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TEXTUALISM AND THE MODERN JUDICIARY

by Chris Rawlins*

I. INTRODUCTION

The confirmation hearings of Justice Sotomayor to the Supreme Court demonstrate that there is still much controversy over the role of the federal judge and how he or she should best execute this role.¹ In a recent debate between Supreme Court Justices Stephen Breyer and Antonin Scalia concerning constitutional interpretation, Justice Scalia argued that judges should rule based on the original public understanding of the text, largely regardless of consequences (a theory aptly named textualism). Justice Breyer, on the other hand, defended interpreting the text based on broad constitutional principles in light of the consequences a ruling would have on society. Justice Breyer said that if Justice Scalia were right, we should have nine “historians” on the Supreme Court: men and women trained to find the original public understanding of generations long past. Justice Scalia countered, saying that if Justice Breyer were right, we should have nine “ethicists” on the Supreme Court: men and women practiced in the study of right and wrong.²

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Of course, we have neither historians nor ethicists; we have nine lawyers. And while the study of the law is still considered to be independent of other scholarly disciplines, the law now influences many other areas of our lives. This suggests that judges, in addition to being historians and ethicists, must also be linguists, economists, and administrators. This increasingly complicated role places more pressure on the judiciary to contribute to a more perfect union and a better-functioning society. Textualism is not a satisfactory nor complete method for interpreting the Constitution because it fails to account for these modern expectations of the government and the role of the judiciary.

As a method of statutory and constitutional interpretation, textualism seeks to look only at the original public meaning of the text of the statute or the constitutional provision in question. Textualism suggests that judges be given a clear mandate of how to do their job in order to prevent judges from exercising unrestrained judicial activism. Justice Scalia advocates textualism as a defense against the dangers of judges making the law, rather than interpreting the law. According to textualism, judges should decide cases on the words that the lawmakers said, rather than trying to decide what the law ought to say (the latter view being a theory that has been branded “the living Constitution”), or looking for what the legislature or framers meant to say (another theory known as “original intent”). According to textualism, judges should rule only on the clear meaning of the text.

For Justice Scalia, *The Church of the Holy Trinity v. United States* is an example of a case when textualism should have prevailed but did not. In this case, a church in New York hired an Englishman to be its pastor. However, federal law clearly stated that it was illegal to “in any way assist or encourage the importation or migration of any alien...into the United States...under contract or agreement...made previous to the importation or migration of such alien...”, to perform

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labor or service of any kind in the United States...” The law even included a specific list of professions that were exempt from the statute and pastor was not included on the list. However, the Supreme Court held that the church did not violate the law because “[it could not] think Congress intended to denounce with penalties a transaction like that in the present case.” By ruling on its idea of what the law should have been rather than the clear meaning of the actual law, the Court effectively changed the law that Congress passed. Justice Scalia argues that even if the legislature had intended something different, the Court should have held that the Church had violated the law since the reasonable interpretation based on the text forbade it from hiring the minister.

Why does Justice Scalia feel that judges should behave in this way? The ultimate authority upon which Justice Scalia bases both the necessity and logic of textualism is the principle of democracy: we are a nation based on the notion of popular sovereignty, with a government following the principle of separation of powers. Textualism seeks to protect these institutions from the threat of judges who rule based on what they think ought to happen without regard for what the actual text of the law.

There is also strength in Justice Scalia’s position that the “whole purpose [of a written Constitution] is to prevent change,” change that could presumably come at the hands of judges trying to respond to changes in society. Justice Scalia refers to a now-famous line of the Massachusetts State Constitution, “A government of laws, not of men,” as evidence of the colonists’ efforts to eliminate de facto

5 Id. at 19.
7 SCALIA, supra note 4, at 22.
9 SCALIA, supra note 4, at 22–23.
10 Id. at 40.
11 Id. at 17.

Another argument for textualist-based judicial restraint is that it is very difficult for the people to overturn a Supreme Court decision through the legislative process, especially in the case of constitutional amendments; the court normally has to reverse itself to overturn a faulty opinion. Justice Scalia accepts the principle of stare decisis (the practice of the current court respecting the decisions handed down by previous courts) even when it requires upholding non-textualist opinions.\footnote{Scalia, supra note 4, at 138–40.} Consequently, he must not favor frequent Supreme Court reversal as a form of constitutional adaptation either. Judicial activism is largely a one-way road; it is easy to lay down constitutional precedent, but it is difficult to overrule that precedent.

