**Scalia - "Common-Law Courts in a Civil Law System"**

- Lecture 1:
    - Scalia begins by examining what he calls the *common law attitude*.
        - Lawyers are trained up in the tradition of common law, distinguishing between cases in an attempt to arrive at the *best* outcome in the case at hand.
            - They ask, "what is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"
            - They then set about performing "the broken-field running through earlier cases that leaves him free to impose that rule - distinguishing one prior case on his left, straight-arming another on his right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches his goal: good law."
        - BUT this attitude is not appropriate to most of the work that judges and even justices (even SCOTUS justices) do. Most of this work is not common law reasoning about cases but statutory interpretation or interpretation of the Constitution.
            - But there's little agreement on a philosophy of statutory interpretation, so Scalia sets out to defend his own favored position.
    - Scalia argues for his preferred philosophy of statutory construction (that he calls ***textualism***) and against a couple of positions with which his is often confused:
        - He argues against both those who adopt a construction based on **"legislative intent"** and against **"strict constructionists"** who construe the meaning of statutes *strictly* in terms of the meanings of the words as they would have been understood by the author of the text.
        - Against legislative intent, he argues that judges don't look for *subjective intent* (that is, what the author of the statute intended to communicate or how they intended it to apply) but rather *objectified intent* (that is, the intent that a reasonable person would gather from the text of the law, placed alongside the *corpus juris*.)
            - Subjective intent is too slippery:
                - It's not clear a corporate body like a legislature could have an intent.
                - Most of the legislators probably never read or understood the legislation before voting on it. They outsourced this work to staff and committees, but the power of the legislature is to make laws not to make lawmakers, so we can't take the intent of staff or committees (in committee reports) as authoritative.

        - Even those who understood the law could not have understood it in the context of the whole body of law.
    - But objectified intent slides back into common law, for the judge is merely going to substitute what he, as a reasonable person, would have intended for the fictional intent of the legislature.
    - So intent won't do. (See *Holy Trinity* example)
  - Against strict constructionism, he argues that we need not a strict or lenient construction, but a reasonable one. (See the gun case)
- For the Textualist, the text is the law.
  - "The text is the law, and it is the text that must be observed."
    - Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means."
  - It doesn't mean he's too dull to perceive the broader social purposes of a statute, only that he thinks judges have no authority to pursue those broader purposes or write new law…this is the job of the legislature.
  - The textualist is neither a literalist nor a nihilist.
    - Words have a limited range of meanings, the meanings are to be understood in terms of how those to whom the law was directed would have understood them.

- Lecture 2:
  - The aim of the second lecture is to complete the account of textualism (now with an argument against legislative history as a means of interpretation) and then to develop his account of originalism.
    - Legislative history was intended as a way to constrain interpretation of legislative intent, but it has failed to do this.
      - It has failed be a constraint because it too can be manipulated.
      - It substitutes the intent of committees and staff for that of legislature, but this violates the separation of powers outlined in constitution.
      - It has led to putting the cart before the horse. Lobbyists now supply language to staffers knowing full well that it will be used in the courts' interpretations of statutes.
        - See ALEC, American Legal Exchange Council, exposed by The Nation in 2011
        - Koch ties

- Constitutional Interpretation (Originalism vs. The Living Constitution)
    - A Constitution is an unusual text.
        - It could not be complete because that would be an entire body of law. It is a framework, and thus in need of interpretation. But how should we go about interpreting it?
    - For Scalia, what matters is not original intent but original meaning.
        - He understands this in terms of how the Constitution was originally understood by intelligent and informed readers.
        - To adopt original intent as what matters would be to accept strict constructionism, but recall that Scalia rejects this view.
        - What matters isn't what the framers intended but *what they said*.
    - On the "living constitution" view, what matters, according to Scalia, is not original meaning but *current meaning*.
- Scalia defends originalism by arguing against alternatives.
    - Against strict constructionism, he argues that we can't know what framer's intent was (we can't even be sure such a thing exists)
        - He also argues that the way that judges use the idea of intent is problematic, for they don't seek "subjective intent" but something he calls "objectified intent"
            - This is shown by the way in which judges interpret intent in the context of the whole body of law. No legislator could have understood the consequences of the law for the whole body of law, so this does not capture subjective intent.
            - Objectified intent is the intent that a reasonable person would have in adopting the clause in question as law. But this is problematic because the judge will judge herself to be a reasonable person and will take intent to be just what she would intend, and what she would intend will be shaped about how she wants the present case to turn out. The judge will slide back into common law reasoning.
            - One way out is to try to adopt a "legislative history," but this is problematic as well.
                - Most legislators never read or understood the legislation. They outsourced this to their staff or to committees.

- If one adopts “legislative history” as a proxy for legislative intent, then one assumes it is permissible for the legislature to make legislators (rather than make law), for this gives ultimate authority to the committees that wrote the laws. But this is not a power the legislature has

- Legislative history is also manipulated by lobbyists who write language for the legislature to adopt in order to frame the future interpretation of the law by judges.

