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The Irreplaceable Justice Scalia

THE ISSUE IN BRIEF

- With his larger-than-life prose, Justice Scalia transformed the way all of us think about American Law. The late Justice provided a theoretical framework for ensuring that the Founders' vision of a limited government, and a limited judiciary, continues.
- First, Justice Scalia changed the way we think about interpreting the Constitution. He believed that the document should be interpreted according to its original meaning.
- He warned that an evolving constitution, on the other hand, allows judges to find things in the Constitution that are not there and do away with provisions that do exist. Neither of these is a palatable choice in a democracy.
- In stark contrast to living constitutionalism, the originalist method of interpretation confines the choices and preferences of unelected judges and thus is a powerful tool to combat judicial activism.
- Second, but no less important, Justice Scalia changed the way courts and lawyers approach work-a-day statutory interpretation.
- According to Justice Scalia, the words of a statute matter. The text enacted by Congress is what governs, not the legislative history or a judge's view of what the statute *should* say.
- Justice Scalia's return to the original meaning of the Constitution and to the enacted text of statutes are a win for separation of powers principles and limited government. Both originalism and textualism place boundaries on the sources a judge may consult in analyzing a legal question and limit the ability of a judge to impose his or her own policy preferences.

EXECUTIVE SUMMARY

In February 2016, nearly one-third of Americans had no idea who Justice Scalia was. An additional 12% had formed neither a favorable nor unfavorable opinion. This, for the legal giant who transformed the way judges go about constitutional and statutory interpretation. But the next President may well appoint *four* Supreme Court Justices, changing the balance of the Court for the next 30 years, and the public is beginning to notice. Indeed, according to polls, for many voters, the impact on the Supreme Court is second only to the economy in the 2016 Presidential Election. It is thus high-time to consider the legacy left by Justice Scalia.

With his larger-than-life prose, Justice Scalia transformed American Law by providing the theoretical framework for maintaining limited government. As Justice Elena Kagan remarked upon his death, "Nino Scalia will go down in history as one of the most transformational Supreme Court Justices of our nation. His views on interpreting texts have changed the way all of us think and talk about the law." This transformational change was two-fold.

First, Justice Scalia radically altered the way we think about our Constitution. He believed that the document should be interpreted according to its original meaning. Originalism, his trademark constitutional interpretation theory, asks not what the Constitution should say, but rather, as a historical matter, what did the text mean when it was enacted. In stark contrast to living constitutionalism, this method of interpretation confines the choices and preferences of unelected judges and thus is a powerful tool to combat judicial activism.

Second, but no less important, Justice Scalia changed the way judges and lawyers approach work-a-day statutory interpretation. Before Justice Scalia, it was common for Supreme Court decisions interpreting statutes to rely upon everything but the text. Statutory purpose, legislative history, workability, and policy considerations held the keys to statutory interpretation. The courts commonly asked how a statute was supposed to operate (in their view) instead of asking what it was that the law actually said.

With his colorful and persuasive opinions, Justice Scalia placed the focus of statutory interpretation back on the statutory text. The arguments made by lawyers and by courts today begin with the text. This return to enacted language protects the constitutional requirement that it is Congress, and not the judiciary, that is to make the law.

MORE INFORMATION

According to his Martin-Quinn score, statistics which measure the ideology of judges, Justice Scalia was a core member of the conservative block. In most cases and on most issues, conservatives could count on his vote. The truly transformational thing about Justice Scalia, though, was not his conservative positions, but the theoretical framework and methodological tools he provided the legal profession. These tools give effect to the Framers' vision of a limited judiciary—a judiciary that interprets the law, but does not make law. Justice Scalia's method of interpreting the Constitution, originalism, and statutes, textualism, narrow the sources that judges may consult and limit the ability of judges to impose their own policy preferences.

Originalism

Justice Scalia made Originalism—a particular way of interpreting the Constitution—mainstream. In his view, the Constitution's text was fixed at the time of its enactment. It was a static document. As he colorfully put it, "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted."

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For Justice Scalia, the question was not one of original intent *per se*, but instead original meaning. That is, when looking at a particular provision of the Constitution, Justice Scalia would ask what reasonable people at the time of enactment would have understood the text to mean.

