

ROE V. WADE AND THE DRED SCOTT DECISION: JUSTICE SCALIA'S PECULIAR ANALOGY IN *PLANNED PARENTHOOD V. CASEY*

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The Supreme Court built by Presidents Ronald Reagan and George Bush was partially designed to overturn *Roe v. Wade*¹ in or-

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1. 410 U.S. 113 (1973) (holding that the right of privacy encompasses a woman's decision to have an abortion within certain limits). For a more complete discussion of the holding in *Roe*, see *infra* note 65.

President Reagan stated explicitly his opposition to *Roe* and his willingness to use the federal judiciary to overturn it. Helen Thomas, UPI, Aug. 5, 1986, available in LEXIS, Nexis Library ("In many areas—abortion, crime, pornography, and others—progress will take place when the federal judiciary is made up of judges who believe in law and order and a strict interpretation of the Constitution. . . . It is not our heritage as Americans to turn our backs on massive, legalized abortion. . . . Today we proclaim what our heritage has always maintained: that all human life is sacred."). During his eight-year tenure, President Reagan appointed three new Supreme Court Justices—Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy—and appointed William Rehnquist Chief Justice. These Justices joined Justice White in forming the majority that challenged the tenets of *Roe*'s trimester system. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

Like President Reagan, President Bush stated his desire to see *Roe* overturned. See *Abortion Demonstrators, Converge on Capitol*, UPI, Jan. 23, 1989, available in LEXIS, Nexis Library (discussing how President Bush announced, over loudspeakers at an anti-abortion demonstration, that *Roe* was "wrong" and urged the Supreme Court to overturn it). While President Bush never stated outright that he would use the federal judiciary to overturn *Roe*, he did run on a platform that stated: "We reaffirm our support for appointment of judges who respect traditional family values and the sanctity of innocent human life." REPUBLICAN NATIONAL COMMITTEE, THE REPUBLICAN PLATFORM 1992, at 22 (1992). President Bush nominated David Souter and Clarence Thomas to the Supreme Court. As expected, Justice Thomas has demonstrated his willingness to overturn *Roe* by joining the dissent in *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791 (1992). Justice Souter's position in *Casey*, on the other hand, was more of a surprise, as he joined the majority that upheld the right to abortion as fundamental. David G. Savage, *The Rescue of Roe vs. Wade; How a Dramatic Change of Heart by a Supreme Court Justice Affirmed the Right to Abortion*, LOS ANGELES TIMES, Dec. 13, 1992, at A1. Some conservatives have assailed President Bush because of Justice Souter's support for the preservation of the principles of *Roe*. Richard Brookhiser, *Gravedigger of the Revolution: George Bush and Conservative Revolution*, ATLANTIC, Oct. 1992, at 70, 75-76.

der to "protect the sanctity of innocent human life."² In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Rehnquist Court came dangerously close to doing it.³ But when it walked up to the abyss of America-without-*Roe* and peered down into it, the Court's majority saw the Court tearing the nation apart and destroying its own legitimacy in the process.⁴ With a nascent centrist bloc made up of Justices O'Connor, Kennedy, and Souter finding its voice and joining the pro-*Roe* Justices, Blackmun, and Stevens, the majority came back from the edge.⁵ With the election of President Bill Clinton, who is strongly pro-choice, and the likely appointment of several new Supreme Court Justices during his first term, the fundamental right of American women to choose abortion will be preserved,⁶ albeit subject, for now, to obstacles that may be set by states to complicate, though not unduly burden, a woman's right to choose.⁷

2. REPUBLICAN PLATFORM, FAMILY, NEIGHBORHOOD, WORK, PEACE, FREEDOM, PROPOSED BY THE COMMITTEE ON RESOLUTIONS TO THE REPUBLICAN NATIONAL CONVENTION 13 (1980); REPUBLICAN PLATFORM, AMERICA'S FUTURE FREE AND SECURE, PROPOSED BY THE COMMITTEE ON RESOLUTIONS TO THE REPUBLICAN NATIONAL CONVENTION 51 (1984); REPUBLICAN PLATFORM, AN AMERICAN VISION: FOR OUR CHILDREN AND OUR FUTURE, PROPOSED BY THE COMMITTEE ON RESOLUTIONS TO THE REPUBLICAN NATIONAL CONVENTION 31-32 (1988); and REPUBLICAN NATIONAL COMMITTEE, THE REPUBLICAN PLATFORM 1992, at 22 (1992).

3. 112 S. Ct. 2791 (1992). The Court reaffirmed *Roe*, while upholding an "informed consent" requirement, *id.* at 2823; a 24-hour waiting period, *id.* at 2825-26; a parental consent requirement, *id.* at 2832; and a reporting and recording requirement, *id.* at 2832-33.

4. The Court addressed the impact of overruling the essential holding of *Roe*:

Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the court's legitimacy, and to the Nation's commitment to the rule of law.

Id. at 2816.

5. Justices O'Connor, Kennedy, and Souter delivered the opinion of the Court. *Id.* at 2803-38. Justice Blackmun concurred in part and dissented in part. *Id.* at 2843-55 (Blackmun, J., concurring). Justice Stevens concurred in part and dissented in part. *Id.* at 2838-43 (Stevens, J., concurring).

6. During his campaign Governor Bill Clinton made the following statement at a news conference:

Because the judiciary has been so politicized in the last ten or eleven years and because that decision [*Roe*] is hanging by a thread, I would expect any judge that I appoint to have an expansive view of the Bill of Rights, including the right to privacy, including the right to choose

Cragg Hines, *Clinton Judicial Appointees to be "Pro-Choice," He Vows*, HOUS. CHRON., July 1, 1992, at A8.

At least one member of the Supreme Court has admitted, anonymously, that *Roe* "will never be overturned now." Savage, *supra* note 1.

7. A state may now pass any requirements intended to protect the health and safety of the pregnant woman as long as these requirements do not constitute an "undue burden." The *Casey* Court only minimally clarified the hazy concept of "undue burden":

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid be-

In this sense, the Supreme Court's decision in *Casey* represented the last chance—for decades at least, perhaps forever—for conservatives to abolish the constitutional right to abortion.⁸ Thus, we can understand Justice Antonin Scalia's enraged dissenting opinion in *Casey* as a *cri de coeur*, the swan song diatribe for the Court's anti-*Roe* Justices. His thoughts, however, command special attention because they illustrate in striking fashion how the conservative constitutional imagination suppresses, misappropriates, and inverts the historical and constitutional experience of African-Americans and American women of all races.

I. INTRODUCTION: A CURIOUS ANALOGY

At the close of his dissenting opinion, Justice Scalia repeatedly likens the Supreme Court's decision in *Roe* to its holding in the *Dred Scott* case.⁹ It is a startling, disorienting analogy, saturated with more than a century of political meaning. By bringing one of the most significant freedom-expanding decisions in American history¹⁰ into association with the Court's most racist and pro-slavery deci-

cause the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.

Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2820 (1992). Justice Scalia furnishes a critique of the majority's unprincipled departure from *Roe* and its development of an unmanageably open-textured standard for adjudicating abortion regulation. Of course, Justice Scalia's purpose is to argue for an abandonment of *Roe* rather than a stout adherence to it. *Id.* at 2875-76 (Scalia, J., dissenting).

8. This conclusion is reinforced by the Court's denial of *certiorari* in the *Guam* case. *Ada v. Guam Soc'y of Obstets. & Gynecs.*, 962 F.2d 1366 (9th Cir. 1992) (holding that Guam's law proscribing all abortions except in cases of medical emergency is unconstitutional on its face), *cert. denied*, 113 S. Ct. 633 (1992). See Kathleen Sullivan, *The Supreme Court 1991 Term: Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the fact that the judicial conservative revolution emanating from the Supreme Court never materialized to the extent anticipated, demonstrated in part by the refusal of the Court to completely overturn *Roe v. Wade*, and that the true division amongst the Justices is not along political lines, but is actually between those who use "rules" and those who use "standards.").

