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September 25, 2011: Justice Scalia at Duquesne Law School

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9/25/2011—Justice Scalia came to Duquesne Law School yesterday as the speaker at our centennial celebration. He was just as advertised: witty, charming, ideologically determined to root out all the influences of his “old friend” William Brennan from American constitutional law.

I had the same reaction to Justice Scalia’s claimed textualism yesterday that I have always had: it is not a method of interpretation, but an ideological form of politics masquerading as a method of interpretation. Therefore, it is not applied consistently, but selectively.

Why is inconsistency so damaging to Justice Scalia’s position? Because, as he would be the first to admit, a method of interpretation that one chooses on some occasions without clarity of rule about when it is to be invoked is no improvement on the nakedly normative to interpretation that Brennan practiced. It is not a method that removes normative judgment from judging.

Actually, Justice Scalia has already admitted that he is making normative judgments. Once, somewhere in his non-judicial writings, he called himself a minimal textualist who probably would not follow through if the results were sufficiently damaging to the Republic. This marks him as a sane judge, but also as a practitioner of the living constitution school. (Justice Scalia also looks to tradition since the Constitution or a provision was adopted, which is also a direct contradiction of textualism and something he refused to do with regard to guns in Heller, but I am making a different attack here).

Here are four examples from the caselaw of what I consider inconsistencies in method. To interpret “establishment” in the Establishment Clause, Justice Scalia looks to practices extent at the time of adoption of the first amendment. They worshipped God, therefore so can we. But they either did or certainly would have if the matter had come up, punished burning the American flag. So burning the flag cannot be free speech. But Justice Scalia held that it was protected.

Two: Equal Protection did not protect women from the discriminations of the common law—married women could not own property for example. Now of course it does. Justice Scalia admits that it does.

What has happened in these two examples is that we have come to see that the conceptions the founders had of speech and equality were faulty, so we have improved on them. That is the living constitution at work. Why not say that their conception of cruelty was faulty as well and find the death penalty unconstitutional? It would be the same “method”. (I could have made the same point about so-called regulatory takings, which I believe were unknown to the Constitution).

My third example is more technical. Justice Scalia interprets standing narrowly and makes no pretense of linking that conception of standing to any form of history or text. His view of standing is purely a political theory of limits on the judiciary. (and maybe a good one) The common law allowed much broader conceptions of who could sue and I doubt the modern, narrow approach can be justified.

Finally, Citizens United and the notion that corporations have constitutional rights. Here Justice Scalia has tried to say two things about history and text: that nothing in history allows the government to regulate the speech of persons in an association, including the corporate form. Second, that the text of the first amendment points to speech not speakers.

To be sure I am fair, here is how Wikipedia puts the Scalia dissent: Justice Scalia joined the opinion of the Court, but wrote a separate concurrence, joined by Justice Alito and by Justice Thomas in part. Scalia addressed Justice Stevens's dissent, specifically with regard to the notion that the court's decision was not supported by the original understanding of the First Amendment. Scalia stated that Stevens dissent was "in splendid isolation from the text of the First Amendment. It never shows why 'the freedom of speech' that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form." He further considered the dissent's exploration of the Framers' views about the "role of corporations in society" to be misleading, and even if valid, irrelevant to the text. Scalia principally argued that the first amendment was written in "terms of speech, not speakers" and that "Its text offers no foothold for excluding any category of speaker."

As to the first point, Scalia's history is wrong: at the time of the adoption of the Constitution and for a good while after, corporations were considered creatures of the state and could not have had rights against it. As to the second point, I scorn it because it should lead the Court to strike down political spending limits on China in American Presidential campaigns. Such a holding will never happen and Scalia knows it, so he can take his position in complete inconsistent irresponsibility.

More important than the failure of Scalia to follow textualism or originalism is the reason why he does not. His writing about corporations is instructive. He does not want the government to be able to silence the most trenchant critics of state policies, which are often corporations. This is a perfect example of the living constitution. The world has changed and if we are to keep our Republic, we now need corporations to counter government hegemony.

Maybe this is true. We could argue it. But it is not his claimed method. It is political philosophy. Justice Scalia: the new Bill Brennan.