Make no mistake. Others have a very different view of the Constitution. In 1985, for example, Justice William Brennan argued that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems."

That the originalist Constitution is a static one, does not mean it may not be applied to new phenomena, like the internet or cell phones. Thus, for example, in *Riley v. California*, a unanimous Supreme Court found the Fourth Amendment required law enforcement to obtain a warrant in order to search the contents of a cell phone. And in *Elonis v. United States*, the Supreme Court applied the First Amendment to threats made on social media.

Justice Scalia acknowledged that originalism was not perfect as a theory of constitutional interpretation, but contended that it easily beat out the alternatives. The deciding factor for Justice Scalia was separation of powers principles. He favored originalism because it constrained the policy-making authority of

unelected judges. In Scalia's view, a departure from history meant that judges were free to impose their own moral philosophy and arrive at what they thought the Constitution *ought* to mean.

Originalism takes as its theoretical antecedent Chief Justice John Marshall's famous judicial review opinion in *Marbury v. Madison*. In that case, Chief Justice Marshall explained that a written constitution would be meaningless if it could be changed upon a whim. Rather, to ensure that the limits on government power would not be forgotten, the Constitution had been written.

For Justice Scalia, living constitutionalism threatened the separation of powers principles. In his view, the Founders' Constitution had given the courts the power to interpret the law, not make it. An open-ended, living constitution meant that judges might find things in the Constitution that are not there and take away rights that do exist. Neither of these is a palatable choice in a constitutional democracy. To allow an unelected committee of nine, in Justice Scalia's words, to decide the most pressing legal, social, and political issues of our time is to turn the Founder's Constitution on its head. If instead judges were required to resort to original meaning, their discretion was constrained. "History is a rock-solid science compared to moral philosophy," Justice Scalia famously quipped.

> "Justice Scalia believed the Constitution gave courts 'the power to interpret the law, not make it.'"

As he put it when dissenting from the recent marriage decision, "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." This practice of "constitutional revision by an unelected committee of nine," he argued, "robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."

According to Justice Scalia, an honest originalist will sometimes reach a result he or she does not agree with as a policy matter. And for Justice Scalia, that was very true. He was committed to the principles of his interpretive method. Thus, he sided with the liberal wing of the Court in holding that the Confrontation Clause required defendants to be able to question DNA technicians in *Crawford v. Washington*. And again in *Texas v. Johnson*, a case upholding a First Amendment right to burn the American Flag. He later stated that he had not liked to vote that way, but thought the Constitution compelled it. Further, he noted that a living-Constitution judge has it easier. The morning after the opinion issued, his wife, "a very conservative woman," had scrambled eggs to the tune of "It's a Grand Old Flag." "A living-Constitution judge never has to suffer that way," he said.

Justice Scalia's success in persuading the legal profession of the merits of originalism cannot be overstated. Not so long ago, originalism was scarce. In a 2003 Speech at the University of Chicago's Law School, Justice Scalia noted that "You could fire a grapefruit out of a cannon over the best law schools in the country—and that includes Chicago—and not hit an originalist." That is no longer

the case. Originalists populate (albeit in small numbers) the academic ranks of the nation's most prestigious law schools.

Further, originalism is now the starting point for debates about constitutional meaning. Consider *District of Columbia v. Heller*. In that case, the dissent disagreed with Justice Scalia's conclusion that the Second Amendment protected an individual right, but did so on *originalist* grounds. Indeed, at her 2010 nomination hearings to the U.S. Supreme Court, Justice Elena Kagan explained that the Founders wrote "a Constitution for the ages" that should be interpreted according to its words. "So in that sense," she remarked, "we are all originalists."

Textualism

Justice Scalia invented modern textualism. Textualism is a method of interpreting statutes that looks to the words Congress enacted and rejects wide-ranging inquiries into legislative history, legislative intent, and the purpose of a statute. As the Justice put it in his 1997 Tanner Lecture, "[it] is the law that governs, not the intent of the lawgiver." Textualism, as an interpretive theory, is at least an important legal development as originalism.

