

## JUSTICE SCALIA'S CONSTITUTION—AND OURS

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Our topic today is the impact of Justice Scalia on the Supreme Court. There are many different perspectives from which one might address this issue. I intend to focus on Scalia's methodology, and to say a little bit about how that methodology gets applied in particular cases. This will lead into a slightly larger point about constitutional adjudication more generally, and Scalia's place in that enterprise. And it will lead to a point about the current perception of constitutional adjudication, which is perhaps most important, and Scalia's impact on that.

Justice Scalia's interpretive methodology can largely be captured by three themes: textualism, originalism, and democracy. Textualism suggests in statutory cases that we should focus on the words that are actually law, rather than legislative history such as committee reports, and in constitutional cases that we should heed the words of the Constitution rather than considerations not found in the document itself. Originalism suggests that in seeking to understand the words of the Constitution we should ask how they were understood at the time they were written, not what modern readers might think. And his commitment to democracy means that he believes most substantive value choices—those not addressed directly by the text of the Constitution—are to be left up to the political process. The role of the Court, Scalia said in his dissenting opinion in *Lawrence v. Texas*, is not to take sides in the culture wars but to assure, as a "neutral observer, that the democratic rules of engagement are observed."

Of these three themes, the commitment to democracy is perhaps the most important. Both textualism and originalism can be seen as means to support democracy, because they constrain judges and thereby prevent them from imposing their own values on the people. Judges simply ensure that the choices the people make are made through a functional democratic process.

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I am going to say some things that may sound like criticisms of Scalia, but I have very little in the way of criticism of this model of adjudication. Textualism makes good sense. What, after all, is the point of a written constitution if judges are free to ignore its words? And originalism makes sense as well—if we follow the current understanding of particular words rather than the Framers’ understanding, linguistic changes could lead us to different constitutional results more or less randomly. The word “refute,” for instance, is now increasingly used to mean “rebut” rather than to demonstrate falsity, that is, to rebut successfully. A constitutional provision that requires refutation should not come to require only rebuttal simply because modern speakers are careless of the difference.

Unsophisticated originalism, which you will frequently encounter, does have some problems. Originalists tend to focus almost exclusively on the framing of the original constitution. This is a serious mistake because it gives inadequate weight to the remarkable transformation of our constitution wrought by the Reconstruction Amendments. So our constitutional law and theory should pay much more attention to John Bingham than it does, and perhaps less to James Madison and Thomas Jefferson.

Second, many originalists seem to ignore the possibility that the Constitution was originally understood to contain some provisions that took their meaning from social context. A provision directing senators to dress in “the latest fashions” would certainly not now be understood to call for wigs or knee breeches, nor should it be. The same might be true of other constitutional provisions, of which “cruel and unusual punishment” is perhaps the most obvious, but not the only, example. Allowing the content of some constitutional norms to evolve may be quite consistent with the original understanding. So originalists make mistakes and overstate their claims, but originalism in general is something I have no quarrel with.

Last, the desire to promote democracy is perhaps the most appealing aspect of Scalia’s vision. The Constitution is indeed not a device by which losers in the democratic process can seek judicial overrides. It is a framework for enduring and democratic self-governance, and judges should never lose sight of that fact.

Having said that I agree, at least in broad terms, with Scalia's interpretive methodology, do I agree with the results he reaches? The answer is no, and that leads to the first significant point I want to make. The methodology I have described does not consistently produce politically conservative results. Or at least, it need not. The question, then, is why it does in Scalia's hands, and that's an issue I'll get to later. But what I want to do now is to demonstrate that textualism, originalism, and democracy can in fact lead judges to liberal or progressive outcomes.

Let's start with abortion. Abortion is perhaps the easiest issue for Scalia. The word abortion is certainly nowhere in the constitution; nor is privacy, on which *Roe v. Wade* relied. And the fact that many states had abortion restrictive laws on the books at the time the 14<sup>th</sup> Amendment was ratified suggests that the original understanding of that Amendment did not include an abortion right.

So far, so good. But what about democracy? How do the abortion restrictions on the books at the time of the 14<sup>th</sup> Amendment, or even *Roe v. Wade*, look from the democratic perspective? Not necessarily so good. Women were certainly underrepresented in the legislatures that enacted those laws. Indeed, many of the laws affected by *Roe v. Wade* were enacted before women were even allowed to vote. So it's far from clear that they're the outcome of a well-functioning democratic process.

But how far does that critique get us? Does it justify continued judicial intervention? If you look at the representation of women in state legislatures, the answer may be yes; if you think the right to vote is enough, then you might think no. But important though democracy is, it's not the whole story of American constitutionalism. Majority rule is an important value, but so too is equality. Politically powerful groups may oppress the less powerful, and in fact the Constitution contains equality rules designed to prevent that—the Equal Protection Clause, and also the Due Process Clause. The constitutional mandate of equality, Justice Scalia has said, is our “salvation” from oppressive laws, for it “requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”

What does equality mean in the context of abortion? A law that restricts abortion, Justice Scalia has said, restricts an important liberty. It is permissible, he believes, because it reflects a

legislative judgment that life is more important than liberty. That is the kind of value choice that should be left up to the democratic process.

