding the Supreme Court.[19] The Court observed that streets, sidewalks, and parks are traditionally considered public forums where restrictions on expressive

14. 491 U.S. 781 (1989).

15. *Id.* at 791.

16. *Id.* at 799.

17. *Id.*

18. 461 U.S. 171 (1983).

19. *See id.* at 172, 175–76 (quoting the statute and discussing its interpretation).

conduct are limited to "reasonable time, place, and manner regulations" that are content-neutral, narrowly tailored, and leave open ample alternative channels of communication.[20] Applying this test, the Court said that a total ban on leafleting or picketing was too broad in the absence of any evidence that specific activities "in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds."[21]

B. CONTENT-BASED RESTRICTIONS

The Court applies a much more stringent test to speech restrictions that relate to content. The content distinction found its first clear expression in *Police Department of Chicago v. Mosley*.[22] Mosley, a postal worker, frequently picketed a Chicago high school with a sign accusing the school of having a racial quota and practicing "black discrimination."[23] Seven months after he had started picketing, the city enacted an ordinance prohibiting picketing near any school just before, after, or during school hours.[24] A provision exempted "the peaceful picketing of any school involved in a labor dispute."[25] The *Mosley* Court struck down the ordinance based on a broad rule against content discrimination: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[26] As the Court explained,

> [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[27]

20. *Id.* at 177.
21. *Id.* at 182.
22. 408 U.S. 92 (1972).
23. *Id.* at 93.
24. *Id.*
25. *Id.*
26. *Id.* at 95.
27. *Id.* at 96.

The Court has not always been able to agree on what constitutes content neutrality. In *United States v. Eichman*,[28] the Court considered a federal statute that prohibited physical harm to the American flag except when disposing of worn or soiled flags.[29] The Court found the statute to be content-based nevertheless. The government's asserted interest—to preserve the flag as a national symbol—was inevitably content-based, since it "suppresses expression out of concern for its likely communicative impact."[30] The four dissenters, led by Justice Stevens, insisted that the law was content-neutral since it applied regardless of the defendant's intended message.[31]

The Supreme Court has recently attempted to clarify the meaning of content discrimination, while indicating the stringency of review applied to such restrictions. In *Reed v. Town of Gilbert*,[32] a town's sign ordinance imposed stronger restrictions on signs directing people to specific locations than it did on some other signs, such as address signs.[33] The Court offered a two-pronged definition of content discrimination. First, a law is content-based if the law "applies to particular speech because of the topic discussed or the idea or message expressed" or because of "its function or purpose."[34] Second, a law is content-based if it was motivated by disagreement with particular messages or cannot be justified without respect to the content of some of speech it regulates.[35] Under this test, a law is content-based if it actually categorizes speakers based on their messages or their reasons for speaking, if it was covertly intended to suppress certain kinds of messages, or if it can only be justified because much of the speech it regulates contain particular messages.

Applying this test, the Court found it clear that the sign ordinance was content-based, since it distinguished between different types of signs based on their messages.[36] That being so, the sign ordinance could survive only if it furthered a compelling governmental interest and was narrowly tailored to

28. 496 U.S. 310 (1990).
29. *Id.* at 314.
30. *Id.* at 317.
31. *Id.* at 319.
32. 135 S. Ct. 2218 (2015).
33. *Id.* at 2225.
34. *Id.* at 2227.
35. *Id.*
36. *Id.*

that end.[37] The ordinance failed to survive this test.[38] *Reed* was decided after the abortion protest cases discussed in the next section, so it is not directly relevant to Justice Scalia's charge that the Court was deviating from accepted First Amendment doctrine. Nevertheless, it emphasizes the importance of the content distinction and indicates some of the main considerations in applying it.

II. THE ABORTION PROTEST CASES

Each of the four abortion protest cases involved considerable factual complexity and multiple restrictions on protests, as well as difficult doctrinal issues. A full discussion of any one case would require far more space than is available here. The discussion will thus be limited to the key points in each case and consideration of possible evidence of bias.