Justice Scalia attended Harvard Law School at a time when "legal process" theorists reigned in the academy. They adhered to the idea that statutory purpose was the touchstone of interpretation. Scalia's professors taught that statutes should be interpreted according to their purpose as revealed by legislative history—the text was an afterthought. And by and large the federal courts agreed. They had uncritically used legislative history for more than a century. During the mid-twentieth century, when Justice Scalia came of age, they frequently decided cases by resorting to legislative purpose, sometimes ignoring the words that Congress had actually written.

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Then along came Justice Scalia. Once appointed to the Supreme Court, his disagreement with the legal process movement was immediate and pointed. In one of his first cases, *I.N.S. v. Cardoza-Fonseca*, a unanimous court agreed that Cardozo-Fonseca was entitled to relief under Section 208(a) of the Immigration and Nationality Act. But the newly-appointed Justice Scalia refused to join the majority opinion, instead writing an unusual concurring opinion expressly for the purpose of disagreeing with the majority's use of legislative history. In Scalia's view, the Court's view that contrary legislative intent could override express congressional language was hogwash. Such a doctrine was an "ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." Judges were supposed to "interpret laws rather than reconstruct legislators' intentions."

Justice Scalia's early and firm commitment to textual interpretation may have been influenced by his father, Salvatore Eugene Scalia, an Italian immigrant turned professor of romance language.

Salvatore Scalia was a devotee to the formalist New Criticism school of literary interpretation. This school emphasizes a "close reading," of "the work itself." It rejects the use of extraneous and biographical materials. The goal is to interpret the text, not the author's intent. All of this sounds strikingly familiar to the arguments advanced by Justice Scalia in favor of textualism. But whether or not his father's commitment to literary textualism influenced Justice Scalia's commitment to statutory textualism, that latter commitment was firm.

Justice Scalia argued against interjecting legislative history on several grounds. First, he believed that, "the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." In his view, statutes should be interpreted according to their words. This is because it is the text that Congress enacted that is "the law." In *Shady Grove Orthopedic Associates v. Allstate Insurance Company*, Justice Scalia again reiterated that, "The manner in which the law 'could have been written,' has no bearing; what matters is the law the Legislature did enact. We cannot rewrite that to reflect our perception of legislative purpose."

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Second, Scalia believed that reliance on legislative history disregarded the Constitution's bicameralism and presentment requirements. When a snippet of legislative history was used to resolve a statutory ambiguity, that snippet had not been passed by the whole Congress nor signed by the President.

Third, modern legislation was a package of compromises, with legislators having individual and sometimes competing interests. Thus, the Justice believed that a search for "legislative intent" was fruitless. Any single legislator could issue a floor statement (or attempt to pad the record). Thus, it was absurd to think that a 535-member legislature had a collective intent concerning a statutory ambiguity. As Justice Scalia colorfully argued, advocates and judges often used snippets of legislative history selectively; "the use of legislative history is like walking into a crowded cocktail party and looking over the heads of the guests to pick out your friends."

Finally, if textualism produced a result that Congress disagreed with, Congress could simply change the law.

Even more than in constitutional interpretation, Justice Scalia has won the interpretive war when it comes to statutes. Courts today start with the proposition that statutory interpretation begins with the "language of the statute." And while they sometimes still use legislative history, they are clear that where statutory language is plain the inquiry ends with the text as well. Today, courts "presume that a legislature says in a statute what it means and means in a statute what it says there." Indeed, Justice Scalia's version of textualism has caught on so much that even opponents of the view recognize its lasting legacy.

CONCLUSION

Justice Scalia will long be remembered for his acerbic wit and elegant prose. But he will be remembered even longer for his commitment to, and development of, two theories of interpretation—originalism and textualism—that have changed the way we think about the law. These two developments are more important than any particular result in any given case, because they have elevated the principle that judges should interpret the law, not make law. Originalism requires judges to look to the original meaning of a constitutional provision, not to dress one's own values and preferences in constitutional garb. Textualism requires judges to read the statute that Congress wrote, not the one they think it meant to (or should have) enacted. Each theory is critically important because it constrains the ability of judges to impose their own policy preferences and ties the third branch more closely to the role envisioned by the Founders.

The next President will soon seek to replace Justice Scalia on the Supreme Court, but his legacy will endure for generations to come.