A Matter of Interpretation

FEDERAL COURTS AND THE LAW

AN ESSAY BY

ANTONIN SCALIA

WITH COMMENTARY BY

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Comment

RONALD DWORKIN

1

JUSTICE SCALIA has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle, and he has set out with laudable clarity a sensible account of statutory interpretation. These are considerable achievements. But I believe he has seriously misunderstood the implications of his general account for constitutional law, and that his lectures therefore have a schizophrenic character. He begins with a general theory that entails a style of constitutional adjudication which he ends by denouncing.

His initial argument rests on a crucial distinction between law and intention. "Men may intend what they will," he says, "but it is only the laws that they enact which bind us,"[1] and he is scornful of decisions like *Holy Trinity*, in which the Supreme Court, conceding that the "letter" of a statute forbade what the church had done, speculated that Congress did not intend that result. Indeed, he is skeptical about the very idea of a corporate legislative "intention"; most members of Congress, he says, have never thought about the unforeseen issues of interpretation that courts must face. A careless reader might object, however, that any coherent account of statutory interpretation *must* be based on assumptions about someone's (or some body's) intention, and that Scalia's own account accepts this at several points. Scalia admits that courts should remedy "scrivener's error."[2] He rejects "strict constructionism"—he thinks the

[1] Scalia, "Common-Law Courts in a Civil-Law System," p. 17.

[2] *Id.* p. 20.

Supreme Court's "literalist" decision in the "firearm" case, *Smith* v. *United States*, was silly.[3] He credits at least some of the "canons" of interpretation as being an "indication" of meaning.[4] And he says that it would be absurd to read the First Amendment's protection of speech and press as not applying to handwritten notes, which are, technically, neither.[5]

Each of these clarifications allows respect for intention to trump literal text, and the careless objection I am imagining therefore claims an inconsistency. Scalia's defenders might say, in reply to the objection, that he is not an *extreme* textualist, and that these adjustments are only concessions to common sense and practicality. But that misunderstands the objection, which is that the concessions undermine Scalia's position altogether, because they recognize not only the intelligibility but the priority of legislative intention, both of which he begins by denying. If judges can appeal to a presumed legislative intent to add to the plain meaning of "speech" and "press," or to subtract from the plain meaning of "uses a firearm," why can they not appeal to the same legislative intent to allow a priest to enter the country? Scalia's answer to this objection must not rely on any self-destructive "practicality" claim. It must rely instead on a distinction between *kinds* of intention, a distinction he does not make explicitly, but that must lie at the heart of his theory if the theory is defensible at all.

This is the crucial distinction between what some officials intended to *say* in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it. Suppose a boss tells his manager (without winking) to hire the most qualified applicant for a new job. The boss might think it obvious that his own son, who is an applicant, is the most qualified; indeed he might not have given the instruction unless he was confident that the manager would think so too. Nevertheless, what the boss *said*, and *intended* to say, was that the most qualified applicant should be hired, and if the

[3] *Id.* pp. 23–24. [4] *Id.* p. 27. [5] *Id.* pp. 37–38.

manager thought some other applicant better qualified, but hired the boss's son to save his own job, he would not be following the standard the boss had intended to lay down.

So what I called the careless objection is wrong. The supposed lapses from Scalia's textualism it cites are not lapses at all, because textualism insists on deference to one kind of intention—semantic intention—and in all his remarks so far cited Scalia is deferring to that. Any reader of anything must attend to semantic intention, because the same sounds or even words can be used with the intention of saying different things. If I tell you (to use Scalia's own example) that I admire bays, you would have to decide whether I intended to say that I admire certain horses or certain bodies of water. Until you had, you would have no idea what I had actually said even though you would know what sounds I had uttered. The phrase "using a firearm" might naturally be used, in some contexts, with the intention of describing only situations in which a gun is used as a threat; the same phrase might be used, in other contexts, to mean using a gun for any purpose including barter. We do not know what Congress actually said, in using a similar phrase, until we have answered the question of what it is reasonable to suppose, in all the circumstances including the rest of the statute, it intended to say in speaking as it did.