9. *Casey*, 112 S. Ct. at 2883-85 (Scalia, J., dissenting) (citing *Dred Scott v. Sandford*, 19 How. 393 (1857)) (holding that a member of the African race cannot be a citizen of the United States and, therefore, the Circuit Court could not have diversity jurisdiction in a suit involving a freed slave).

10. I say this because *Roe v. Wade* established normative principles of female sexual sovereignty, gender equality, personal sexual freedom, and bodily liberty from state regulation. *But see* ANGELA Y. DAVIS, *WOMEN, RACE & CLASS 202-21* (First Vintage Books 1983) (1981). With regard to the consequences and importance of *Roe*, its "freedom expanding" impact was not universally celebrated. *Id.* The abortion rights movement leading up to *Roe*, and continuing afterward, was almost exclusively a white women's campaign. African-American women, and other women of color, were largely missing from its membership and politics. *Id.* at 203. One of the reasons for this phenomenon lies, in part, in the original feminist movement's reactionary attitudes on questions of race and class, attitudes that even led sometimes to the advocacy of involuntary sterilization of African-American women. *Id.* at 203-05, 214-21. Additionally, having access to legal abortions was not seen as equally liberating to women who could not afford them. *Id.* at 206. Generally, while many white women have fought against being forced to reproduce, many minority women have fought against being forced not to reproduce—permanently. *Id.* at 215-21.

sion, Justice Scalia dresses up and takes to Court the pro-life movement's pet analogy between the nineteenth-century right to own slaves and the twentieth-century right to have an abortion.¹¹ Justice Scalia's comparison of *Roe* and *Dred Scott*, however, is as fallacious a claim about American constitutional doctrine and method as the comparison between slavery and abortion is an insidious perversion of American history. In fact, while the methodology of the Supreme Court's decision in *Dred Scott* bears almost nothing in common with *Roe*, it turns out to be nearly identical to Justice Scalia's own elaborated method of constitutional analysis: originalism based on strict textual analysis and a study of relevant social tradition.¹² *Roe* and *Dred Scott* are, in fact, opposites, not only in methodological and jurisprudential terms, but as representations of specific visions of justice and liberty in American history. Justice Scalia's analogy amounts to an attack on the importance of the Fourteenth Amendment to the United States Constitution, and an assault on the idea of human freedom as the organizing spirit and meaning of the American Constitution.

II. THE ELEMENTS OF THE ANALOGY—SCALIA'S CONSTITUTIONAL METHOD AND HIS ATTACK ON *ROE*

In order to understand Justice Scalia's analogy, we must place it in the context of his full opinion and his general interpretive methodology of textual analysis informed by social tradition,¹³ the technique with which he applies his philosophy of "faint-hearted

11. In the more debased and explicit version of this comparison, abortion foes assert that fetuses are comparable to slaves and, just as slaves were denied their fundamental human rights under *Dred Scott*, so are fetuses under *Roe*. See John Moore, *Lobbying the Court*, 21 NAT'L J. 908 (1989) (stating that the American Life League ran full-page advertisements in *The Washington Post*, *The Washington Times* and *USA Today* linking *Dred Scott*, the Nazis' 1936 decrees stripping German Jews of their legal rights, and *Roe*); see also Clarence Thomas, Why Black Americans Should Look to Conservative Policies, Address at The Heritage Foundation (June 18, 1987), in 119 THE HERITAGE LECTURES at 1, 8 (praising as a "splendid example of applying natural law" an article comparing the right to abortion with the right to own slaves and stating that both violate inalienable rights) (citing Lewis E. Lehrman, *The Declaration of Independence and the Right to Life*, AM. SPECTATOR, Apr. 1987, at 22); Lewis E. Lehrman, *The Right to Life and the Restoration of the American Republic*, NAT'L REV., Aug. 29, 1986, at 25 (comparing abortion to slavery and the protection of abortion rights in *Roe* to the protection of slavery in *Dred Scott*); Jim Clardy, 'Invisible Man' Keyes Gets Rousing Welcome by Party, WASH. TIMES, Aug. 18, 1992, at A5 (quoting Maryland Senate candidate Alan Keyes, speaking at the 1992 Republican National Convention: "Just as our forbearers insisted on respect for the humanity of enslaved blacks, we must insist on respect for the humanity of unborn children . . ."); Nat Hentoff, *Civil Rights and Anti-Abortion Protests*, WASH. POST, Feb. 6, 1989, at A11 (stating that pro-lifers should be compared to the abolitionists since "like the slave, the fetus is property and its owner can dispose of it.").

12. See *infra* notes 14, 18-20 and accompanying text.

13. See *infra* notes 14, 18-20 and accompanying text.

originalism."¹⁴ Justice Scalia contends that the question posed in *Casey* is easily answered. He formulates the question as whether "the power of a woman to abort her unborn child . . . is a liberty interest protected by the Constitution of the United States."¹⁵ He answers: "I am sure it is not."¹⁶ He reaches this conclusion "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."¹⁷ This analysis cogently represents Justice Scalia's specific methodology for defining rights under the Fourteenth Amendment to the United States Constitution: given the unhelpful generality of the phrase "due process," he contends that the only liberty interests that can be recognized by the Fourteenth Amendment are those "rooted in history and tradition."¹⁸ In defining whether a liberty is so rooted, the decisive historical tradition to be relied upon is the "most specific" one which can be found "protecting, or denying protection to, the asserted right"¹⁹ Thus, because there is a social tradition prior to *Roe* permitting states to regulate and indeed criminalize abortion, due process cannot be said to include a right to choose abortion.²⁰

14. See Justice Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."). In this article, Justice Scalia defends originalism—searching for the "original meaning" of constitutional language—as being the interpretive philosophy most consistent "with the nature and purpose of a Constitution in a democratic system." *Id.* at 862. The purpose of constitutional guarantees, he asserts, "is precisely to prevent the law from reflecting changes in original values that the society adopting the Constitution thinks fundamentally undesirable." *Id.* The reason that Justice Scalia's originalism is "faint-hearted" is because he would import an "evolutionary" intent or possibility into his reading of the Constitution where its "original meaning" would compel a clearly indigestible result, such as "upholding a statute that imposes the punishment of flogging." *Id.* at 864.

15. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting).

16. *Id.*

17. *Id.*

18. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). See *infra* text accompanying note 57.

19. *Id.* at 127. For a discussion of Justice Scalia's method of analysis see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (challenging Justice Scalia's suggestion in *Michael H.* that his method of selecting the appropriate method of generality is value neutral). See also Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373 (1991) (arguing that Justice Scalia's interpretation of substantive due process in *Michael H.* is so narrow that it leads to the "effective end" of the doctrine); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991) (analyzing Justice Scalia's approach to tradition); Rebecca L. Brown, *Tradition and Insight: A Theory of Cognitive Interpretation* (unpublished article, on file with *The American University Journal of Gender & the Law*) (analyzing the role tradition plays under different theories of constitutional interpretation).

20. Justice Scalia introduced his view that the right to abortion is not part of our "long-standing traditions" in *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (holding an Ohio statute constitutional that requires unmarried, unemancipated minors to notify a parent or obtain a judicial by-pass to obtain abortions). Justice Rehnquist's dissent in *Roe* mirrors this view:

If *Roe* is fatally flawed because the right to abortion is secured neither by Constitutional text nor by social tradition, Justice Scalia argues, then the only arguments for preserving *Roe's* core protected right are to honor *stare decisis*²¹ and protect judicial legitimacy in the public mind. Justice Scalia quotes the majority opinion's articulation of these arguments in his dissent:

[The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.²²

This passage prompts Justice Scalia to counter that it is by *failing* to overrule *Roe* that the Court undermines its legitimacy, at which point he introduces an analysis of *Dred Scott* into his opinion.²³

"In my history-book," he writes, "the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, an erroneous (and widely opposed) opinion that it did *not* abandon . . ." ²⁴ Thus, at first blush, it seems that Justice Scalia is only comparing *Roe* to *Dred Scott* because neither decision was overruled, and he thinks both should have been; that is, they are both good examples of blind faith in *stare decisis*.²⁵ He goes further, however, and links the cases

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'

Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) (quoting *Snyder v. Mass.*, 291 U.S. 97, 105 (1934)). Justice Scalia noted that a discussion of whether there was a tradition of laws proscribing abortion constituted a significant portion of the *Roe* decision. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (citing *Roe v. Wade*, 410 U.S. 113, 129 (1973)).