And that's a fairly plausible thing to say. Many value choices should be left up to the political process, and judges' role in such cases, as Justice Scalia would agree, is simply to make sure that these choices are made in an even-handed fashion. It's okay for a State to decide that life is more important than liberty. What it can't do is decide that life is more important than women's liberty alone—that women can be singled out to bear a burden others need not.

The equality-focused analysis of abortion is complicated by the fact that only women get pregnant. If men could get pregnant, I don't think abortion restrictions would be constitutionally troubling. And I think it's also almost certain that they wouldn't exist. But in the world we have, what should a judge concerned about equality do? Well, one thing to do is to ask whether the State does ask other people to sacrifice their liberty to promote life. Does it impose a duty to rescue? Does it require blood donation? Does it require people to make their organs available to others upon their death? If the answer is no, as it is in every state in the union, then one might indeed conclude that the abortion restriction exists only because the legislature gives less respect to women's liberty, which the constitution prohibits.

My second example merits only a little discussion. In the so-called new federalism cases, Justice Scalia has repeatedly joined majorities, or even written opinions, that have no basis in the text of the constitution. Can the federal government require state officials to implement federal legislation? Nothing in the Constitution says no. Can the federal government authorize individuals to sue states for money damages? Here there does seem to be a relevant piece of constitutional text, the 11<sup>th</sup> Amendment, which says that the judicial power of the United States shall not be construed to extend to suits against states by citizens of other states. This might mean that federal law can't provide for suits in federal court, though most scholars agree that this was not the original understanding. But it plainly says nothing about suits in state court. Yet in *Alden v. Maine*, Justice Scalia joined the familiar 5-4 majority to hold that such suits were barred by state sovereign immunity, despite the obvious lack of a textual

or historical basis for that ruling. Textualism and originalism would lead to the opposite result here; so too would a plausible understanding of democracy, for the will of the National people would be expected to prevail over the will of a State. And indeed, there's further textual support for that expectation—the Supremacy Clause, which provides that federal law shall prevail over state laws and state constitutions.

My last example, and the most important one, concerns equal protection. And here I want to juxtapose two of Justice Scalia's positions, one on affirmative action and one on gay rights. With respect to affirmative action, Scalia believes the matter is clear. Racial classifications are never permitted, regardless of their purpose. As he wrote in *Croson*, "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign'."

What about laws that classify on the basis of sexual orientation? Here Scalia believes that the matter is equally clear: the Constitution has nothing to say. A Court that strikes down a Colorado constitutional amendment that stops cities from forbidding discrimination based on sexual orientation has "mistaken a Kulturkampf for a fit of spite." A Court that strikes down a Texas law criminalizing same-sex sodomy has "taken sides in the culture war"—thankfully, we don't get the German this time.

Now, how, as textualists, originalists, and democrats, do we reconcile these two positions? It would be easy if the Equal Protection Clause said "no state shall make any distinction based on race, but distinctions based on sexual orientation are okay." But of course it doesn't. It simply guarantees the equal protection of the laws. A textualist doesn't know what to do with that. If you take it seriously, it might seem to suggest that all differential treatment is prohibited, but all laws can be described as making distinctions, so that's not a workable interpretation. If you want to look at history, history shows that immediately after the ratification of the 14<sup>th</sup> Amendment, the very same Congress that drafted it repeatedly enacted race-conscious remedial legislation. From the originalist perspective, affirmative action looks okay. Sexual orientation discrimination is less clear. The text simply doesn't take us all the way here; we need some kind of theory of what the Equal Protection clause is about.

Does our third desideratum, respect for democracy, offer any additional resolving power? Yes, it does. As it was initially understood, the Equal Protection Clause was designed to protect against invidious discrimination—discrimination intended to stigmatize or harm a particular class. Post-New Deal Equal Protection jurisprudence carried that understanding forward and supplemented it with an analysis focused on the political process. The kinds of laws that the Equal Protection clause invalidates, under this analysis, are those that burden minorities historically the targets of prejudice. And if that's your approach, it's pretty clear that affirmative action is not constitutionally suspect, but a law that criminalizes the sexual conduct of gays and lesbians is.

Scalia disagrees, and in fact his five-justice majority has been responsible for changing Equal Protection jurisprudence from a doctrine that protects minorities into one that prohibits certain kinds of classifications, regardless of who's benefited and who's burdened. That's a possible approach to Equal Protection. I don't think it's the most sensible, in terms of text, history, and democracy—I don't think that the white majority needs constitutional protection from affirmative action—but it's possible.