A. JUDICIAL INJUNCTIONS AGAINST PROTESTERS

Madsen v. Women's Health Center[39] involved an injunction against protesters who had violated an earlier, more limited injunction. In an opinion by Chief Justice Rehnquist, the Court upheld a 36-foot buffer zone on a public street but struck down some other aspects of the injunction.[40] The operators of a Florida abortion clinic initially obtained an injunction against the defendants from interfering with public access to the clinic or physically abusing people entering or leaving the clinic.[41] When the first injunction proved ineffective, the operators sought a broader injunction against the defendants, including an injunction against harassing doctors and clinic workers in their homes.[42] The broader injunction, besides setting up the buffer zone, prohibited loud noises and sound amplification during surgical hours and prohibited the defendants from physically approaching anyone seeking to use the clinic without that person's consent.[43] The Court invalidated this "bubble"

37. *Id.* at 2231.
38. *Id.* at 2231–32.
39. 512 U.S. 753 (1994).
40. *Id.* at 757.
41. *Id.* at 758.
42. *Id.*
43. *Id.* at 759.

provision as being broader than necessary to ensure access and prevent intimidation.[44]

The most basic question facing the Court was the appropriate standard of review. The injunction itself did not refer to the content of speech, so arguably the standard for content-neutral regulations should apply. On the other hand, given that the injunction was aimed only at specific speakers, it presented a greater opportunity for content-based motivation than a general law, arguably justifying strict scrutiny. Taking into account these opposing arguments, the majority compromised with an intermediate standard for review of injunctions, asking whether "the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[45]

Justice Scalia argued that there was no real precedent for the Court's holding, and this seems to be correct.[46] The case that seemed to come closest was *Carroll v. President of Princess Anne,*[47] in which the Court said that an injunction against speech "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."[48] There is indeed a difference between the language used in *Madsen* and this standard—"narrowest terms" versus "burden no more speech than necessary," and perhaps more significantly, "significant government interest" versus "essential needs of the public order." So *Madsen* might be considered to dilute the *Carroll* formulation somewhat. On the other hand, *Carroll* could hardly be considered to have established a definitive standard for reviewing the substance of speech injunctions, because this language was dictum. The *Carroll* Court's holding was based entirely on the procedural flaws in the injunction proceeding and in particular on the failure to allow the plaintiffs to argue for some narrowing of the very sweeping injunction in the case.[49] It was relevant to the

44. *Id.* at 764.
45. *Id.* at 766.
46. *Id.* at 799 (Scalia, J., dissenting).
47. 393 U.S. 175 (1968).
48. *Id.* at 183.
49. As the Court explained:

> We need not decide the thorny problem of whether, on the facts of this case, an injunction against the announced rally could be justified. The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without

decision that some narrowing might be required by the First Amendment, but there was no reason for the Court to rule on how much narrowing was required.

Thus, the *Madsen* Court could not have properly claimed to be simply applying settled law. Still, the fact that the Court had never previously ruled directly on the proper standard means that there was no precedent in favor of Scalia's position either. And it does dispel his assertion that the Court had departed far from past practice, since there was no relevant past practice, only dictum.[50]

Justice Scalia's dissent devotes considerable attention to the facts. He spent a great deal of time describing a video and other evidence about the demonstrations in order to show that the defendant's conduct did not justify the second injunction.[51] For instance, he argued that there was no evidence to support the finding that the original injunction had been violated.[52] He also argued that the trial court had improperly found some other anti-abortion demonstrators to be acting "in concert" with the defendants and therefore bound by the injunction.[53]

The trouble with Scalia's arguments was not that they were wrong but that they were irrelevant. These issues simply were not before the Court. In order to obtain review in the Florida Supreme Court, the defendants had limited their claim to an argument that the injunction was invalid on its face, and they explicitly conceded for purposes of review that "a factual basis exists to grant injunctive relief."[54] So the question of whether there was a factual basis for the injunction was no longer part of the case. Nor, as the majority pointed out, were the possible claims of individuals who had been held to be acting in concert with the defendants, because none of them were parties.[55] Thus, much of Scalia's opinion was devoted to legally irrelevant material.

> notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings.

Carroll, 393 U.S. at 180.

50. *Madsen*, 512 U.S. at 800.

51. *Id.* at 786–91 (videotape); 796–97 (evidence regarding individuals acting "in concert"); 804–12 (testimony about defendant's conduct).