Critics of textualism doubt whether textualism can really work as a guiding theory for judicial opinions. Even if our country came to a clear consensus that our judges should be firm textualists, textualism still may not provide clear judicial guidance. Textualism depends on an original public understanding that modern judges can recognize and adjudicate; however, in some cases it may be difficult for judges to determine the original public understanding or the original public may not have foreseen the specific issues with which we deal, and thus no public understanding exists.

Justice Scalia responded to such questions by asserting that his job was not to show that textualism was perfect but simply to show that it was better than any other method.\footnote{Address, supra note 2.} Therefore, if textualism is an internally workable theory and the original public understanding can be known, understood, and applied, the question becomes “is this what we want from our judges?” If textualism does not best assist judges in serving the needs of our society, then we should adopt a different method of interpretation.
Proponents of textualism may immediately object to that idea. To them, constitutional interpretation is inherently a textualist endeavor; if the role of the judiciary does not conform to textualism, then the role of the judiciary should change. However, as Cass R. Sunstein, a professor of law at the University of Chicago and a leading constitutional law scholar, asserts, “No approach to constitutional interpretation is mandatory. Any approach must be defended by reference to its consequences, not asserted as part of what interpretation requires.”

We must therefore analyze textualism according to its consequences.

The debate concerning the proper role of judges is by no means new. In fact, important transformations of society’s view of judges began early on and continued throughout the revolutionary era. As Gordon Wood, a leading founding era historian explains, judges went from being much-maligned agents of the royal magistrate to being seen as one of the three independent divisions of government power subject to the people. In this latter role, judges were celebrated and promoted as the only check available against tyrannical legislatures.

With this justification, the framers of the Constitution established an independent judiciary as part of the broader government system based on the separation of powers. Surprisingly, the Constitution is significantly imprecise about the role of the judiciary. The judicial branch is broadly given judicial power extending to “all Cases, in Law and Equity.” However, the framers did not include in the Constitution instructions as to how the Supreme Court should interpret the Constitution, amendments to the Constitution, or statutes. In fact, the Constitution does not explicitly establish the Supreme

16 Wood, supra note 12, at 452, 453, 460, 462.
17 Wood, supra note 8, at 50–54.
18 Wood, supra note 12, at 536–37.
19 U.S. Const. art. III, § 2.
Court as the final authority to interpret the Constitution. Some of the founding fathers thought that each branch of government had the right to interpret the meaning of the Constitution.21

However, in 1791, the Bill of Rights was passed. The Bill of Rights significantly shaped the role of federal judges and established the role of the Supreme Court. Also, early in the nation’s history, interpreting the “fundamental law” of the Constitution came to be seen as the prerogative of the Court, a shift manifest most strongly by the Marshall Court.22 The combination of the passing of the Bill of Rights with the acceptance of the Court’s claim to constitutional interpretation meant that the judicial branch now had to protect individual rights from the overreaching Congress.23 The Supreme Court was entrusted to be the legal check to protect the rights of the people.24 Such a responsibility entails significant amounts of interpretation of a relatively short text. Exactly what is the right to bear arms? How far does the freedom of speech extend? What constitutes an infringement of a right?