And this leads to my larger point, which is about the nature of constitutional adjudication. There's more than one possible approach to Equal Protection. How does a Justice choose? History and respect for democracy, I think, favor the approach that seeks to protect the politically weak, but they don't compel it. In the end, this comes down to something like a value choice. There are value choices in constitutional adjudication. Equal Protection is far from the only example—judges are frequently called upon to decide whether a governmental action is reasonable or legitimate, and there is no way to apply those standards except by making a value-laden judgment.

Thus, different approaches to constitutional adjudication will promote different values. Let me return to the equal protection example for just a moment to make this point. In the *Romer* case, with which you're probably familiar, the Court struck down a Colorado constitutional amendment that had barred cities and towns from including sexual orientation as a protected trait in their antidiscrimination ordinances. Justice Scalia, of course, dissented. In that case, the majority said, what Colorado had done was to systematically disadvantage gays and lesbians in their effort to

seek legislative protection. All other groups could use the legislative process to their advantage; gays and lesbians could not. This is unheard-of, the court said. It is a denial of equal protection in its most literal sense, and it is inexplicable as anything but animus.

Well, some of that might be true, but not the unheard-of part. Because the current approach to equal protection does exactly that. Think again about affirmative action. Under Justice Scalia's approach, the Equal Protection clause doesn't protect minorities. Instead, it prevents the government from using racial classifications. So what does this mean for university admissions, or for the distribution of governmental benefits more generally? It means that almost any group can get preferential treatment. Alumni children, athletes, flute players, people from different geographical regions. All of these people can be favored. Who can't? Racial minorities. Current Equal Protection jurisprudence prevents racial minorities, and basically no one else, from getting benefits through the ordinary political process. So there's a pretty big difference between in the values these different approaches to equal protection promote.

So what's the larger point? It's that Scalia is wrong to say that the Constitution doesn't take sides. It does, inevitably. On the older version of Equal Protection, the constitution took the side of the politically weak and protected them from majoritarian oppression. On Scalia's understanding, it takes the side of the majority and protects them from being asked to make any sacrifice in the name of racial equality. Neither of these readings is compelled by the canons of constitutional construction. Each embodies a value choice.

So Scalia is making value choices. I'm not here to say that that is illegitimate; indeed, my argument is that it's inevitable. And I'm not here to say that his values are wrong, either. They aren't my values. I hope, and I believe, that they aren't America's values. But in a democracy, putting *Bush v. Gore* aside, that's a question for the American people. What I do criticize Scalia for is not acknowledging that he's making value choices. This failure is connected to, and is in part no doubt a cause of, the most troubling aspect of contemporary discourse about constitutional adjudication.

This is the final point I want to make. Justice Scalia's refusal to admit that he is making these choices and his attacks on others for making them, contribute to a widespread misperception, among liberals as well as conservatives, that conservative judges adhere strictly to the Constitution and apply it in the manner in which it was originally understood, while liberals attempt to import modern notions of justice.

This dichotomy is a false one. And most of the terms used in making such characterizations are nonsensical. "Strict construction," a phrase we sometimes hear in this context, is a meaningless slogan. As Justice Scalia himself has said, a judge should get no credit for construing a statute or constitutional provision either strictly or loosely. What we want, presumably, are judges who construe these things correctly. And since some constitutional provisions empower government, while some restrict it, strict construction does not even have a consistent political valence. All it has is a specious aura of legitimacy.

The same is true for a more commonly used phrase: "judicial activism." Judicial activism, popularly understood, consists of the substitution of a judge's own values for those embodied in the constitution. Again, however, the term has almost no real content. There is no judge out there, I can assure you, who understands his or her own behavior in this way. What there are are judges who are making the value choices inherent in at least some constitutional adjudication, more or less honestly, more or less openly, and with more or less acknowledgement that judging requires judgment. To call these judges activist is simply a more rhetorically charged method of registering disagreement with their values. And again, as I hope my discussion of affirmative action suggests, it can be done as well to the right as to the left. If judicial activism means anything, it might mean that judges strike down laws they should not and thereby thwart the will of a majoritarian branch of government. But this understanding is not particularly useful—a judge that lets an unconstitutional law stand has broken faith with the constitution as much as one that strikes down a constitutional law. And it does not distinguish right from left, for the Rehnquist Court has struck down laws as aggressively as any Court ever has. The Violence Against Women Act, the New Jersey antidiscrimination law applied to the Boy Scouts' policy of excluding gays, the Americans with Disabilities and Age

Discrimination in Employment Acts as applied to the states. This is not a restrained Court.

There simply is not a difference in kind between liberal and conservative constitutional adjudication. What there is, is a difference in values. What values the Justices of the Supreme Court should hold is not a question for me as a constitutional law professor. It is a question for all of us as voters. We are called upon periodically to make choices that will affect the composition of the Court—notably, every four years in presidential elections. In the long run, the Court will reflect the values of America, whatever those values are. Which is to say that in the end, we'll get the constitution we deserve.