

Constitutional Interpretation the Old Fashioned Way

Justice Antonin Scalia delivered the following remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C., on March 14, 2005.

JUSTICE SCALIA: It's a pizzazzy topic: Constitutional Interpretation. It is however an important one. I was vividly reminded how important it was last week when the Court came out with a controversial decision in the *Roper* case. And I watched one television commentary on the case in which the host had one person defending the opinion on the ground that people should not be subjected to capital punishment for crimes they commit when they are younger than eighteen, and the other person attacked the opinion on the ground that a jury should be able to decide that a person, despite the fact he was under eighteen, given the crime, given the person involved, should be subjected to capital punishment. And it struck me how irrelevant it was, how much the point had been missed. The question wasn't whether the call was right or wrong. The important question was who should make the call. And that is essentially what I am addressing today.

I am one of a small number of judges, small number of anybody — judges, professors, lawyers — who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people. I'm not a "strict constructionist," despite the introduction. I don't like the term "strict construction." I do not think the Constitution, or any text should be interpreted either strictly or sloppily; it should be interpreted reasonably. Many of my interpretations do not deserve the description "strict." I do believe, however, that you give the text the meaning it had when it was adopted.

This is such a minority position in modern academia and in modern legal circles that on occasion I'm asked when I've given a talk like this a question from the back of the room — "Justice Scalia, when did you first become an originalist?" — as though it is some kind of weird affliction that seizes some people — "When did you first start eating human flesh?"

Although it is a minority view now, the reality is that, not very long ago, originalism was orthodoxy. Everybody, at least purported to be an originalist. If you go back and read the commentaries on the Constitution by Joseph Story, he didn't think the Constitution evolved or changed. He said it means and will always mean what it meant when it was adopted.

Or consider the opinions of John Marshall in the Federal Bank case, where he says, we must not, we must always remember it is a constitution we are expounding. And since it's a constitution, he says, you have to give its provisions expansive meaning so that they will accommodate events that you do not know of which will happen in the future.

Well, if it is a constitution that changes, you wouldn't have to give it an expansive meaning. You can give it whatever meaning you want and, when future necessity arises, you simply change the meaning. But anyway, that is no longer the orthodoxy.

Oh, one other example about how not just the judges and scholars believed in originalism, but even the American people. Consider the 19th Amendment, which is the amendment that gave women the vote. It was adopted by the American people in 1920. Why did we adopt a constitutional amendment for that purpose? The Equal Protection Clause existed in 1920; it was

adopted right after the Civil War. And you know that if the issue of the franchise for women came up today, we would not have to have a constitutional amendment. Someone would come to the Supreme Court and say, “Your Honors, in a democracy, what could be a greater denial of equal protection than denial of the franchise?” And the Court would say, “Yes! Even though it never meant it before, the Equal Protection Clause means that women have to have the vote.” But that’s not how the American people thought in 1920. In 1920, they looked at the Equal Protection Clause and said, “What does it mean?” Well, it clearly doesn’t mean that you can’t discriminate in the franchise — not only on the basis of sex, but on the basis of property ownership, on the basis of literacy. None of that is unconstitutional. And therefore, since it wasn’t unconstitutional, and we wanted it to be, we did things the good old fashioned way and adopted an amendment.

Now, in asserting that originalism used to be orthodoxy, I do not mean to imply that judges did not distort the Constitution now and then, of course they did. We had willful judges then, and we will have willful judges until the end of time. But the difference is that prior to the last 50 years or so, prior to the advent of the “Living Constitution,” judges did their distortions the good old fashioned way, the honest way — they lied about it. They said the Constitution means such and such, when it never meant such and such.

It’s a big difference that you now no longer have to lie about it, because we are in the era of the evolving Constitution. And the judge can simply say, “Oh yes, the Constitution didn’t used to mean that, but it does now.” We are in the age in which not only judges, not only lawyers, but even school children have come to learn the Constitution changes. I have grammar school students come into the Court now and then, and they recite very proudly what they have been taught: “The Constitution is a living document.” You know, it morphs.

Well, let me first tell you how we got to the “Living Constitution.” You don’t have to be a lawyer to understand it. The road is not that complicated. Initially, the Court began giving terms in the text of the Constitution a meaning they didn’t have when they were adopted. For example, the First Amendment, which forbids Congress to abridge the freedom of speech. What does the freedom of speech mean? Well, it clearly did not mean that Congress or government could not impose any restrictions upon speech. Libel laws, for example, were clearly constitutional. Nobody thought the First Amendment was *carte blanche* to libel someone. But in the famous case of *New York Times v. Sullivan*, the Supreme Court said, “But the First Amendment does prevent you from suing for libel if you are a public figure and if the libel was not malicious” — that is, the person, a member of the press or otherwise, thought that what the person said was true. Well, that had never been the law. I mean, it might be a good law. And some states could amend their libel law.