21. For a discussion of Justice Scalia's outlook on *stare decisis*, see *infra* note 25 and accompanying text.

22. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2883 (1992) (Scalia, J., dissenting) (quoting *Casey* at 2815-16).

23. *Id.* at 2883 (Scalia, J., dissenting) (citing *Dred Scott v. Sandford*, 19 How. 393 (1857)).

24. *Id.* at 2883 (Scalia, J., dissenting) (emphasis supplied).

25. Justice Scalia has repeatedly demonstrated a willingness to overturn precedent. According to him, the doctrine of *stare decisis* "exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules." *Walton v. Arizona* 497 U.S. 639, 673 (1990) (Scalia, J., concurring). However, when a line of cases "finds no proper basis in the Constitution" and conflicts with a line of cases that is constitutionally sound, Scalia argues that the goals of *stare decisis* cannot be met. In such a case, Scalia abandons *stare decisis*. *Id.* at 672-73 (arguing that *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Woodson v. North Carolina*, 428 U.S. 280 (1976), should be overruled because they are irreconcilable with *Furman v. Georgia*, 408 U.S. 238 (1972)). Scalia has argued that where "precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance [to overrule precedent] ought to disappear." *Rutan v. Republican Party of Ill.*, 497

at the doctrinal level, asserting that “*Dred Scott* . . . rested upon the concept of ‘substantive due process’ that the Court praises and employs today.”²⁶ Moving his critique from doctrine to political commentary, Justice Scalia finally suggests that the Court will come to mourn its decision in *Casey* the same way he imagines Chief Justice Taney regretting his opinion in *Dred Scott*.²⁷ Scalia describes, at great length and with almost comic solemnity, a portrait of Taney that hangs in the Harvard Law School:

U.S. 62, 110-11 (1990) (Scalia, J., dissenting) (rejecting the Court’s limitations on patronage and arguing that *Elrod v. Burns*, 427 U.S. 247 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) should be overruled).

For a discussion of the apparent paradox between Justice Scalia’s adherence to tradition and his willingness to overturn precedent see Strauss, *supra* note 19, at 1715 (concluding that it is not surprising that Justice Scalia would want to overrule some precedents given his “substantive agenda” and the relatively recent Warren Court decisions challenging “entrenched practices.”).

Justice Scalia has stated that “[w]e have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents . . . and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions.” *Harmelin v. Michigan*, 111 S. Ct. 2680, 2686 (1991) (arguing that the Eighth Amendment contains no proportionality guarantee and that, therefore, *Solem v. Helm*, 363 U.S. 277 (1983) was wrongly decided). Other cases in which Scalia has advocated overruling precedent include: *South Carolina v. Gathers*, 490 U.S. 805, 819 (1989) (Scalia, J., dissenting) (arguing that *Booth v. Maryland*, 482 U.S. 496 (1987) should be overruled) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 657 (1987) (Scalia J., dissenting) (arguing that *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) should be overruled). See also Robert A. Burt, *Precedent and Authority in Antonin Scalia’s Jurisprudence*, 12 *CARDOZO L. REV.* 1685, 1685 (1991) (arguing that “[m]ore openly than any other justice sitting today, Antonin Scalia is ready to reverse prior Supreme Court precedent.”).

26. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2883 (1992) (Scalia, J., dissenting). Under the doctrine of substantive due process, the Due Process Clauses of the Fifth and Fourteenth Amendments protect certain rights from arbitrary and unreasonable interference. The rise of the Supreme Court’s application of substantive due process occurred in the 1930s. During this period, the Court struck down state statutes regulating economic activity. See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York law limiting the hours that a bakery employee could work to ten per day and sixty per week as interfering with the liberty to contract in violation of the Due Process Clause). The demise of substantive due process protection for economic rights came about in *United States v. Carolene Prods.*, 304 U.S. 144 (1938) (holding that in cases involving an economic regulation, there is a presumption of constitutionality and that the statute need only be “rationally” related to the goal).

In the last fifteen years, the Supreme Court has used the doctrine of substantive due process to protect non-economic rights, in particular the right to privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that the right of a married person to use contraceptives falls within the “penumbra” or “zone” of privacy guaranteed by the Bill of Rights). Other rights protected under substantive due process doctrine include the right to die, *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261 (1990); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); and the right to engage in one’s chosen profession, *Schwartz v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957). See *infra* note 68 and accompanying text (discussing additional cases relating to rights protected by substantive due process and assailed by Justice Scalia).

27. *Casey*, 112 S. Ct. at 2885 (Scalia, J., dissenting) (stating that like the *Dred Scott* Court, the *Casey* Court unrealistically thinks that it settled “an issue involving life and death, freedom and subjugation . . .” but that actually, the Court merely “prolongs and intensifies the anguish.”).

He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself “call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.”²⁸

III. MISREPRESENTING *DRED SCOTT*, A MASTERPIECE OF SCALIA-LIKE ORIGINALISM

As a claim about constitutional doctrine and methodology, Justice Scalia's analogy is not only badly misleading, but actually backfires on his polemical purpose. *Dred Scott* was most definitely not “the original precedent for . . . *Roe v. Wade*,”²⁹ as the originalist constitutional method employed in *Dred Scott* is wholly foreign to the dignitary and rights-based Fourteenth Amendment assumptions of *Roe*. Even more importantly, however, *Dred Scott*'s methodology closely resembles Justice Scalia's own interpretive method of originalism informed by majoritarian social tradition.³⁰

The essential holding in *Dred Scott* had nothing to do with substantive due process.³¹ It was a jurisdictional decision, turning on whether an African-American could be a federally recognized “citizen” of a state for the purpose of establishing diversity jurisdiction in federal court.³² *Dred Scott*, a slave in Missouri, brought suit in federal court against his owner, a New York citizen.³³ He asserted that he had been legally emancipated when a prior owner brought

28. *Id.*

29. *Casey*, 112 S. Ct. at 2883 (Scalia, J., dissenting) (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 271 (1985), for the proposition that *Dred Scott* was the original precedent for *Roe*). See *infra* notes 60, 62, 65, and accompanying text (discussing the basis for *Roe* in the right to privacy found through the Fourteenth Amendment).

30. For a discussion of the constitutional method employed in *Roe*, see *infra* notes 60, 62, 65, and accompanying text. For a discussion of Justice Scalia's constitutional method see *supra* notes 17-20 and accompanying text.

31. For a discussion of the validity of Justice Scalia's claim that the holding in *Dred Scott* was based on substantive due process see *infra* note 86 and accompanying text.

32. *Dred Scott v. Sandford*, 19 How. 393, 400 (1857).

33. *Id.*

him to Illinois, a free state, and then to portions of the Louisiana Territory, which was made free under the terms of the Missouri Compromise.³⁴ Justice Taney disposed of the suit by holding that there was no diversity jurisdiction because no African-American could be a "citizen" of a state within the meaning of the United States Constitution.³⁵

Justice Taney framed the dispositive question as whether

a negro, whose ancestors were imported into this country, and sold as slaves, [can] become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?³⁶

The Court answered in the negative, holding that the descendants of African slaves, whether free or not, are not endowed with the rights and privileges of citizenship because the Constitution does not include Africans, nor was it intended that they be included as citizens.³⁷ The Court continued:

On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.³⁸

In order to reach this conclusion regarding the Framers' original understanding, Justice Taney focused his lengthy analysis on the original meaning of the text of the Constitution, and the social and legal traditions of the nation and the states³⁹—that is, precisely

34. The Court considered two claims presented by Dred Scott: that he and his family were free as a result of their stay in the Missouri Territory and that he was free because of his stay in Illinois. *Id.* at 431-32.

35. *Id.* at 430. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 549 (1988) (relating that *Dred Scott* is "often recalled for its politically disastrous dictum and wholly gratuitous announcement by Chief Justice Taney that the Missouri Compromise was unconstitutional. The decision's greatest constitutional significance, however, lay in its holding that African-Americans could not bring suit in federal court or become United States citizens.").