The difficulty of the Court’s role was accentuated as other amendments were added to the original Bill of Rights. Following the Civil War, the Fourteenth Amendment broadened the Supreme Court’s sentry duties to include state laws and also introduced the debate concerning incorporation of rights to the individual states, a debate that still exists today.25

Even after the drastic changes following the Civil War era, more drastic transformations followed. Since the 1960s, government has become more involved with divisive issues such as abortion, sexual rights, prisons, schools, the environment, and welfare.26 As govern-

21 Wood, supra note 8, at 61–62.
22 Wood, supra note 8, at 62.
23 Wood, supra note 12, at 543.
24 Id.
26 Posner, supra note 3, at 767, 770.
ment has expanded into more areas of our lives, other areas of scholarship have expanded into the study of law.\textsuperscript{27} Also, at the same time that statutes started dealing with a broader range of social issues, the law seemed to move away from the common law toward a focus on statutory law.\textsuperscript{28} This means that both the scope and volume of statutory law has increased, and this is part of the difficulty the Court is facing. If the Court follows textualism in dealing with these changes, it will become increasingly determined to seek the original understanding of the legislature.

However, it is also possible that judges will have to accept the fact that a larger, more involved government requires judges who base decisions not only on original public understanding but also on realistic goals for government. In serving as a check on the other branches of government and protecting people’s rights, the judiciary will have to take on new roles.\textsuperscript{29} If we want our government to be involved with the regulation of markets, then judges have to at times be economists. Similarly, when dealing with individual rights and the welfare of the state, judges at times will have to be ethicists.

There certainly are dangers associated with the expanding role of government, and with it, the role of the judiciary. As government (including the judiciary) receives more power, unelected individual judges will have a great deal of control over our society. This is the outcome that textualists try to prevent: judges imposing their own will, rather than the will of the people as expressed through the laws passed by the people’s representatives.\textsuperscript{30}

However, a closer look at textualism shows that its weaknesses prevent it from being the best theory for interpreting the Constitution. Textualism presumes a uniform, or at least a coherent and discoverable, original understanding of statutes and constitutional clauses. However, it is possible in many situations that there is not a conclusive understanding about history and, even if there were, it

\textsuperscript{27} Id. at 767–68.
\textsuperscript{28} Id. at 773.
\textsuperscript{29} See Posner, supra note 3, at 761, 767.
\textsuperscript{30} Scalia, supra note 4, at 17–18, 22.
would be very difficult for judges to find it.\textsuperscript{31} Justice Scalia makes an analogous argument while criticizing the use of legislative intent when interpreting statutes. Citing Dean Landis, he dismisses the idea that judges should search for the legislative intent as a guide for deciding cases by pointing out that this practice can be a cover for judges to in fact rule the way they think the case before them should be decided\textsuperscript{32} (just as a common law judge).\textsuperscript{33} The objection to the use of legislative intent is valid; if you are asked to decide what a reasonable person meant, you will probably say what you (as a reasonable person) would have meant.\textsuperscript{34}

Justice Scalia further argues that even if you agree with the principle of looking for legislative intent (which he of course does not), it normally does not exist. Speaking of using legislative history (which is the record of what congressional representatives said or had put in the committee report) to determine the intent of the legislature, Scalia made the following statement:

\begin{quote}
with respect to 99.99 percent of the issues of construction reaching the courts, there \textit{is} no legislative intent, so that any clues provided by the legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question.... For a virtual certainty, the majority [of both houses of Congress] was blissfully unaware of the \textit{existence} of the issue, much less had any preference as to how it should be resolved.\textsuperscript{35}
\end{quote}

Similarly, applying Justice Scalia’s argument about using legislative intent to constitutional interpretation, there is no original public understanding of how the constitutional provision would deal with the specific issue before the court. When ruling on cases stemming

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\textsuperscript{31} \textsc{Breyer, supra} note 20, at 126.
\textsuperscript{32} \textsc{Scalia, supra} note 4, at 30.
\textsuperscript{33} \textit{Id.} at 13, 18.
\textsuperscript{34} \textit{Id.} at 18.
\textsuperscript{35} \textit{Id.} at 32.
from issues of a modern society and individual rights, understanding of the past will not always contain indications on how to rule in a present-day case. Even in this type of situation, textualism does not respond to the demands placed on the judiciary.

