Justice Scalia's Jurisprudence

M gim A Parks, California State University - San Bernardino

Available at: https://works.bepress.com/megim_parks/2/
Justice Scalia’s Jurisprudence

Justice Antonin Scalia’s jurisprudence has come under “extreme scrutiny” repeatedly, so I’ll add my own critique to the burgeoning mass. Scalia uses the “person-from-Pluto” approach coined by Friedman (54) to talk around the true issues in cases involving civil rights and affirmative action, frequently skirting issues of discrimination by making sure that the argument is skewed toward a separate issue of regulation and precedent rather than an issue of harm done to the specific group bringing the suit.

A particular case dealing with affirmative action, Alexander v. Sandoval, in which Scalia writes the opinion, should have been concerned primarily with the question of whether the Alabama Department of Public Safety had discriminated against the respondents, who sued Alabama on the grounds that the Department’s English-only testing policy barred non-English speakers from passing the tests, and therefore, barred them from obtaining driver’s licenses. Stepping over the real issue at hand, Scalia references other court cases in which the Supreme Court held decisions by lower courts, saying that unless discrimination was “intentional,” there was no case: the courts cannot create a private right where Congress has not mapped it out, and thus far, only “intentional discrimination” could be litigated. The term for unintentional was “disparate-impact.” Thus, instead of dealing with the discrimination issue—instead of dealing with the language of the laws that, in a language-y, subversive way, “disparately impact”
certain populations—Scalia makes it clear that the court was concerned with whether there exists a private right by individuals to sue to enforce the regulations of 602, a statute made to provide the forming of regulations to ban discrimination in governmental agencies receiving federal funds. In defending the Alabama Department of Public Safety, Scalia writes (too) succinctly in the opinion to assure that the case is not about the right or wrong of Alabama’s English-only policy for driver’s licenses and tests—

“We do not inquire here whether the DOJ regulation was authorized by § 602, or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin. The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation” (7).

Instead, he contends, the real case is in deciding whether individuals have rights to sue for *unintentional* discrimination. Basically, even though the right by individuals to sue for “intentional discrimination” is clear with respect to 601 of the Civil Rights Act, the right to sue for “unintentional,” “disparate-impact” discrimination remains in question.

Of course, to make sure that the argument is not construed in any way to be about race, Scalia references court cases such as Bakke and Guardians v. Civil Serv. of NYC, in which only intentional discrimination was covered under Title VI of the Civil Rights Act. This is dangerous wording: if a governmental agency testifies that the negative impact on a certain portion of the community is not “intended,” all rights by private citizens to sue for damages disappear. If a government can say its discriminatory laws are only *de facto*, rather than intentional, the government can get away with discrimination based upon race, creed, and national origin in the United States.
Alabama’s Department of Public Safety maintained that the law requiring driver’s tests be given in English was in the interest of public safety. But although there may be reasons for citizens to need English, such as reading street signs, most street signs are comprehensible to citizens who can’t read at all, so public safety arguably is not affected at all by citizens not being able to read English. In addition, when Scalia references the Bakke case, he specifically refers to the ruling to delineate that 601 “‘proscribes only those racial classifications that would violate the Equal Protection Clause’” (3). Thus, Scalia asserts that, not only does the requirement by Alabama constitute “disparate-impact” rather than “intentional”discrimination, the happenstance that people who speak Spanish might be of a certain racial identity or nationality is merely coincidental, and that, by the way, language fluency (or lack thereof) is not one of the classifications protected by the 14th Amendment.

Scalia parses his argument in such simple ways that it appears to contradict itself in even the glossiest of readings. He assures in one place that the court is not bound by language: “To reject a private cause of action to enforce the disparate-impact regulations, they say, we would ‘[have] to ignore the actual language of Guardians and Cannon.’…But in any event, this Court is bound by holdings, not language” (9). That is not true; holdings are language. However, despite the court’s supposed independence from language, Scalia insists that the court must “interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy” (Alexander v. Sandoval 10) [emphasis added], because “implicit in our discussion thus far has been a particular understanding of the genesis of private causes of
action….Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress” (9).

In another court case involving civil rights, Scalia rejects the rights of an African American man to sue because he was only acting on behalf of a company and was therefore was not discriminated against as a separate entity (even though it was clear that he had been discriminated against as a person, and had proven that the discrimination had led to financial loss and humiliation), even though the contractual agreement was breached several times and even, in part, caused McDonald, a shareholder and president of JWM, the investment company in question, to file for bankruptcy. Discrimination was not in question whatsoever, but Scalia stepped over the issue, making it instead about whether a person could sue for damages resulting from personal discrimination toward an agent of a company.