[TO THE CAMERAMEN COVERING THE SPEECH] Could we stop the cameras? I thought I announced a couple of shots at the beginning was fine, but click, click, click. Thank you.

It’s one thing for a state to amend it’s libel law and say, “We think that public figures shouldn’t be able to sue.” That’s fine. But the courts have said that the First Amendment, which never meant this before, now means that if you are a public figure, that you can’t sue for libel unless it’s intentional, malicious. So that’s one way to do it.

Another example is the Constitution guarantees the right to be represented by counsel. That never meant the state had to pay for your counsel. But you can reinterpret it to mean that.

That was step one. Step two, I mean, that will only get you so far. There is no text in the Constitution that you could reinterpret to create a right to abortion, for example. So you need something else. The something else is called the doctrine of “Substantive Due Process.” Only lawyers can walk around talking about substantive process, in as much as it’s a contradiction in terms. If you referred to substantive process or procedural substance at a cocktail party, people would look at you funny. But, lawyers talk this way all the time.

What substantive due process is is quite simple — the Constitution has a Due Process Clause, which says that no person shall be deprived of life, liberty or property without due process of law. Now, what does this guarantee? Does it guarantee life, liberty or property? No, indeed! All three can be taken away. You can be fined, you can be incarcerated, you can even be executed, but not without due process of law. It’s a procedural guarantee. But the Court said, and this goes way back, in the 1920s at least, in fact the first case to do it was Dred Scott. But it became more popular in the 1920s. The Court said there are some liberties that are so important, that no process will suffice to take them away. Hence, substantive due process.

Now, what liberties are they? The Court will tell you. Be patient. When the doctrine of substantive due process was initially announced, it was limited in this way, the Court said it embraces only those liberties that are fundamental to a democratic society and rooted in the traditions of the American people.

Then we come to step three. Step three: that limitation is eliminated. Within the last 20 years, we have found to be covered by due process the right to abortion, which was so little rooted in the traditions of the American people that it was criminal for 200 years; the right to homosexual sodomy, which was so little rooted in the traditions of the American people that it was criminal for 200 years. So it is literally true, and I don’t think this is an exaggeration, that the Court has essentially liberated itself from the text of the Constitution, from the text and even from the traditions of the American people. It is up to the Court to say what is covered by substantive due process.

What are the arguments usually made in favor of the Living Constitution? As the name of it suggests, it is a very attractive philosophy, and it’s hard to talk people out of it — the notion that the Constitution grows. The major argument is the Constitution is a living organism, it has to grow with the society that it governs or it will become brittle and snap.

This is the equivalent of, an anthropomorphism equivalent to what you hear from your stockbroker, when he tells you that the stock market is resting for an assault on the 11,000 level. The stock market panting at some base camp. The stock market is not a mountain climber and the Constitution is not a living organism for Pete’s sake; it’s a legal document, and like all legal documents, it says some things, and it doesn’t say other things. And if you think that the aficionados of the Living Constitution want to bring you flexibility, think again.

My Constitution is a very flexible Constitution. You think the death penalty is a good idea — persuade your fellow citizens and adopt it. You think it’s a bad idea — persuade them the other way and eliminate it. You want a right to abortion — create it the way most rights are created in

a democratic society, persuade your fellow citizens it's a good idea and enact it. You want the opposite — persuade them the other way. That's flexibility. But to read either result into the Constitution is not to produce flexibility, it is to produce what a constitution is designed to produce — rigidity. Abortion, for example, is offstage, it is off the democratic stage, it is no use debating it, it is unconstitutional. I mean prohibiting it is unconstitutional; I mean it's no use debating it anymore — now and forever, coast to coast, I guess until we amend the Constitution, which is a difficult thing. So, for whatever reason you might like the Living Constitution, don't like it because it provides flexibility.

That's not the name of the game. Some people also seem to like it because they think it's a good liberal thing — that somehow this is a conservative/liberal battle, and conservatives like the old fashioned originalist Constitution and liberals ought to like the Living Constitution. That's not true either. The dividing line between those who believe in the Living Constitution and those who don't is not the dividing line between conservatives and liberals.

Conservatives are willing to grow the Constitution to cover their favorite causes just as liberals are, and the best example of that is two cases we announced some years ago on the same day, the same morning. One case was *Romer v. Evans*, in which the people of Colorado had enacted an amendment to the state constitution by plebiscite, which said that neither the state nor any subdivision of the state would add to the protected statuses against which private individuals cannot discriminate. The usual ones are race, religion, age, sex, disability and so forth. Would not add sexual preference — somebody thought that was a terrible idea, and, since it was a terrible idea, it must be unconstitutional. Brought a lawsuit, it came to the Supreme Court. And the Supreme Court said, "Yes, it is unconstitutional." On the basis of — I don't know. The Sexual Preference Clause of the Bill of Rights, presumably. And the liberals loved it, and the conservatives gnashed their teeth.