36. *Id.* at 403.

37. *Dred Scott v. Sandford*, 19 How. 393, 403 (1857).

38. *Id.* at 404-05.

39. Justice Taney, like Justice Scalia, was clearly an originalist. Taney described the Supreme Court's interpretive project in *Dred Scott* in the following terms:

It is not the province of the [C]ourt to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the [C]ourt is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent or meaning.

those inquiries urged also by Justice Scalia.⁴⁰ Justice Taney relied heavily on two clauses in the Constitution that mention African-Americans, referring to them as a separate class of persons, as clear evidence that they were not considered citizens when the government was formed.⁴¹ The first provision reserved "to each of the thirteen States the right to import slaves until the year 1808 . . ."⁴² and "by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories."⁴³ The Court stated that

these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.⁴⁴

Beyond the fine print of the Constitution, Justice Taney placed detailed emphasis on provincial and state laws enslaving and oppressing the African-American population to

show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.⁴⁵

Thus, in the same way that Justice Scalia relies on state statutes criminalizing abortion to show that abortion was not a part of the "longstanding traditions" of American society,⁴⁶ the *Dred Scott*

Id. at 405. My colleague James Boyle has completed a wonderful analysis of Justice Taney's opinion in *Dred Scott* as an exemplary piece of "original understanding" jurisprudence. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 *YALE J.L. & HUMAN.* 263, 290-94 (1991). Boyle points out the paradoxical quality of Judge Robert Bork's spirited attack on *Dred Scott* in the course of proclaiming his own (new-found) faith in the doctrine of "original understanding." *Id.* at 292-94. It is increasingly clear that *Dred Scott* is the decision that conservative jurists love to hate but hate to explain.

40. *Dred Scott*, 19 How. at 403-30.

41. *Id.* at 411.

42. *Dred Scott v. Sandford*, 19 How. 393, 411 (1857) (citing U.S. CONST. art. I, § 9, cls. 1, 5 and § 10, cl. 2 (expired 1808)).

43. *Dred Scott*, 19 How. at 411 (citing U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII).

44. *Dred Scott*, 19 How. at 411.

45. *Id.* at 409.

46. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting).

Court used the history of slavery and anti-Black statutes to show that African-Americans were never thought of as citizens.⁴⁷ In the colonies, Justice Taney observed,

a negro of the African race was regarded . . . as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. . . . The legislation of the different colonies furnishes positive and indisputable proof of this fact.⁴⁸

The Court then cited a Maryland provincial statute punishing miscegenation by free blacks by returning them to slavery, and a Massachusetts colonial statute providing for a severe whipping of “any negro or mulatto” who “shall presume to smite or strike” any white person.⁴⁹ The Court also invoked the post-Revolutionary “statute books,” which were

full of provisions in relation to [African-Americans], in the same spirit with the Maryland law. . . . [The states] have continued to treat them as an inferior class. . . . [A]s relates to these States, it is too plain for argument, that [African-Americans] have never been regarded as a part of the people or citizens of the State[s] . . .⁵⁰

Justice Taney thus used none other than Justice Scalia’s constitutional method to arrive at the conclusion that the United States was a hereditary republic based on the exclusionary principle of white supremacy.⁵¹ Although Justice Scalia wants to identify *Dred Scott* with *Roe*, *Dred Scott* turns out to have been a model application of Scalia’s own constitutional jurisprudence. Of course, since the concept of “social tradition” is essentially indeterminate, and thus inescapably value-laden in application, it is surely possible to arrive at other conclusions in *Dred Scott* using Justice Scalia’s interpretive methodology. The text of the Constitution and social tradition could have been read differently if one squinted more in the direc-

47. *Dred Scott v. Sandford*, 19 How. 393, 408-20 (1857).

48. *Id.* at 408.

49. *Id.*

50. *Id.* at 412.

51. Of course, Justice Scalia may honestly disagree with Chief Justice Taney over the “substantive due process” question that was decided unnecessarily the *Dred Scott* Court. After finding that jurisdiction did not lie, Chief Justice Taney went on to declare the Missouri Compromise unconstitutional because Congress lacked the power to ban slavery in a federal territory acquired since the Constitution was written. The logic of this position was that, since constitutional rights applied against Congress even in the territories, and slaves were property under the Constitution, Congress could no more liberate slaves taken by their owners into federal territories than it could “quarter a soldier in a house in a Territory without the consent of the owner, in time of peace,” or “take private property for public use without just compensation.” *Id.* at 450. The alternative position, of course, was that Congress, as local sovereign for the territory, had as much power to ban slavery there as a state government had to ban slavery within its own boundaries. *Id.* at 604-27 (Curtis, J., dissenting).

tion of liberty. The script of the Constitution nowhere foreclosed the possibility of African-American freedmen⁵² becoming citizens of their states and, as a matter of tradition, several states had actually given freedmen their civil and political rights.⁵³ Thus, the Court might have found, using Justice Scalia's methodology, that African-Americans *could* become citizens within the meaning of the Constitution. Indeed, this is roughly the position that Justice Curtis takes in his dissent.⁵⁴ But one could only arrive at this destination if one

52. It should be noted that the term "freedmen" is an accurate reflection of conditions of the time because women, both African-American and white, were generally without civil and political rights. For example, women were denied the right to vote until the adoption of the Nineteenth Amendment August 18, 1920. U.S. CONST. amend. XIX. Even then, African-American women (and men) were generally prevented from exercising this right. *Infra* note 85.

Women were also denied other rights on the basis of their gender. In the first gender discrimination case, *Bradwell v. Illinois*, 83 U.S. 130 (1873), the Supreme Court upheld an Illinois law that prohibited women from practicing law. It was not until the Supreme Court ruled in *Reed v. Reed*, 404 U.S. 71 (1971), that sex discrimination was deemed a violation of equal protection. See generally WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 1286-1308 (6th ed. 1986) (tracing the development of gender discrimination as a violation of equal protection from its inception to recent times).

Furthermore, African-American women have been particularly vulnerable, throughout our country's history, to the denial of political and civil rights because of the double discrimination that they face. For general discussions on this topic, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 2 DUKE L.J. 365 (1991) (discussing the difficulty the law has, in its current form, dealing with African-American women and the duality of the discrimination they face); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (revealing the perspective of poor Black women with regard to the prosecution of pregnant drug addicted women and factoring the several forms of oppression that these women face into the analysis); Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experience*, 98 YALE L.J. 1475 (1989) (examining the history of African-American women's work experiences from slavery to the present); Kristin Bumiller, *Symposium: Excluded Voices: Realities in Law and Law Reform: Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75 (1987) (analyzing the racist and sexist elements of rape and rape laws).

53. Five of the thirteen original states granted free native born inhabitants citizenship at the time of the ratification of the Articles of Confederation. They were New Hampshire, Massachusetts, New York, New Jersey, and North Carolina. *Dred Scott v. Sandford*, 19 How. 393, 573 (1857) (Curtis, J., dissenting).

54. To support his argument that African-Americans could be considered citizens, Justice Curtis quotes "the fourth of the fundamental articles of the Confederation . . . 'The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States. . . .'" and points out that since some states granted citizenship to free persons of color, the effect of the fourth article of the Confederation was to "confer on such persons the privileges and immunities of general citizenship" *Id.* at 575 (Curtis, J., dissenting).

Justice Curtis concludes this was "not only known to those who framed and adopted those articles, but the evidence is decisive, that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected." *Id.* at 575 (Curtis, J., dissenting). To support this conclusion, Justice Curtis describes a failed attempt to amend article four to include the word "white" before the word "inhabitants" which took place in Congress on June 25, 1778. *Id.* at 575-76 (Curtis, J., dissenting). Furthermore, Justice Curtis maintains, there is nothing in the Constitution that, "*proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption; or who should be native-born citizens of any state after its adoption; nor any power enabling Congress to disfranchise persons born on the

were looking for relevant *dissenting* traditions of freedom and resistance to the dominant national structures of racism and slavery.