When we are trying to decide what someone meant to say, in circumstances like these, we are deciding which clarifying *translation* of his inscriptions is the best. It is a matter of complex and subtle philosophical argument what such translations consist in, and how they are possible—how, for example, we weave assumptions about what the speaker believes and wants, and about what it would be rational for him to believe and want, into decisions about what he meant to say.[6] The difficulties are greatly increased when we are translating not the utterances of a real person but those of an institution like a legislature. We rely on personification—we suppose that the institution has

[6] Reference to work of Quine, Grice, and Davidson.

semantic intentions of its own—and it is difficult to understand what sense that makes, or what special standards we should use to discover or construct such intentions. Scalia would not agree with my own opinions about these matters.[7] But we do agree on the importance of the distinction I am emphasizing: between the question of what a legislature intended to say in the laws it enacted, which judges applying those laws must answer, and the question of what the various legislators as individuals expected or hoped the consequences of those laws would be, which is a very different matter.

Holy Trinity illustrates the difference and its importance. There can be no serious doubt that Congress meant to say what the words it used would naturally be understood to say. It is conceivable—perhaps even likely—that most members would have voted for an exception for English priests had the issue been raised. But that is a matter of (counterfactual) expectations, not of semantic intention. The law, as Scalia emphasizes, is what Congress has said, which is fixed by the best interpretation of the language it used, not by what some proportion of its members wanted or expected or assumed would happen, or would have wanted or expected or assumed if they had thought of the case.[8] Not everyone agrees with that judgment. Some lawyers think that it accords better with democracy if judges defer to reasonable assumptions about what most legislators wanted or would have wanted, even when the language they used does not embody those actual or hypothetical wishes. After all, these lawyers argue, legislation should reflect what those who have been elected by the people actually think best for the country. Scalia disagrees with that judgment: he thinks it more democratic to give semantic intention priority over expectation intention when the two conflict, as they putatively did in *Holy Trinity*.

[7] See chapter 9 of my *Law's Empire* (Harvard University Press, 1986).

[8] I am prescinding, as Scalia does, from the question Professor Tribe raises about the constitutionality of the statute considered in *Holy Trinity* if it is read to say what it was plainly intended to say.

2

Now consider the implications of textualism so understood for the most important part of Scalia's judicial duties: interpreting the exceedingly abstract clauses of the Bill of Rights and later rights-bearing amendments. Scalia describes himself as a constitutional "originalist." But the distinction we made allows us a further distinction between two forms of originalism: "semantic" originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say, and "expectation" originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have. Consider, to see the difference, the *Brown* question: does the Fourteenth Amendment guarantee of "equal protection of the laws" forbid racial segregation in public schools? We know that the majority of the members of Congress who voted for that amendment did not expect or intend it to have that consequence: they themselves sustained racial segregation in the schools of the District of Columbia.[9] So an expectation-originalist would interpret the Fourteenth Amendment to permit segregation and would declare the Court's decision wrong. But there is no plausible interpretation of what these statesmen meant to *say*, in laying down the language "equal protection of the laws," that entitles us to conclude that they *declared* segregation constitutional. On the contrary, as the Supreme Court held, the best understanding of their semantic intentions supposes that they meant to, and did, lay down a general principle of political morality which (it had become clear by 1954) condemns racial segregation. So, on that ground, a semantic-originalist would concur in the Court's decision.

[9] For a recent account of the literature, see Michael J. Klarman, Brown, *Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 Virginia Law Review, 1881 (1995).