52. *Id.* at 808.

53. *Id.* at 796–97.

54. *Id.* at 770.

55. *Id.* at 775–76.

Perhaps the strongest sign that Justice Scalia was emotionally overwrought by the case was his accusation that the majority opinion reflected favoritism toward abortion advocates. Recall that the majority opinion was written by Chief Justice Rehnquist, a strong opponent of abortion rights. So Scalia's allegation of favoritism toward abortion providers seems to fall flat.

This is not to say that the majority was necessarily right. Perhaps, as Scalia claimed, the standard should have been strict scrutiny, or perhaps, as Justice Stevens argued in a separate opinion, it should have been even more lenient than the Court's standard.[56] And the Court may or may not have been right in its application of the test. But Scalia's diatribe against the Court seems to reflect more on his own emotional predispositions than on the majority's. There is simply no evidence to believe that the Court was violating established precedent or violating normal procedures, whereas Scalia himself was at least guilty of the latter missteps by addressing issues that were not properly before the Court.

The propriety of injunctions against anti-abortion protesters returned to the Court a few years later in *Schenck v. Pro-Choice Network*.[57] The injunction in *Schenck* included two key restrictions: (1) floating buffer zones requiring individuals to stay fifteen feet away from those entering or leaving the facility, and (2) a fixed buffer zone fifteen feet from all entrances.[58] Chief Justice Rehnquist once again delivered the opinion of the Court. The bone of contention with Justice Scalia involved the fixed buffer zone. Rehnquist found sufficient evidence for the trial judge to conclude that the only way to assure access was to move the demonstrators away from doorways and other entrances, particularly since the defendant's harassment of police made it difficult for the police to intervene on the basis of misconduct by individual protesters.[59]

Rejecting the argument that a simple injunction against blocking physical access would be enough, Rehnquist found sufficient basis for the judge to "conclude that some of the defendants who were allowed within 5 to 10 feet of clinic

56. *Id.* at 778–79 (Stevens, J., concurring in part and dissenting in part).
57. 519 U.S. 357 (1997).
58. *Id.* at 366–67.
59. *Id.* 380–81.

entrances would not merely engage in stationary, non-obstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars."[60] The Court also found a basis for excluding sidewalk counselors in the fixed buffer zone because of evidence that many of them had been arrested multiple times for harassment.[61]

Justice Scalia's angry dissent begins with a legal error, citing a rule governing review of administrative agencies instead of the contrary rule applying to review of judicial judgments.[62] The reasoning of his dissent, unfortunately, was keyed to this incorrect standard. This may seem an obscure technicality to the uninitiated, but it is a surprisingly elementary legal mistake for an experienced appellate judge to make.

Justice Scalia also excoriated the Court for considering the interest in public safety in assessing the case, on the theory that only the private interests of the plaintiff could be considered.[63] In Scalia's view, the case only involved a trespass on the abortion clinic's property. Although the plaintiff also made a state civil rights claim, Justice Scalia found it incredible that anyone might think that blocking access to an abortion clinic raised a civil rights issue, and he also contended that the trial judge could not rely on public safety as the justification for an injunction against trespass.[64]

Justice Scalia went to particular lengths to rebut the Court's reliance on public safety as a justification for the injunction. Only the state executive, he said, could bring a claim based on public safety.[65] As the Court pointed out, Justice Scalia seemed to be confusing whether the plaintiffs had a

60. *Id.* at 381–82.

61. *Id.* at 384–85.

62. *Id.* at 385 (Scalia, J., dissenting). The difference is that a court can only affirm an agency decision on the same argument the agency made, but it can affirm a lower court on the basis of different reasons. The majority cites the numerous precedents that deal with review of court orders. *Id.* at 384. As to how basic this rule is, I can only say that I learned it in the first week of my clerkship at a federal court of appeals.

63. *Id.* at 392–93.

64. *Id.* at 391.

65. *Id.* at 393–94. Given the ability of private plaintiffs to bring public nuisance cases, Scalia's claim seems dubious on this score.

cause of action to protect public safety with whether, in response to a First Amendment defense, they could invoke public safety as a justification for the constitutionality of the injunction.[66] Procedurally, these are two very different issues, and Scalia does nothing to explain why they should be treated identically.