The very next case we announced is a case called *BMW v. [Gore]*. Not the [Gore] you think; this is another [Gore]. Mr. [Gore] had bought a BMW, which is a car supposedly advertised at least as having a superb finish, baked seven times in ovens deep in the Alps, by dwarfs. And his BMW apparently had gotten scratched on the way over. They did not send it back to the Alps, they took a can of spray-paint and fixed it. And he found out about this and was furious, and he brought a lawsuit. He got his compensatory damages, a couple of hundred dollars — the difference between a car with a better paint job and a worse paint job — plus \$2 million against BMW for punitive damages for being a bad actor, which is absurd of course, so it must be unconstitutional. BMW appealed to my Court, and my Court said, "Yes, it's unconstitutional." In violation of, I assume, the Excessive Damages Clause of the Bill of Rights. And if excessive punitive damages are unconstitutional, why aren't excessive compensatory damages unconstitutional? So you have a federal question whenever you get a judgment in a civil case. Well, that one the conservatives liked, because conservatives don't like punitive damages, and the liberals gnashed their teeth.

I dissented in both cases because I say, "A pox on both their houses." It has nothing to do with what your policy preferences are; it has to do with what you think the Constitution is.

Some people are in favor of the Living Constitution because they think it always leads to greater freedom — there's just nothing to lose, the evolving Constitution will always provide greater and greater freedom, more and more rights. Why would you think that? It's a two-way street. And indeed, under the aegis of the Living Constitution, some freedoms have been taken away.

Recently, last term, we reversed a 15-year-old decision of the Court, which had held that the Confrontation Clause — which couldn't be clearer, it says, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witness against him." But a Living Constitution Court held that all that was necessary to comply with the Confrontation Clause was that the hearsay evidence which is introduced — hearsay evidence means you can't cross-examine the person who said it because he's not in the court — the hearsay evidence has to bear indicia of reliability. I'm happy to say that we reversed it last term with the votes of the two originalists on the Court. And the opinion said that the only indicium of reliability that the Confrontation Clause acknowledges is confrontation. You bring the witness in to testify and to be cross-examined. That's just one example, there are others, of eliminating liberties.

So, I think another example is the right to jury trial. In a series of cases, the Court had seemingly acknowledged that you didn't have to have trial by jury of the facts that increase your sentence. You can make the increased sentence a "sentencing factor" — you get 30 years for burglary, but if the burglary is committed with a gun, as a sentencing factor the judge can give you another 10 years. And the judge will decide whether you used a gun. And he will decide it, not beyond a reasonable doubt, but whether it's more likely than not. Well, we held recently, I'm happy to say, that this violates the right to a trial by jury. The Living Constitution would not have produced that result. The Living Constitution, like the legislatures that enacted these laws would have allowed sentencing factors to be determined by the judge because all the Living Constitution assures you is that what will happen is what the majority wants to happen. And that's not the purpose of constitutional guarantees.

Well, I've talked about some of the false virtues of the Living Constitution, let me tell you what I consider its principle vices are. Surely the greatest — you should always begin with principle — its greatest vice is its illegitimacy. The only reason federal courts sit in judgment of the constitutionality of federal legislation is not because they are explicitly authorized to do so in the Constitution. Some modern constitutions give the constitutional court explicit authority to review German legislation or French legislation for its constitutionality, our Constitution doesn't say anything like that. But John Marshall says in *Marbury v. Madison*: Look, this is lawyers' work. What you have here is an apparent conflict between the Constitution and the statute. And, all the time, lawyers and judges have to reconcile these conflicts — they try to read the two to comport with each other. If they can't, it's judges' work to decide which ones prevail. When there are two statutes, the more recent one prevails. It implicitly repeals the older one. But when the Constitution is at issue, the Constitution prevails because it is a "superstatute." I mean, that's what Marshall says: It's judges' work.

If you believe, however, that the Constitution is not a legal text, like the texts involved when judges reconcile or decide which of two statutes prevail; if you think the Constitution is some exhortation to give effect to the most fundamental values of the society as those values change from year to year; if you think that it is meant to reflect, as some of the Supreme Court cases say,

particularly those involving the Eighth Amendment, if you think it is simply meant to reflect the evolving standards of decency that mark the progress of a maturing society — if that is what you think it is, then why in the world would you have it interpreted by nine lawyers? What do I know about the evolving standards of decency of American society? I'm afraid to ask.

If that is what you think the Constitution is, then *Marbury v. Madison* is wrong. It shouldn't be up to the judges, it should be up to the legislature. We should have a system like the English — whatever the legislature thinks is constitutional is constitutional. They know the evolving standards of American society, I don't. So in principle, it's incompatible with the legal regime that America has established.