If Scalia were faithful to his textualism, he would be a semantic-originalist. But is he? Notice his brief discussion of whether capital punishment offends the Eighth Amendment's prohibition against "cruel and unusual" punishments. An expectation-originalist would certainly hold that it does not, for the reasons Scalia cites. The "framers" would hardly have bothered to stipulate that "life" may be taken only after due process if they thought that the Eighth Amendment made capital punishment unconstitutional anyway. But the question is far more complicated for a semantic-originalist. For he must choose between two clarifying translations—two different accounts of what the framers intended to *say* in the Eighth Amendment. The first reading supposes that the framers intended to say, by using the words "cruel and unusual," that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase "punishments widely regarded as cruel and unusual at the date of this enactment" in place of the misleading language they actually used. The second reading supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual. Of course, if the correct translation is the first version, then capital punishment does not violate the Eighth Amendment. But if the second, principled, translation is a more accurate account of what they intended to say, the question remains open. Just as the manager in my story could only follow his boss's principled instruction by using his own judgment, so judges could then only apply the Eighth Amendment by deciding whether capital punishment is in fact cruel and has now become (as in fact it has become, at least among democracies) unusual.

The textual evidence Scalia cites would be irrelevant for a semantic-originalist who translated the Eighth Amendment in a principled rather than a concrete and dated way. There is no contradiction in the following set of claims. The framers of the Eighth Amendment laid down a principle forbidding whatever punishments are cruel and unusual. They did not themselves

expect or intend that that principle would abolish the death penalty, so they provided that death could be inflicted only after due process. But it does not follow that the abstract principle they stated does not, contrary to their own expectation, forbid capital punishment. Suppose some legislature enacts a law forbidding the hunting of animals that are members of "endangered species" and then, later in its term, imposes special license requirements for hunting, among other animals, minks. We would assume that the members who voted for both provisions did not think that minks were endangered. But we would not be justified in concluding from that fact that, as a matter of law, minks were excluded from the ban even if they plainly *were* endangered. The latter inference would be an example of *Holy Trinity* thinking.

You will now understand my concern about Scalia's consistency. For he cites the view that capital punishment is unconstitutional as so obviously preposterous that it is cause for wonder that three justices who served with him actually held such an opinion.[10] If he were an expectation-originalist, we would not be surprised at that view, or at the evidence he offers to support it. But for a semantic-originalist the question just *cannot* be foreclosed by references to the death penalty in the rest of the Constitution. A semantic-originalist would also have to think that the best interpretation of the Eighth Amendment was the dated rather than the principled translation, and even someone who might be drawn to that dated interpretation could not think the principled one *preposterous*.

On the contrary, it is the dated translation that seems bizarre. It is near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary moral language, would have used "cruel" as shorthand for "what we now think cruel." They knew how to be concrete when they intended to be: the various provisions for criminal and civil process in the Fourth, Fifth, Sixth, and Seventh

[10] Scalia, "Common-Law Courts in a Civil-Law System," p. 46.

Amendments do not speak of "fair" or "due" or "usual" procedures but lay down very concrete provisions. If they had intended a dated provision, they could and would have written an explicit one. Of course, we cannot imagine Madison or any of his contemporaries doing that: they wouldn't think it appropriate to protect what they took to be a fundamental right in such terms. But that surely means that the dated translation would be a plain mistranslation.

So Scalia's impatience with what seems the most natural statement of what the authors of the Eighth Amendment intended to say is puzzling. Part of the explanation may lie in his fear of what he calls a "morphing" theory of the Constitution—that the rights-bearing clauses are chameleons which change their meaning to conform to the needs and spirit of new times. He calls this chameleon theory "dominant," but it is hardly even intelligible, and I know of no prominent contemporary judge or scholar who holds anything like it. True, a metaphorical description of the Constitution as "living" has figured in constitutional rhetoric of the past, but this metaphor is much better understood as endorsing, not the chameleon theory, but the view I just described as the one that Scalia, if he were a semantic-originalist, might be expected to hold himself—that key constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules. If so, then the application of these abstract principles to particular cases, which takes fresh judgment, must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says.