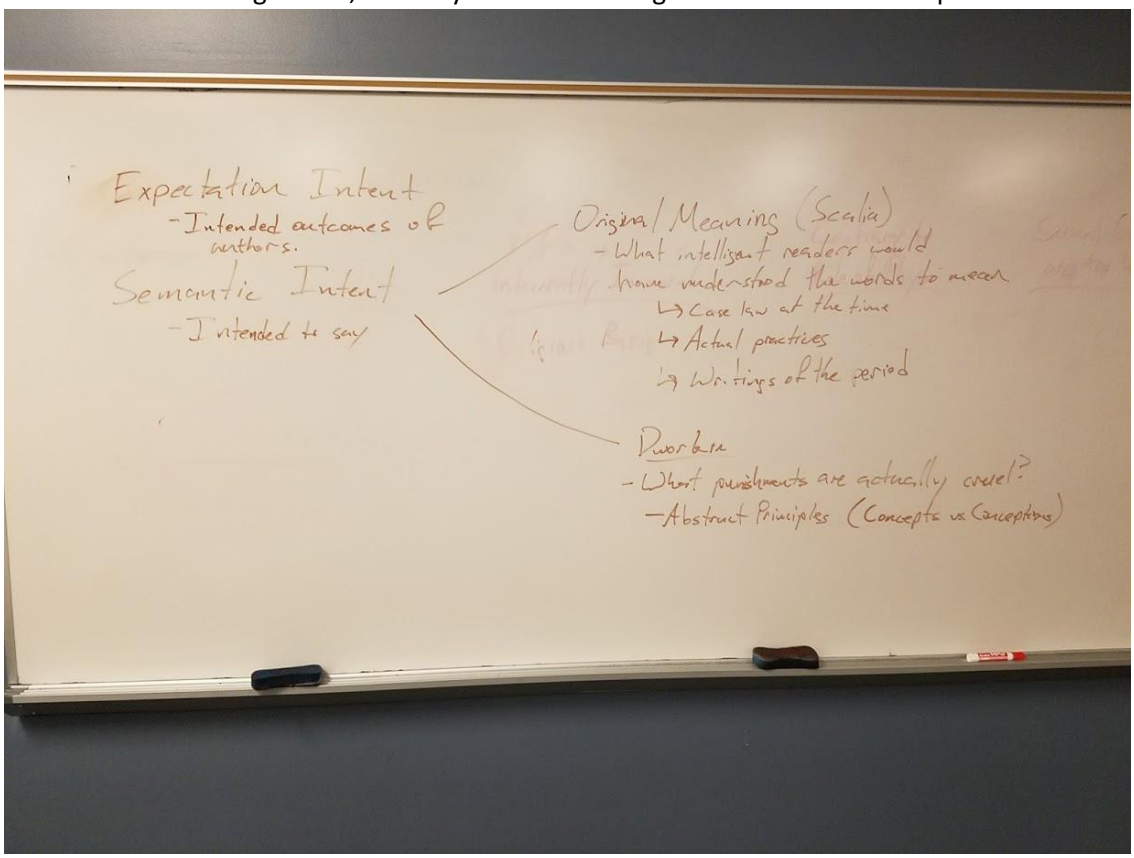
- Against the living constitution, he argues essentially that it is anti-democratic. The living constitution view empowers judges as lawmakers and arbiters of cultural morality, but this is the role accorded the legislature by the constitution.

    - It does not make for a more flexible law, but a less flexible one. Reading liberties into the constitution undermines the prerogative of the legislature to make laws regarding those liberties.

- Is this really undemocratic? It protects the individual from majoritarian overreach. (Wilk)

- Dworkin argues against Scalia by posing a kind of dilemma.
    - Dworkin tries to present Scalia with a dilemma. He can be an expectation originalist or a semantic originalist. The difference between the two is best illustrated by the “hire the best person for the job” example.
    - This is a dilemma because it presents Scalia with the choice between an objectionable theory and his favored understanding of the Constitution’s meaning; Dworkin claims that he can’t have both. Expectation originalism fits Scalia’s arguments about the Eighth Amendment, but is objectionable. Semantic originalism is so benign that Dworkin himself claims to subscribe to it. But, Dworkin argues, semantic originalism doesn’t support Scalia’s conclusions about what the Constitution says.
    - Scalia opts for semantic originalism. He says that the Constitution sets out abstract principles that the courts have to interpret and apply in novel circumstances. These principles were not meant to be limited to what the people at the time knew. For example, he thinks that the Eighth Amendment rules out torture using electrical equipment like cattle prods, bright lights, and recorded music, even though these things were unknown in the eighteenth century.

- Both are semantic orginalists, but they are semantic oiginalists of different stripes:3




- Scalia is concerned about a backsliding, an erosion of rights that the framers wanted to save and protect for all time.
- Dworkin is more optimistic.
- Both present an argument about the context of the more abstract rights in the constitution…