Justice Scalia cannot make this move and thereby escape the perfect logic of his alignment with Justice Taney. For Justice Scalia has argued that the Court must consult the "most specific" social tradition available to define liberty interests, and wherever specific social traditions prohibit a practice, then that practice cannot attain the status of a fundamental liberty.⁵⁵ Thus, in *Casey*, Justice Scalia found it conclusive that the Constitution mentioned no right to abortion and "the longstanding traditions of American society have permitted it to be legally proscribed."⁵⁶ Similarly, he asserted in *Michael H. v. Gerald D.* that natural fathers do not have any parental rights to children born into extant marital unions because the states had never recognized such rights.⁵⁷ He notes that the Court applied the same logic in its holding in *Bowers v. Hardwick*,⁵⁸ where it pointed out that the majority of states had, at one point or another, criminalized sodomy.⁵⁹ Thus, based on Justice Scalia's reasoning, the fact that the federal government and the overwhelming number of states refused to make African-Americans citizens would have to dispose of the assertion that they had a constitutional *right* to be defined as citizens by the states. At any rate, the fact that justices equally committed to originalism had to choose between competing social traditions in *Dred Scott* demonstrates the essential indeterminacy of the originalist method.

Beyond the extraordinary congruence between the Taney and Scalia approaches to constitutional liberty, it is obvious that the holding in *Dred Scott* has little in common with the logic of *Roe*. Where *Dred Scott* decided that African-Americans had no constitutional right to be treated like citizens, *Roe* decided that women have a constitutional right of privacy. "This right of privacy," Justice Blackmun wrote,

soil of any state, and entitled to citizenship of such State by its Constitution and laws." *Id.* at 576 (Curtis, J., dissenting).

55. See *supra* notes 17-20 and accompanying text (discussing Justice Scalia's view of the use of tradition in defining rights).

56. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting).

57. *Michael H. v. Gerald D.*, 491 U.S. 110, 126-27 (1989) (Scalia, J., dissenting).

58. 478 U.S. 186 (1986).

59. *Michael H.*, at 127 n.6 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). Justice Scalia is responding to Justice Brennan's contention that his reliance on the most specific historical tradition in *Michael H.* is "novel." Justice Scalia cites the Court's holding in *Bowers* in which the Court, in its decision that there is no right to engage in homosexual sodomy, relied upon the fact that 32 of the 37 states had criminal sodomy laws at the time the Fourteenth Amendment was ratified; all 50 states had such laws up until 1961; and 24 states and the District of Columbia had such laws when the case was being decided. *Id.*

whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.⁶⁰

From the standpoint of legal doctrine, *Dred Scott* and *Roe* could not be more dissimilar: what separates them is the Fourteenth Amendment, and its revolutionary impact on individual liberty in the federal system.⁶¹ Whatever its flaws, *Roe* began with the federal liberty interests of each individual, interests that were rooted, the Court argued, in the Fourteenth Amendment.⁶² This amendment had effectively overturned the bitter legacy of *Dred Scott*, which began with the principle of perpetual white supremacy and found that African-Americans could never be citizens within the meaning of the Constitution.⁶³ Under *Dred Scott*, African-Americans could never challenge final state court decisions enforcing enslavement or violations of

60. *Roe v. Wade*, 410 U.S. 113, 153 (1973). *Roe* balanced this fundamental right of privacy in reproductive decision-making against the state's "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life . . ." to develop the trimester approach. *Id.* at 154.

61. See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985) (discussing the judicial enforcement of the Reconstruction Amendments and citizens' rights). According to Kaczorowski,

[t]he adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and the various civil rights statutes was predicted [sic] on the primacy of national authority over the rights of citizens. These amendments and statutes gave federal officers and federal courts criminal jurisdiction over civil rights cases. This jurisdiction, previously held under state authority by state officers, was a novel one for the federal judiciary. Federal jurisdiction over criminal violations of citizens' civil rights required judicial acceptance of legal theories that affirmed the primacy of national authority to enforce and protect fundamental rights. Congress's civil rights legislation thus encompassed revolutionary constitutional and legal theories and revolutionary changes in federal functions.

Id. at xi; see also GERALD GUNTHER, *CONSTITUTIONAL LAW* 408 (11th ed. 1985) ("With the hindsight of more than a century, it is clear that th[e] [13th, 14th, and 15th] Amendments, and particularly the 14th, have spawned national protection of a wide range of individual rights, procedural and substantive.").

62. See *Roe*, 410 U.S. at 152-53, 168-70 (holding that the concept of liberty, under the Due Process Clause of the Fourteenth Amendment, embraces a woman's right to have an abortion).

63. In *Dred Scott*, the Court's refusal to extend citizenship to African-Americans was rooted in the principle of white supremacy. See *Dred Scott v. Sandford*, 19 How. 393, 404-07 (1857) ("We think they are . . . not included, and were not intended to be included, under the word 'citizens' in the Constitution. . . . On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority. . . .").

The Fourteenth Amendment overturned *Dred Scott* because it declared that any person born in the United States was a citizen of the United States and of the state in which the citizen lived; that no state could "deprive any person of life, liberty or property, without due process of law . . ." and that every person within its jurisdiction was entitled to "the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

their civil rights.⁶⁴ In contrast, *Roe* found that women had a privacy right protecting them from state criminal prosecution and imprisonment for having abortions.⁶⁵ *Dred Scott* thus upheld the broad powers of slavery and condemned the African-American population to its fate within the state legal and criminal justice systems;⁶⁶ *Roe* upheld broad rights of individual liberty and rescued women from the exercise of tyrannical power by state criminal justice systems.⁶⁷ *Dred Scott* made the Fourteenth Amendment necessary; the Fourteenth Amendment made *Roe* possible.

IV. THE SPIRIT OF FREEDOM, THE MISSING INGREDIENT IN JUSTICE SCALIA'S CONSTITUTION

Because it suppresses the historical and legal meaning of the Fourteenth Amendment, Justice Scalia's analogy between *Dred Scott* and *Roe* constitutes an affront to the principle of freedom as the guiding spirit of the modern Constitution.⁶⁸ Freedom was not a

64. See *Dred Scott*, 19 How. 393 *passim* (holding that African-Americans were not entitled to the rights and privileges extended to the citizens of this country). See *supra* text accompanying notes 32-38.

65. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that the Fourteenth Amendment furnishes women with a right to privacy that restricts state involvement in the decision to terminate a pregnancy).

This right, however, is not absolute, and may be qualified. *Id.* at 153-54. The *Roe* Court held that after the first trimester, a state may regulate the abortion procedure in a manner that is reasonably related to the mother's health. Furthermore, after viability, a state is permitted to regulate or prohibit abortion, in the interest of the potential life of the fetus. *Id.* at 164-65. See *supra* notes 60, 62 and accompanying text.

66. See *Dred Scott*, 19 How. at 426 ("The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require.").

67. *Roe*, 410 U.S. at 153. The Court delineated the problems it foresaw with leaving the abortion decision to the states:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

Id. at 153.

68. Of course, it is unlikely that this is an accident. In footnote six in *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), Justice Scalia argued that the "liberty" protected by a substantive due process reading of the Fourteenth Amendment refers only to activities that have historically been free from state control and intervention. Robin West has discussed the ramifications of this position, pointing out that "Scalia's position, if accepted, would undermine . . . virtually every major substantive due process case of the last twenty years." See Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1375 (1991) (citing the following decisions as among those that would be damaged by Justice Scalia's analysis: *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (upholding the

possible result under either the majority's or the dissenters' interpretation of the Constitution in *Dred Scott*. The majority would not emancipate the slaves, because it read African-Americans completely out of the constitutional experiment, defining the document as a compact among white men and their progeny.⁶⁹

On the other hand, the dissenters, Justices McLean and Curtis, argued that African-Americans could conceivably become citizens⁷⁰ and that Congress was within its powers in banning slavery in the territories.⁷¹ Under the facts of the case, Justices McLean and Curtis would have held that Dred Scott had the right to sue for his freedom.⁷² The dissenters did *not* argue, however, that Dred Scott should automatically be set free, along with all slaves, because slavery itself was unconstitutional.⁷³ Thus, emancipation could not have been the social consequence of *Dred Scott* even had the dissenters prevailed. This is the profound reality that Justice Scalia ignores.