I have defended that view in a series of books over the last decade,[11] and some of what I have written might strike Scalia as saying that the Constitution itself changes, though I meant the opposite. I said, for example, that, subject to the constraints of

[11] See chapter 10 of *Law's Empire*, *supra* note 7, chapter 5 of *Life's Dominion* (Alfred Knopf, 1993), and *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996).

integrity which require judges to keep faith with past decisions, "The Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command."[12]

It is that moral and principled reading of the Constitution, not the mythic chameleon claims he describes, that Scalia must produce reasons for rejecting. In his contribution to this volume, Professor Tribe endorses the abstract moral reading of many clauses as well; he proposes that the First Amendment, for example, be read as abstract.[13] So we may gauge Scalia's arguments against the principled reading by studying his response to Tribe's suggestion. Scalia argues that the First Amendment should be read not as abstract but as dated—that it should be read, that is, as guaranteeing only the rights it would have been generally understood to protect when it was enacted. He makes three points: first, that since many parts of the Bill of Rights are plainly concrete—the Third Amendment's prohibition against quartering troops during peacetime, for example—the "framers" probably intended to make them all so; second, that the "framers" would presumably be anxious to insure that their own views about free speech were respected even if later generations no longer agreed; and, third, that in any case the

[12] *Life's Dominion*, *supra* note 11, 145.

[13] I assume that Tribe agrees that some constitutional clauses are semantically principled, though in his lecture he called such clauses "aspirational," a term that is often used to describe ambitions that government should strive to realize as distinct from law it is bound to obey. Many contemporary constitutions, for example, set out "aspirational" declarations of economic and social rights meant to have that function. Scalia may have understood Tribe in that sense in describing Tribe's view of the First Amendment as a *"beau idéal."* Based on Justice Scalia's verbal reply to his respondents on the occasion of the Tanner Lectures, March 1995. Hereafter referred to as Tanner reply. The abstract principles of the Constitution's text are as much law—as much mandatory and as little aspirational or idealized—as any other clauses. See *Freedom's Law*, *supra* note 11.

"framers" would not have wanted to leave the development of a constitutionalized moral principle to judges.[14]

These are all arguments for ignoring the natural semantic meaning of a text in favor of speculations about the expectations of its authors, and the Scalia of the preconstitutional part of these lectures would have ridiculed those arguments. First, why shouldn't the "framers" have thought that a combination of concrete and abstract rights would best secure the (evidently abstract) goals they set out in the preamble? No other national constitution is written at only one level of abstraction, and there is no reason to suppose the authors of the Bill of Rights would have been tempted by that kind of stylistic homogeneity. Second, as I said, Enlightenment statesmen were very unlikely to think that their own views represented the last word in moral progress. If they really were worried that future generations would protect rights less vigorously than they themselves did, they would have made plain that they intended to create a dated provision. Third, we must distinguish the question of what the Constitution means from the question of which institution has final authority to decide what it means. If, as many commentators think, the "framers" expected judges to have that authority, and if they feared the consequences for abstract rights, they would have taken *special* care to write concrete, dated clauses. If, on the contrary, they did not expect judicial review, then Scalia's third argument fails for that reason. The First Amendment turns out to be his *Holy Trinity*.

He ignores, moreover, an apparently decisive argument against a translation of the First Amendment as dated. There *was* no generally accepted understanding of the right of free speech on which the framers could have based a dated clause even if they had wanted to write one. On the contrary, the disagreement about what that right comprises was much more profound when the amendment was enacted than it is now. When the dominant Federalist party enacted the Sedition Act in 1798,

[14] Tanner reply.

its members argued, relying on Blackstone, that "the freedom of speech" meant only freedom from "prior restraint"—in effect, freedom from an advance prohibition—and did not include any protection at all from punishment *after* publication.[15] The opposing Republicans argued for a dramatically different view of the amendment: as Albert Gallatin (Jefferson's future secretary of the treasury) pointed out, it is "preposterous to say, that to punish a certain act was not an abridgment of the liberty of doing that act." All parties to the debate *assumed* that the First Amendment set out an abstract principle and that fresh judgment would be needed to interpret it. The Federalists relied, not on contemporary practice, which hardly supported their reading,[16] but on the moral authority of Blackstone. The Republicans relied, not on contemporary practice either, but on the logic of freedom. No one supposed that the First Amendment codified some current and settled understanding, and the deep division among them showed that there was no settled understanding to codify.

