

Scalia's Originalism

1 Reactions to the idea of a living constitution¹

In my reading and travels I have sensed a second connotation of the phrase "living Constitution," however, one quite different from what I have described as the Holmes version, but which certainly has gained acceptance among some parts of the legal profession. Embodied in its most naked form, it recently came to my attention in some language from a brief that had been filed in a United States District Court on behalf of state prisoners asserting that the conditions of their confinement offended the United States Constitution. The brief urged:

We are asking a great deal of the Court because other branches of government have abdicated their responsibility Prisoners are like other 'discrete and insular' minorities for whom the Court must spread its protective umbrella because no other branch of government will do so. . . . This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated.

Here we have a living Constitution with a vengeance. Although the substitution of some other set of values for those which may be derived from the language and intent of the framers is not urged in so many words, that is surely the thrust of the message. Under this brief writer's version of the living Constitution, nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so. These same judges, responsible to no constituency whatever, are nonetheless acclaimed as "the voice and conscience of contemporary society."

2 The Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹ William H. Rehnquist. "The Notion of a Living Constitution." *Texas Law Review* 54 (1976): 694.

3 Stare decisis, a.k.a precedent

Probably the greatest contrast between [Justice Clarence] Thomas and his colleagues was that he fundamentally did not believe in stare decisis, the law of precedent. If a decision was wrong, Thomas thought it should be overturned, however long the case may have been on the books. As he wrote once, "When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning." At an appearance ... in 2005, Scalia was asked to compare his own judicial philosophy with that of Thomas. "I am an originalist," Scalia said, "but I am not a nut."²

4 Could judges stick to originalism?

4.1 *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 located such a principle in the ideal of federalism, which addresses the "separation of the two spheres"

² Jeffrey Toobin, *The Nine* (Doubleday, 2007), pp. 102-3.

of federal and state power, and which Scalia interpreted as “one of the Constitution’s structural protections of liberty.”³

4.2 *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.⁴

5 Would an originalist Constitution fit the times?

Dworkin ... is right to say that the Constitution should not be interpreted to fit with the concrete expectations of people long dead. In many areas, existing constitutional law goes well beyond the original understandings of the Framers and ratifiers, and thank goodness for that. The Constitution is now understood to forbid race and sex discrimination by the national government, even though none of its provisions was originally understood to forbid such discrimination. The Constitution is now taken to include broad protection of freedom of speech, going far beyond the original understandings. In many domains, originalism fails to fit our practices. And in most of those areas, originalism would make our constitutional system worse, not better.⁵

³ Robert Post, “Justice for Scalia” *The New York Review of Books* 45 (June 11, 1998).

⁴ Post, “Justice for Scalia”, quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520, 527 (1989) (Scalia, J., concurring).

⁵ Cass R. Sunstein “Virtues and Verdicts” *The New Republic* May 22, 2006, p. 36.