Justice Scalia's commentary in *Casey* reflects a kind of conservative glibness about *Dred Scott*. He repeatedly suggests that the Court in *Dred Scott* would have avoided all kinds of negative consequences for the nation if it had simply taken a different course and left the matter of slavery to the individual states.⁷⁴ Justice Scalia's objection is not that the *Dred Scott* court upheld slavery, but rather, that it went too far in doing so, imposing a "rigid national rule instead of allowing for regional differences."⁷⁵ In *Casey*, after his melancholy panegyric to Chief Justice Taney, the "lustre" of whose "great Chief

right to die); *Roe v. Wade*, 410 U.S. 113 (1973) (affirming the right to an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding the right of a married couple to use contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (affirming the right of unmarried persons to use contraception)); *supra* note 19.

69. See *Dred Scott v. Sandford*, 19 How. 393, 406 (1857) ("[E]very person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else.").

70. See *Dred Scott*, 19 How. at 531-33, 572-88 (McLean, J., and Curtis, J., dissenting) (arguing that some states considered free African-Americans born in-state, and their descendants, to be citizens of those states, thus making them citizens of the United States). See *supra* notes 53, 54, and accompanying text.

71. See *Dred Scott*, 19 How. at 546-47, 617-18, 633 (McLean, J., and Curtis, J., dissenting) (reporting numerous laws demonstrating Congress's ability to both allow and prohibit the practice of slavery in the various territories). See *supra* note 52, 54, 55, and accompanying text.

72. See *Dred Scott*, 19 How. at 588 (McLean, J., and Curtis, J., dissenting) (arguing that there were no facts in the case showing Dred Scott not to be a citizen and, as such, he was entitled to sue in federal court).

73. *Dred Scott*, 19 How. at 529-633 (McLean, J., and Curtis, J., dissenting).

74. Scalia maintains that the *Dred Scott* Court, and especially Chief Justice Taney, brought dishonor to themselves and intensified discord in the country by imposing a decision that was binding on the nation as a whole. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2876, 2883, 2885 (1992) (Scalia, J., dissenting).

75. *Id.* at 2885.

Justiceship came to be eclipsed by *Dred Scott*,"⁷⁶ Justice Scalia states that:

It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be 'speedily and finally settled' by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.⁷⁷

Justice Scalia's assessment implies that somehow a more prudent balance could have been struck between the slave states and the free states. In believing that the Court should have left the matter of slavery to the states, Justice Scalia's implicit position is that white political majorities within those states rightfully held the power to decide the freedom or enslavement of African-Americans.⁷⁸

Even had the dissenters prevailed, and had the issue been properly returned to "the political forum" (as if it were not already there!), the nation would have been saved little "anguish."⁷⁹ It was impossible to run away from the central moral issue: either slavery was going to be constitutionally authorized, and slaves a form of protected property under specific state laws, or slavery was going to be unconstitutional and forbidden everywhere. Unless the Supreme Court in *Dred Scott* was willing to find enslavement of human beings a violation of the Declaration of Independence or the Constitution—which certainly does not appear to be Justice Scalia's position—nothing the Court could have done would have prevented the Civil War. The struggle over the very existence of slavery was the ultimate and irreducible political cause of the conflict.⁸⁰ As Presi-

76. *Id.*

77. *Id.* (citation omitted).

78. See *Casey*, 112 S. Ct. at 2885 (arguing that the *Dred Scott* Court should have followed a democratic model of "allowing for regional differences . . ." which implies that if a majority in a state supported slavery, then the Court had the power to enforce it). See *supra* text accompanying note 75.

79. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2885 (1992). See *infra* note 80 and accompanying text.

80. See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 *YALE L.J.* 821, 850 ("*Dred Scott* might have heightened the nation's divisions over slavery, but the divisions were there in any event, and it is a gross exaggeration to contend that the decision 'caused' the Civil War."); DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 562 (1978) ("[S]ince there were many other causes of the hostility

dent Lincoln had contended, the Union could not long endure "half slave and half free."⁸¹

The Court in *Dred Scott* simply articulated the constitutional underpinnings of the political regime of white supremacy.⁸² This regime was only dismantled by the Civil War and the ensuing passage of the Thirteenth,⁸³ Fourteenth,⁸⁴ and the Fifteenth Amendments.⁸⁵ It took fundamental constitutional changes to dismantle the legal regime of white supremacy because that regime was rooted in the very structure of the pre-Civil War Constitution—and not, as Justice Scalia suggests, in a misguided view of "substantive due process."⁸⁶ To pretend as if the Civil War and the Reconstruction Amendments could have been avoided had the Court followed the dissenters in *Dred Scott*, is to both conceal the real causes of the Civil War and to minimize the sweeping radicalism of the Reconstruction Amend-

between North and South, it is difficult to imagine a dissipation of the gathering storm if only Justice Nelson had been allowed to speak for the Court, as originally planned, in his shorter and less controversial *Dred Scott* opinion."). Fehrenbacher also notes that "[m]ost historians would probably agree that the sectional conflict over slavery was already deep-seated and pervasive before 1857." *Id.* at 562.

81. Abraham Lincoln, Address at the Ill. Republican State Convention (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953).

82. *Dred Scott v. Sandford*, 19 How. 393, 404-07 (1857). See *supra* notes 63, 69, and accompanying text; see *infra* note 86 and accompanying text.

83. The Thirteenth Amendment, enacted in 1865, abolished involuntary servitude. U.S. CONST. amend. XIII.

84. The Fourteenth Amendment, enacted in 1868, established that all persons born in the United States "are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV.

85. The Fifteenth Amendment, enacted in 1870, theoretically extended the right to vote to African-Americans. U.S. CONST. amend. XV. This right did not translate into immediate practice, however, because many states instituted prerequisites to voting, such as literacy tests, ownership of property, and poll taxes, that were specifically designed to prevent the franchise of African-Americans. These prerequisites were often effective barriers to voting for former slaves. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS (1974); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, at 55-58 (1951); Armond Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973).

86. In *Casey*, Justice Scalia states that the *Dred Scott* decision "rested upon the concept of 'substantive due process' that the [*Casey*] Court praises and employs today." Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791, 2883 (1992) (Scalia, J., dissenting). This explanation of *Dred Scott*, however, is at best oversimplified and has been deeply questioned and criticized. See, e.g., HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 186-87 (1982) ("At most, this notion of substantive due process was one idea among many in [Justice] Taney's 55 pages."); FEHRENBACHER, *supra* note 80, at 378-84 ("Taney's contribution to the development of substantive due process was . . . meager and somewhat obscure. . . . Certainly the few lines that he devoted to the subject barely scratched its surface.").

The *Dred Scott* opinion was more firmly rooted, rather, in the regime of white supremacy existing under the Constitution of the time. See *Dred Scott*, 19 How. at 404-07 (describing the inferiority of African-Americans to whites); *supra* notes 63, 69, and accompanying text. In fact, Justice Taney devoted almost half of his lengthy majority opinion to the question of what place, if any, the "degraded class" held in the American regime. *Dred Scott*, 19 How. at 403-27.

ments.⁸⁷ These Amendments, and the Fourteenth Amendment in particular, occasioned revolutionary change in federalism and a sweeping enhancement of the rights of citizens against their own states.⁸⁸

It is in the post-Fourteenth Amendment context of selective incorporation⁸⁹ and the expansion of the realm of citizen liberty that *Roe* emerged. *Roe* represents a vision of society that takes the ideas of gender equality and justice seriously. *Roe* was destined to last because overturning it would return the question of women's freedom and equality to the states, allowing some states to conscript women into compulsory motherhood while others preserved women's freedom.⁹⁰ Such a regime could not long endure in a nation

87. Even had the dissenters prevailed, the decision would only have granted some African-Americans the right to citizenship; it would not have held the institution of slavery unconstitutional. See *supra* text accompanying notes 69-73. Thus, the Civil War and its ensuing Amendments would still have been necessary to accomplish the extraordinary act of emancipation. See DON E. FEHRENBACHER, *SLAVERY, LAW AND POLITICS* 299 (1981) (stating that the Reconstruction agenda "constituted a blueprint for a social revolution of remarkable proportions. . . ." considering the pervasiveness of racial prejudice at the time).