Secondly, and this is the killer argument — I mean, it's the best debaters argument — they say in politics you can't beat somebody with nobody, it's the same thing with principles of legal interpretation. If you don't believe in originalism, then you need some other principle of interpretation. Being a non-originalist is not enough. You see, I have my rules that confine me. I know what I'm looking for. When I find it — the original meaning of the Constitution — I am handcuffed. If I believe that the First Amendment meant when it was adopted that you are entitled to burn the American flag, I have to come out that way even though I don't like to come out that way. When I find that the original meaning of the jury trial guarantee is that any additional time you spend in prison which depends upon a fact must depend upon a fact found by a jury — once I find that's what the jury trial guarantee means, I am handcuffed. Though I'm a law-and-order type, I cannot do all the mean conservative things I would like to do to this society. You got me.

Now, if you're not going to control your judges that way, what other criterion are you going to place before them? What is the criterion that governs the Living Constitutional judge? What can you possibly use, besides original meaning? Think about that. Natural law? We all agree on that, don't we? The philosophy of John Rawls? That's easy. There really is nothing else. You either tell your judges, "Look, this is a law, like all laws, give it the meaning it had when it was adopted." Or, you tell your judges, "Govern us. You tell us whether people under 18, who committed their crimes when they were under 18, should be executed. You tell us whether there ought to be an unlimited right to abortion or a partial right to abortion. You make these decisions for us." I have put this question — you know I speak at law schools with some frequency just to make trouble — and I put this question to the faculty all the time, or incite the students to ask their Living Constitutional professors: "Okay professor, you are not an originalist, what is your criterion?" There is none other.

And finally, this is what I will conclude with although it is not on a happy note. The worst thing about the Living Constitution is that it will destroy the Constitution. You heard in the introduction that I was confirmed, close to 19 years ago now, by a vote of 98 to nothing. The two missing were Barry Goldwater and Jake Garnes, so make it 100. I was known at that time to be, in my political and social views, fairly conservative. But still, I was known to be a good lawyer, an honest man — somebody who could read a text and give it its fair meaning — had judicial impartiality and so forth. And so I was unanimously confirmed. Today, barely 20 years later, it is difficult to get someone confirmed to the Court of Appeals. What has happened? The American people have figured out what is going on. If we are selecting lawyers, if we are selecting people to read a text and give it the fair meaning it had when it was adopted, yes, the most important

thing to do is to get a good lawyer. If on the other hand, we're picking people to draw out of their own conscience and experience a new constitution with all sorts of new values to govern our society, then we should not look principally for good lawyers. We should look principally for people who agree with us, the majority, as to whether there ought to be this right, that right and the other right. We want to pick people that would write the new constitution that we would want.

And that is why you hear in the discourse on this subject, people talking about moderate, we want moderate judges. What is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean? There is no such thing as a moderate interpretation of the text. Would you ask a lawyer, "Draw me a moderate contract?" The only way the word has any meaning is if you are looking for someone to write a law, to write a constitution, rather than to interpret one. The moderate judge is the one who will devise the new constitution that most people would approve of. So, for example, we had a suicide case some terms ago, and the Court refused to hold that there is a constitutional right to assisted suicide. We said, "We're not yet ready to say that. Stay tuned, in a few years, the time may come, but we're not yet ready." And that was a moderate decision, because I think most people would not want — if we had gone, looked into that and created a national right to assisted suicide, that would have been an immoderate and extremist decision.

I think the very terminology suggests where we have arrived — at the point of selecting people to write a constitution, rather than people to give us the fair meaning of one that has been democratically adopted. And when that happens, when the Senate interrogates nominees to the Supreme Court, or to the lower courts — you know, "Judge so-and-so, do you think there is a right to this in the Constitution? You don't? Well, my constituents think there ought to be, and I'm not going to appoint to the court someone who is not going to find that" — when we are in that mode, you realize, we have rendered the Constitution useless, because the Constitution will mean what the majority wants it to mean. The senators are representing the majority, and they will be selecting justices who will devise a constitution that the majority wants. And that, of course, deprives the Constitution of its principle utility. The Bill of Rights is devised to protect you and me against, who do you think? The majority. My most important function on the Supreme Court is to tell the majority to take a walk. And the notion that the justices ought to be selected because of the positions that they will take, that are favored by the majority, is a recipe for destruction of what we have had for 200 years.

To come back to the beginning, this is new — 50 years old or so — the Living Constitution stuff. We have not yet seen what the end of the road is. I think we are beginning to see. And what it is should really be troublesome to Americans who care about a Constitution that can provide protections against majoritarian rule. Thank you.

Thanks to Jeffrey King of www.threebadfingers.com for transcribing Justice Scalia's speech from the CSPAN broadcast.