Scalia was clearly correct that the Court did not bend over backwards to uphold the defendants' First Amendment claims in these cases, and he may have been right that it has done so in some other First Amendment cases. But it seems odd to accuse the Court of a grave misstep for judging a case objectively in one case simply because it failed to do so in some other cases. At the same time, as in the previous case, Scalia's opinion seems to reflect procedural confusion that is not, one would hope, generally present in his opinions, and that could be taken as a sign of emotional involvement in the cases.

B. STATUTORY RESTRICTIONS ON ABORTION PROTESTS

The two most recent cases on abortion protesters involve statutory rather than injunctive restrictions. In *Hill v. Colorado*,[67] a state law prohibited certain conduct within a hundred feet of a healthcare facility: knowingly intruding within eight feet of another person to pass out a leaflet, display a sign, or engage in "oral protest, education, or counseling."[68] The majority opinion this time was written by Justice Stevens, not by Rehnquist, although Rehnquist joined the opinion. Justice Stevens concluded that the content-neutral test applied, that the government had a significant interest in protecting individuals using the clinic from unwanted speech,[69] and that the restriction was narrowly tailored to that end.[70] Justice Stevens argued that it would be difficult to apply a rule banning "harassment," and that because of the subjective

66. *Id.* at 396 n.7. There seems to be authority contrary to Scalia's position even in terms of the plaintiff's claim for equitable relief, let alone in terms of rebutting a First Amendment defense. In *Sierra Club v. Morton*, the Court said: "The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief." 405 U.S. 727, 740 n.15 (1972).

67. 530 U.S. 703 (2000).

68. *Id.* at 705.

69. *Id.* at 718.

70. *Id.* at 726–31.

nature of harassment, such a rule would offer less guidance to speakers than a broader, prophylactic rule.[71]

Justice Scalia again dissented. He had "no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protesters, or union members seeking to 'educate' the public about the reasons for their strike."[72] The majority's response was that the law's reference to "oral protest, education, or counseling" was simply designed to eliminate casual conversations that would not interfere with building access.[73] Rather than being aimed at the speaker's message, the majority seemed to think that "oral protest, education, or counseling" really was aimed at buttonholing listeners, a type of behavior that might be identified visually with no knowledge of the speaker's message.

Today, I suspect, Scalia's argument about the standard of review might prevail. As understood today, the requirement of content neutrality might require the state to ban even asking a person for the time if it wanted to prevent blatant verbal harassment. But even so, this would not affect the other aspects of the statute governing leafleting and picketing, which are clearly content-neutral.

Justice Scalia also argued at length that the statute placed a heavy burden on the activities of sidewalk anti-abortion counselors. He may well have been right, but if the content-neutral test applies, the validity of the law must be judged on its face, not on the basis of the particular needs of a specific group of speakers.[74]

Perhaps the clearest indication of the difference between the majority and the dissent is found in Justice Scalia's dismissal of the rationale that "the statute aims to protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics."[75] "If these are punishable acts," he continued "they should be prohibited in those terms."[76] Note the "if"—Scalia apparently wanted to reserve the question of whether harassment of people trying to use a healthcare facility is a valid government concern. The majority clearly does think that harassment is a genuine

71. *Id.* at 729.
72. *Id.* at 742.
73. *Id.* at 722.
74. *Id.* at 779–91.
75. *Id.* at 776.
76. *Id.*

problem and that a prohibition phrased in terms of "harassment" would neither be workable (because of problems of proof) nor desirable (because it would fail to give speakers notice of when they cross the line of illegality). Scalia seems unable to grasp how anyone could hold that view.

It is difficult to assess Scalia's claim that the Court would have ruled differently in a case that did not involve abortion protests. Suppose, for instance, that the tables had been turned. Imagine that pro-choice protesters outside religiously affiliated hospitals were harassing people entering these hospitals because of the hospitals' refusal to provide abortions. Would the majority then have struck down a law creating a buffer zone? Would Justice Scalia have been so dismissive of the reasons for the regulation? It seems impossible to know.

