

Scalia's originalism

1 The Living Constitution

When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in light of our whole experience and not merely of what was said a hundred years ago.¹

2 Consistency

2.1 *Printz v. United States*

At issue in the *Printz* case was the Brady Act's requirement that state law enforcement officers perform background checks on handgun purchasers. The constitutional question was whether the federal government had the power to compel state officers to administer or enforce federal regulatory programs. By a vote of five to four the Court decided against the federal government.

Scalia began his opinion for the Court by conceding that "there is no constitutional text speaking to this precise question." He then reviewed the fragmentary and equivocal evidence of the original intent of the Framers, which provided little guidance. The essence of Scalia's constitutional judgment, therefore, rested on what Scalia himself called "the structure of the Constitution," i.e., on whether he could "discern among its 'essential postulate[s]...a principle that controls the present cases.'" Scalia

¹Oliver Wendell Holmes, *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

located such a principle in the ideal of federalism, which addresses the "separation of the two spheres" of federal and state power, and which Scalia interpreted as "one of the Constitution's structural protections of liberty."²

2.2 *Richmond v. Croson*

At some point every judge will say that one purpose of the Constitution is to consolidate the "whole experience" of the nation, which we may call the national ethos. Scalia has himself so interpreted the Constitution. His passionate opinions opposing race-based affirmative action, for example, make no serious effort to explore the original meaning or language of the Equal Protection Clause of the Fourteenth Amendment. They turn instead on an urgent appeal to the "American principle" that "men and women" should not be classified "on the basis of...the color of their skin." For Scalia this principle is fundamental to the very character of the nation and hence inescapable as a ground for interpreting the majestic but delphic generalities of the Fourteenth Amendment.³

²Robert Post, "Justice for Scalia" *The New York Review of Books* 45 (June 11, 1998).

³Post, "Justice for Scalia", quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, 527 (1989) (Scalia, J., concurring).