88. See *supra* note 61.

89. Selective incorporation refers to the extension of some of the provisions of the Bill of Rights to the states through the Fourteenth Amendment. LOCKHART ET AL., *supra* note 52, at 431-47. This doctrine led to the development of criteria for determining which rights would be applicable to the states. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) ("[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty . . ." and therefore can be applied to the states through the Fourteenth Amendment); *Adamson v. California*, 332 U.S. 46, 60 (1947) (Frankfurter, J., concurring) (stating that "the 'immutable principles of justice' as conceived by a civilized society . . ." must be violated if a federal right is to be extended to the states through the concept of due process and the Fourteenth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (applying the federally guaranteed right to a trial by jury to the states through the Fourteenth Amendment because this principle is "fundamental to the American scheme of justice . . .").

90. See *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2811 (1992) (discussing the importance of allowing an individual to make "certain kinds of important decisions" without unjustified government interference). In *Casey*, Justice O'Connor cites from *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977), where the Court includes decisions regarding procreation, marriage, family relationships, contraception, education, and child rearing as within the realm of protected decisions. O'Connor goes on to state that if these protections, including the right to have an abortion, were not in place, "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions." *Casey*, 112 S. Ct. at 2811 (citations omitted). See also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (describing the *Roe* Court's depiction of the problems women would face if the abortion decision were returned to the states).

Just before *Roe* was decided, the most common model for state abortion laws resembled that of the Model Penal Code. The Code allowed abortion only if continuing the pregnancy would impose a substantial risk of serious physical or mental harm to the mother; the pregnancy resulted from rape; or the pregnancy resulted from incest or other "felonious intercourse." Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 27 (1992); James A. Knight, Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177, 180-81 n.32. Furthermore, there are currently numerous states that would immediately reinstate strict abortion prohibitions were *Roe* overruled. See, e.g., *State v.*

with a popular passion for the universal apportionment of liberty.⁹¹

V. THE AMBIGUITIES OF TRADITION

What does Justice Scalia's perverse analogy reflect about his constitutional methodology in general? Because *Dred Scott* is both the most infamous decision in the history of the Supreme Court, and the logical outcome of an interpretive approach based on textualism-plus-social-tradition, it is a nightmare which haunts the pristine (although wholly illusory) clarity of Justice Scalia's originalism. It is inevitable that Justice Scalia will continually return to this dread decision, not to analyze it, but just to hang around and accuse others, like a criminal returning to the scene of the crime. Justice Scalia likens *Dred Scott* to *Roe* to suggest that *Roe*'s flaws reflect a *Dred Scott*-like imposition of subjective and arbitrary judicial value choices.⁹² *Dred Scott*, however, is actually a perfect demonstration of a Court following the framers' text and society's traditions, in a faint-hearted originalist way, without any reference to the spirit of justice or freedom.⁹³

It is likely that the spirit of justice and freedom was largely absent from the Constitution at that time, at least as it applied to African-Americans and women, and the Civil War and the Reconstruction Amendments were needed to supply that spirit.⁹⁴ Today, that spirit is the dynamic force within our Constitution; yet, Justice Scalia

Berquist, Nos. 2-91-0970-0989 (D. Ill. filed Jan. 28, 1993) ("[I]f [the abortion rights] decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this state to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."); *State v. Aguillard*, 567 So. 2d 674 (La. App. 1990) (stating a similar intention of the State of Louisiana to prohibit abortions if it becomes possible again).

91. Supreme Court decisions have reflected a preferred image of the Constitution as a system for "ordered liberty." See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the Fourth Amendment's exclusionary rule to all the states); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) (extending to the states the Fifth Amendment's prohibition of double jeopardy).

92. In *Casey*, Justice Scalia criticizes the majority's claim that it is relying on "reasoned judgment," arguing instead that the decision is only a result of "personal predilection." *Casey*, 112 S. Ct. at 2875-76. Scalia analogizes the erroneous nature of this analysis to the faulty approach taken by the *Dred Scott* Court, quoting from Justice Curtis's dissenting opinion: "When . . . the theoretical opinions of individuals are allowed to control [the Constitution's] meaning, we have no longer a Constitution; we are under the government of individual men [sic], who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.* at 1876 (citation omitted).

93. See *supra* note 14 and text accompanying notes 39-51.

94. Anticipation of an imminent spirit of freedom is evident in many statements made by Senators in debates held before the Amendments were enacted. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (quoting Republican Senator Henry Wilson of Massachusetts: "When th[e] Thirteenth A]mendment of the Constitution shall be consummated . . . Then the sacred rights of human nature . . . will be protected by the guardian spirit of that law which make sacred alike the proud homes and lowly cabins of freedom.").

wants to ignore and traduce it. His principal method of doing so has become the elevation and constitutionalization of pernicious social traditions which often predate, and always betray, the spirit of justice and liberty.⁹⁵ The appeal to tradition as the definitive locator of constitutional rights, however, is hopelessly indeterminate, theoretically incoherent, and, in Justice Scalia's hands, ultimately destructive for the progress of justice.

The facile rhetoric enshrining "tradition" masks unsolvable problems of theoretical and historical indeterminacy.⁹⁶ In the first place, it is hard to see why the social tradition of legal precedent is less important than other social traditions, such as statutes. For example, why does the post-*Roe* social tradition of universal protection of abortion rights matter less than the pre-*Roe* tradition of selective regulation and tolerance? Which traditions should the Court enforce? If a majority of the states permitted abortion, but a minority banned abortion, would this be reflective of a social tradition embracing or refuting the abortion right as a liberty interest? If a majority of the states banned abortion at the time the Fourteenth Amendment was written, but allowed it just before *Roe*, which tradition would govern? And why should we find the social tradition governing at the time the Fourteenth Amendment was enacted to be controlling if the local political majorities that passed anti-abortion statutes were made up exclusively of white men? What if the purpose of the Fourteenth Amendment was precisely to *change* existing social conditions and to continually judge them by external principles of freedom? And, if there is a social tradition of women obtaining abortions in the face of state-imposed restrictions, should the spirit of liberty honor the practice of government regulation or the practice of popular civil disobedience? Justice Scalia's "objective" method begs the question because the essence of adjudicating liberty is selecting *between* competing historical traditions.⁹⁷

95. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting) (arguing that the Court was erroneous in invalidating a religious prayer in a public school graduation, because of the "longstanding American tradition of nonsectarian prayer to God at public celebrations."); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (denying visitation rights to a natural father of a child whose mother was married to another man at the time of the child's birth, based on the fact that there had been no societal tradition recognizing paternity rights in this context). See also *id.* at 127 n.6 (agreeing with the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), denying any right to engage in consensual homosexual conduct because of the age-old tradition of state criminal sodomy laws).

96. See Tribe & Dorf, *supra* note 19, at 1089 ("[H]istory provides ambiguous guidance both because historical traditions can be indeterminate, and because even when we discover a clear historical tradition it is hardly obvious what the existence of that tradition tells us about the Constitution's meaning.")

97. See *id.* at 1087 ("The decision to look to tradition for guidance in defining fundamental rights . . . carries great risk.") The authors further noted that "[j]udges must *choose* be-

As a theoretical matter, it is hard to see why we should rely exclusively on social consensus from the past ("tradition") to define constitutional rights today. One would think that if majoritarian notions were to inform our present reading of the Constitution, the relevant notions would come from *contemporary* majorities.⁹⁸ American democracy was born out of an attack on hereditary government, both in the sense of royalty, and rule by past generations of future ones.⁹⁹ Why should political majorities in states that once banned abortion be more important than the fact that a majority of men and women today believe in abortion rights,¹⁰⁰ or indeed that the Supreme Court has upheld the right to abortion since 1973?¹⁰¹

It is curious that Justice Scalia denounces the "political pressure" applied on the Court by both sides of the abortion debate.¹⁰² "How upsetting it is," he writes, "that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law, but in determining some kind of social consensus."¹⁰³ Yet, Justice Scalia's

tween competing traditions those which will receive legal protection—and the choice of, say, heterosexuality over homosexuality (or homophobia over tolerance) requires value judgments." *Id.*

98. See Charles Mcc. Mathias, Jr., *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174 (1987) (discussing why constitutional analysis should take into account contemporary interpretations). Mathias argues that

arbitrarily fixing the meaning [of the Constitution] at the intent of the founders robs modern America of the power to consent. . . . A civil war, twenty-six amendments, and tremendous social, political, and technological changes have put flesh on the bones of the Constitution, thus altering our reading and relationship to it. Why should we ignore this history when we read the Constitution? Why should we who have been molded by that history not participate in the debate?