So Scalia's discussion of the First Amendment is as puzzling as his briefer remarks about the Eighth Amendment. Now consider what he says about the Fourteenth Amendment's guarantee of "equal protection of the laws." He says that that clause "did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and sex."[17] Why is he so sure that the Equal Protection Clause did not always forbid discrimination on grounds of age, property, or sex (or, for that matter, sexual orientation)? Certainly when the amendment was adopted, few people *thought* that the clause had that consequence, any more than they thought that it had the consequence

[15] For a recent description of the arguments over the Sedition Act, see Anthony Lewis, *Make No Law* (Random House, 1991), chapter 7.

[16] See the exchange of views between Professors Leonard Levy and David Anderson, summarized in the former's 1985 edition of his book, *Legacy of Suppression*.

[17] Scalia, "Common-Law Courts in a Civil-Law System," p. 47.

of making school segregation illegal. But the semantic-originalist would dismiss this as just what the framers and later generations of lawyers expected, not a matter of what the framers actually *said*. If we look at the text they wrote, we see no distinction between racial discrimination and any other form of discrimination: the language is perfectly general, abstract, and principled. Scalia now reads into that language limitations that the language not only does not suggest but cannot bear, and he tries to justify this mistranslation by attributing understandings and expectations to statesmen that they may well have had, but that left no mark on the text they wrote. The Equal Protection Clause, we might say, is Scalia's *Holy Trinity* cubed.

What has happened? Why does the resolute text-reader, dictionary-minder, expectation-scorner of the beginning of these lectures change his mind when he comes to the most fundamental American statute of them all? He offers, in his final pages, an intriguing answer. He sees, correctly, that if we read the abstract clauses of the Bill of Rights as they were written—if we read them to say what their authors intended them to say rather than to deliver the consequences they expected them to have—then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. That does not mean ignoring precedent or textual or historical integrity or morphing the Constitution. It means, on the contrary, enforcing it in accordance with its text, in the only way that this can be done. Many conservative judges therefore reject semantic originalism as undemocratic; elected judges, they say, should not have that responsibility. Scalia gives nearly the opposite reason: he says the moral reading gives the people not too little but too much power, because it politicizes the appointment of Supreme Court justices and makes it more likely that justices will be appointed who reflect the changing moods of the majority. He fears that the constitutional rights of individuals will suffer.

History disagrees. Justices whose methods seem closest to the moral reading of the Constitution have been champions, not en-

emies, of individual rights, and, as the political defeat of Robert Bork's nomination taught us, the people seem content not only with the moral reading but with its individualist implications. Scalia is worried about the decline of what he believes to be property rights embedded in the Constitution but ignored in recent decades. He reminds liberals that rights of criminal defendants may also be at risk. But even if we were persuaded that the Court has gone too far in neglecting property rights, and also that *Maryland* v. *Craig* compromised a valid constitutional right, these assumed mistakes would hardly outweigh the advantages to individual freedom that have flowed from judges' treatment of the great clauses as abstract.

It is, however, revealing that this is the scale on which Scalia finally wants his arguments to be weighed, and it may provide a final explanation, if not justification, for the inconsistency of his lectures as a whole. His most basic argument for textualism is drawn from majoritarian theory: he says that it is undemocratic when a statute is interpreted other than in accordance with the public text that was before legislators when they voted and is available to everyone in the community afterwards. His most basic argument for rejecting textualism in constitutional interpretation, on the other hand, reflects his *reservations* about majority rule. As with most of us, Scalia's attitudes about democracy are complex and ambivalent. I disagree with his judgment about which individual rights are genuine and important, and about whether the moral reading is a threat or an encouragement to freedom. But I agree with him that in the end the magnet of political morality is the strongest force in jurisprudence. The power of that magnet is nowhere more evident than in the rise and fall of his own love affair with textual fidelity.