Even if the “original public understanding” could be found, should we be bound by the public understanding of a society that existed 200 years ago? Thomas Jefferson did not think so and suggested that each generation should write its own constitution. Jefferson’s idea obviously has not caught on; we must adopt a system that allows for adaptation despite a relatively static constitution. Noted legal scholar Ronald Dwarkin points out in his response to Justice Scalia’s article that the framers of the Constitution were “Enlightenment statesmen” who knew how to be precise in their language when they felt the need to do so. Therefore, if certain constitutional provisions seem frustratingly vague to modern readers, they likely were meant to be so. They knew that they were setting up a government to deal with real lives and that these vague assertions would have to find root in more concrete laws. Textualism presumes that the framers expected the concepts of the Constitution to be filled in by the understanding of their generation and that the original understanding would be accepted as the authoritative context for all future constitutional interpretation. As Professor Laurence H. Tribe concluded, there is nothing in the Constitution suggesting that the original understanding should become binding when the Constitution was ratified or when subsequent amendments were passed.

Modern values of things such as gender and racial equality, perceptions of the role of government in the economy and welfare, and

36 See Posner, supra note 3, at 777.
39 Id. at 120–24.
40 See Tribe, supra note 20, at 69-71.
41 Id.
tolerances of speech and opinion differ from those existing at the time the Constitution was established. If our understanding of the law changes, then it is reasonable that judges uphold that new understanding. For example, textualism suggests that the freedom of speech spoken of in the First Amendment refers to the freedom of speech enjoyed by 18th century Englishmen, for that is the original public understanding of the founding generation. However, that is certainly not the understanding that we attribute to the clause today. Even if we can know the original public understanding, “we the people” should be judged by our understanding. As we look to the courts to uphold our rights as modern Americans, judges must use modern understandings.

An objection to this idea is that it is not the judge’s right to codify the new understandings of law. In referring to the interpretation of statutes, Justice Scalia says that a textualist “need not be too dull to perceive the broader social purposes that a statute is designed…to serve; or too hidebound to realize that new times require new law. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.” Applied to constitutional interpretation, this means that until the Constitution is amended, judges should bind themselves to the former view. However, the conditions of our society are changing much faster than the formal amendment process of the Constitution can facilitate corresponding changes to the Constitution.

For instance, the Sixth Amendment guarantees “in all criminal prosecutions, the accused shall enjoy the right…to be confronted by the witnesses against him.” In a case involving the sexual abuse of a young girl, state law provided that the girl could give her testimony in a separate room while the defendant, judge, and court reporters watched on closed circuit television. A majority of the Supreme Court upheld this practice as constitutional, but Justice Scalia dissented even though he admitted the practice was reason-
able.\textsuperscript{45} In his mind, the language of the Constitution has only one correct interpretation: “There is no doubt what confrontation meant— or indeed means today. It means face-to-face, not watching from another room.”\textsuperscript{46} Aside from the fact that one could see this scenario as reasonably satisfying the Sixth Amendment, the larger question is whether the courts should follow such a method of interpretation, thus requiring an amendment to allow such a situation.

This is not an excuse for unrestrained judicial activism, and certainly some changes to the Constitution must be either forced through the rigorous amendment process or not effectuated. But to require an amendment process for every new situation that, while arguably reasonable, does not find basis in the clause’s original public understanding (such as allowing a child’s testimony on closed circuit television satisfy the confrontation clause of the Sixth Amendment) would be a socially untenable solution. Such an insistence would be an impediment to the more perfect union and promotion of general welfare clearly promulgated by the framers as the reason for the Constitution. The harm to this end outweighs the benefits of a more restricted judiciary.\textsuperscript{47} Justice Scalia makes many good points and textualism has merit; however, modern expectations of government and the role of the judiciary require judges who do more than look just at the original public understanding of the text. Therefore, as a method of judicial interpretation, textualism is inadequate for the needs of our society.

\textsuperscript{45} Scalia, supra note 4, at 43.

\textsuperscript{46} Id. at 43–44.

\textsuperscript{47} Breyer, supra note 20, at 131.