Justice Scalia was equally incensed about the fourth of the abortion protests cases, despite the fact that the protestors won the case. In *McCullen v. Coakley*,[77] a Massachusetts law banned knowingly standing on a sidewalk or street within thirty-five feet of any place, other than a hospital, where abortions were performed. In an opinion by Chief Justice Roberts, the Court struck down the law. It found the law to be content-neutral but then pointed to several possible, less-burdensome alternatives.[78]

Once again, Justice Scalia was incensed, saying that there is an "entirely separate, abridged edition of the First Amendment applicable to speech against abortion."[79] He faulted the Court for unnecessarily determining that the law was not content-based, which he said was gratuitous since the statute failed even the content-neutral test.[80] He also said that it "blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content-based."[81] Perhaps so, but the Court had regularly blinked reality in past cases, as by finding in a landmark case

77. 134 S. Ct. 2518 (2014).

78. *Id.* at 2530, 2537–41.

79. *Id.* at 2541.

80. *Id.* at 2541–42. The Court responded that this was not a departure from normal process and that in any event it could not determine whether less-intrusive alternatives were possible without deciding that they would be at least arguably constitutional themselves. *Id.* at 2530.

81. *Id.* at 2543.

that a law against burning draft cards was not aimed at the draft opponents who were the only ones engaging in this conduct.[82] Scalia also said that the law was content-based because of the possibility that clinic employees, who were exempt from the restriction, might encourage women to get abortions,[83] though this seems quite speculative as a basis for finding legislation to be content-based. Again, whatever the merits of Scalia's argument, his rhetoric seems overwrought since the target of his attack is an opinion by Chief Justice Roberts, who is not a defender of abortion. Indeed, one scholar astutely suggests that the Court might well have been accused of bending the normally very lenient standard for narrow tailoring, warping its application against the government and in favor of the abortion protesters.[84]

It is difficult to assess Scalia's claim of bias since he points to no comparable non-abortion case. Suppose that Congress passed a law forbidding anyone from standing within thirty feet of a military recruiting office, with an exemption for the military recruiters themselves. Would the Court have held this law to be content-neutral and suggested some other, less restrictive alternatives? We cannot know, but it seems reasonably likely that it would have done so. Would Scalia have considered such a law content-based and found it invalid because of its impact on people trying to persuade potential recruits to avoid military service? There is, once again, no way of knowing, although Scalia seems utterly confident of how such hypothetical cases would be resolved (consistently by him, inconsistently by the majority).

CONCLUSION

In these cases involving abortion protesters, Justice Scalia accused the Court of ignoring well-established law in the interest of suppressing speakers with whom the majority disagreed. That was a serious accusation. It involved not only violation of the general judicial duty of impartiality and fairness toward all litigants, but also of the First Amendment's own imperative of neutrality toward opposing viewpoints.

82. United States v. O'Brien, 391 U.S. 367 (1968).

83. McCullen v. Coakley, 134 S. Ct. 2518, 2547 (2014).

84. *See* Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in* McCullen v. Coakley, 2015 SUP. CT. REV. 215, 239–40 (2015).

A close examination of the relevant cases suggests little support for this accusation, although it is never possible to say with confidence that a case was completely unaffected by the biases or ideologies of the judges. Indeed, in three of the cases, the charge of favoritism toward abortion advocates was not terribly plausible to begin with, given that three opinions were written by Justices who opposed abortion rights (and the fourth was joined by one of those Justices). Rather, examination of the cases suggests that Scalia's own legal analysis may have been warped by his passionate endorsement of the protesters' views. His sense of identification with the protestors may also have contributed to his attacks on the majority's motives. In short, his own adherence to objective legal reasoning may have been weaker than he imagined, and that of his opponents stronger than he thought.

Four cases involving a highly contentious issue do not provide a firm basis for drawing generalizations about a three-decade judicial career. Yet, in a sense, it was Scalia himself who identified these cases as tests of judicial integrity and impartiality through the accusations he made against the majority. It is telling, then, that these accusations fell flat and to some extent may have rebounded against him. Like all of us, Justice Scalia might have done well to ask himself about the beam in his own eye before addressing the motes in the eyes of others.[85] But this kind of self-reflection does not seem to have been a feature of his character.

85. "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" *Matthew* 7:3 (King James).