Id. at 176-77. But see Richard H. Fallon, Jr., *A Constructionist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1251 (1987) (arguing that while sticking too rigidly to original intent interpretations would ossify the Constitution and "deprive it of . . . contemporary moral vitality . . . morality itself is deeply controversial, and to release Constitutional interpretation from all obligation to historic understanding would invite the disintegration of much of what is best in our political tradition."); Mark V. Tushnet, *Constitutional Interpretation: Comment: A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 684 n.5 (1985) ("[T]he risk of majoritarian overreaching with respect to things that originalists value is quite substantial given the range of activities toward which legislatures might direct their attention.").

99. The rejection of hereditary government is particularly evident in many of Thomas Paine's essays. See, e.g., 1 THOMAS PAINE, *Common Sense*, in WRITINGS OF THOMAS PAINE 67, 99, 118 (Moncore D. Conway ed., 1967) (making such pronouncements as "so far as we approve of monarchy . . . in America the law is king . . . so in free countries . . . there ought to be no other. . . ." and "[w]e have it in our power to begin the world over again.").

100. See Thomas J. Billitteri et al., *Abortion Ruling Expected Today—Activists, Candidates Brace for Key Decision*, ATLANTA J. & CONST., June 29, 1992, at A1 (reporting a National Abortion Rights Action League (NARAL) survey finding that 68% of Americans generally support a woman's right to an abortion). The same percentages were attained in a survey conducted by John Willke, former president of the anti-abortion National Right to Life Committee. *Id.*

101. *Roe v. Wade*, 410 U.S. 113 (1973).

102. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2884 (1992).

103. *Id.*

own method of ascertaining "objective" law refers explicitly to a kind of "social consensus": the consensus of (some) people who lived in the past.¹⁰⁴ If Justice Scalia would not take a poll in the present to determine whether abortion rights should be considered a constitutionally protected liberty interest, why does he take a poll from the past? If he would not put constitutional rights to the people for an election today, why would he, in effect, conduct a referendum among the dead? His method has the paradoxical quality of being both indefensibly antidemocratic and indefensibly majoritarian: the rights of the living are defined not by themselves in a more democratic present, but by political majorities who inhabited an undemocratic past.

VI. CONCLUSION

It is likely that Justice Scalia will continue to have recourse to selective social traditions that permit the subjugation of personal freedom to state power, especially where the freedom transgressed is that of women and racial minorities. But freedom in a democratic society has its own history and its own social momentum. *Dred Scott* was overturned by abolitionism, the Civil War, and the Fourteenth Amendment.¹⁰⁵ The decision stands not for flawed legal reasoning—for its reasoning may not have been flawed at all given the constitutional assumptions it inherited—but, rather, for an oppressive social system that denied the possibility of freedom to millions of people. *Roe*, on the other hand, was saved by the women's movement and a mass upsurge of citizen activism.¹⁰⁶ It was also saved by certain conservative Justices who, unlike Justice Scalia, understood that overturning it would leave women's freedom and equality to

104. See notes 95, 96, 97, and accompanying text.

105. See *supra* notes 83-86 and accompanying text.

106. According to Women's history Professor Ruth Whitney, "out in the street you speak with numbers. You say: For every one of us here, there are a hundred back home." Diane Mason, *NOW Hopes Washington Protest March Will Inspire Activism*, ST. PETERSBURG TIMES, April 3, 1992, at A2 (discussing the potential impact of the April 5, 1992 *March for Women's Lives*). Citizen activism has been credited for many of the accomplishments of the suffrage movement, the Civil Rights movement, and the anti-Vietnam War movement. *Id.* See, e.g., Daniel Egler, *Pro-Choice Forces Gearing Up for Battle Over Roe v. Wade*, CHI. TRIB., March 13, 1989, at C2 (reporting the mobilization of pro-choice activists to pressure the Supreme Court to uphold *Roe* and a woman's right to abortion); *Group Predicts Roe v. Wade Will Stand*, UPI, July 5, 1989, available in LEXIS, Nexis Library, UPI File (quoting Mr. Gerald Celent, director of the Socio-Economic Research Institute of America, stating that an outpouring of reaction from the public [following *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989)] will keep the Supreme Court from ultimately overturning *Roe*); Nicholas Platt, *U.S. Feminist Movement Gains Momentum With Abortion Ruling*, Reuters, July 7, 1989, available in LEXIS, Nexis Library, Reuters File (discussing the upsurge in membership in, and volunteers at, the National Organization for Women following the Supreme Court's decision in *Webster* by women who feared that it was a signal that the Court would overrule *Roe*).

the mercy of the states, violating the universalizing spirit of the Fourteenth Amendment, while sending the country into turmoil, and destroying the Court's legitimacy.¹⁰⁷ These Justices understood that it is very difficult to make people go back in time, to unlearn freedom, to surrender rights they once had.¹⁰⁸ As history has taught us, the country could not long survive half-free, half-slave.¹⁰⁹ Far from reenacting the consequences of *Dred Scott*, as Justice Scalia claims, the Court in *Casey* saved the country from the same kind of civil division and misery that the *Dred Scott* Court helped to bring about.¹¹⁰

If the precondition for social progress is social memory, the reactionary political project requires the obliteration of memory: the conflation of contrary events in history, the blurring of political meanings, and the poisoning of a coherent vision of freedom's historical progress. Justice Scalia's casually proffered equation of *Dred Scott* and *Roe* is thus characteristic, not atypical, of the conservative project. Yet we can be grateful for the overall trajectory of democratic freedom: *Dred Scott* and slavery are gone with the wind, while *Roe* survives. *Roe* may be somewhat battered by events, but still it remains, its core essence protected, its spirit alive. It stands as an integral part of the new constitutional regime of liberty and equality inaugurated by the Fourteenth Amendment.

107. See *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791, 2809-12 (1992) (discussing the negative repercussions that would result if *Roe* were not upheld); *supra* notes 67, 90, and accompanying text. The Supreme Court asserted that in order to maintain legitimacy and constancy, it must impart its decisions "as grounded truly in principle . . ." and must stand by these principled decisions until "the understanding of the issue has . . . changed so fundamentally as to render the commitment obsolete." *Id.* at 2814-16.

108. As Thomas Paine argued in *The Rights of Man*, "there does not exist in the compass of language an arrangement of words to express so much as the means of effecting a counter-revolution. The means must be an obliteration of knowledge; and it has never yet been discovered how to make a man *unknow* his knowledge or *unthink* his thoughts." 2 THOMAS PAINE, *The Rights of Man*, in WRITINGS OF THOMAS PAINE 258, 360 (Moncore D. Conway ed., 1967).

109. See *supra* note 81 and accompanying text.

110. If *Casey* had overruled *Roe*, thus allowing states to prohibit or severely restrict abortions, the divisions and conflicts already existing nationally under the state regulations permissible today would be greatly exacerbated. See, e.g., Alissa Rubin, *The Abortion Wars Aren't Over; Beyond the Court, Battles Over Access and Restrictions Have Just Begun*, WASH. POST, Dec. 13, 1992, at C2 (discussing how abortion restrictions, and the scarcity of doctors who will perform them, are especially difficult for women who are poor or who live in rural areas, and force women to cross state lines to find access to abortions); *Arguments Before the Court*, 61 U.S.L.W. 3295 (1992) (discussing the issue of the constitutionality of *Abortion Rescue's* blockade tactics preventing women from accessing abortions). See *supra* note 7 (finding that certain abortion restrictions are, in fact, permitted).