What Does the Constitution Mean?

By Supreme Court Justice Antonin Scalia

I am one of a small number of judges, small number of anybody: judges, professors, lawyers; who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people. I'm not a strict constructionist; I don't like the term "strict construction. I do not think the Constitution, or any text, should be interpreted either strictly or sloppily; it should be interpreted reasonably. Many of my interpretations do not deserve the description "strict". I do believe, however, that you give the text the meaning it had when it was adopted.

This is such a minority position in modern legal circles that on occasion I'm asked during talks like these, "Justice Scalia, when did you first become an originalist? ---as though it is some kind of weird affliction that seize some people---like "When did you first start eating human flesh?"

Although it is a minority view now, the reality is that, not very long ago, originalism was orthodoxy. Everybody, at least purported to be an originalist. If you go back and read the commentaries on the Constitution by Joseph Story, he didn't think the Constitution evolved or changed. He said it means and will always mean what it meant when it was adopted.

For example, consider the history of the Nineteenth Amendment, which gave women the right to vote. Why, in 1920, did we adopt a constitutional amendment for that purpose? The Equal Protection Clause existed in 1920; it was adopted right after the Civil War. And you know that if that issue of the franchise for women came up today, we would not have to have a constitutional amendment. Someone would come to the Supreme Court and say, "Your Honors, in a democracy, what could be a greater denial of equal protection than denial of the franchise?" And the Court would say, "Yes! Even though it never meant it before, the Equal Protection Clause means that women have to have the vote." But that's not how the American people thought in 1920. In 1920, they looked at the Equal Protection Clause and said, "What does it mean?" Well, it clearly doesn't mean that you can't discriminate in voting rights---not only on the basis of sex, but on the basis of property ownership, on the basis of literacy. None of that was unconstitutional. And therefore, since it wasn't unconstitutional, and we wanted it to be, we did things the good old fashioned way and adopted an amendment.

Now, in asserting that originalism used to be orthodoxy, I do not mean to imply that judges never distorted the Constitution, of course they did. We had willful judges then, and we will have willful judges until the end of time. But the difference is that prior to the last fifty years, prior to the advent of the "Living Constitution," judges did their distortions the good old fashioned way,--they lied about it. They said the Constitution means such and such, when it was clear it never meant such and such. But now you no longer have to lie about it, because we are in the era of the evolving Constitution. And the
judge can simply say, "Oh yes, the Constitution didn't *used* to mean that, but it does now." We are in the age in which not only judges, not only lawyers, but even school children have come to learn the Constitution changes. I have grammar school students come into the court now and then, and they recite very proudly what they have been taught: "The Constitution is a living document."

Well, let me first tell you how we got to the "Living Constitution." You don't have to be a lawyer to understand it. The road is not that complicated. Initially, the Court began giving terms in the text of the Constitution a meaning they didn't have when they were adopted. For example, the First Amendment forbids Congress to abridge the freedom of speech. What does the freedom of speech mean? Well, it clearly did not mean that Congress, or government, could not impose any restrictions upon speech. Libel laws for example, were clearly constitutional. Nobody thought the First Amendment was *carte blanche* to libel someone. But in the famous case of *New York Times v. Sullivan*, the Supreme Court said, "But the First Amendment does prevent you from suing for libel if you are a public figure and if the libel was not malicious." That is to say, it is not libel if the person, or a newspaper, thought that what they printed was true. Well, that is a new standard for libel. It had never been the law. Of course it might be a good standard, and maybe states should change their libel laws. But it is clearly one thing for a state to amend its libel law and say, "We think that public figures shouldn't be able to sue." That's fine. But the Supreme Court didn’t wait for that, it said that the First Amendment, now means that if you are a public figure, that you can't sue for libel unless it's intentional, malicious. So is a “living document."

Or another example---the Constitution guarantees the right to be represented by counsel. The Sixth Amendment never meant the State had to pay for your counsel. But now it does---under a “living document”.

But the courts haven’t stopped with new meanings for words---that was only step one. Step two takes you further. Consider this: There is no text in the Constitution that you could reinterpret to create a right to abortion. So you need something more. The something more is called the doctrine of "Substantive Due Process."

Substantive due process takes its power from the Constitution’s Due Process Clause, which says that no person shall be deprived of life, liberty or property without due process of law. Now, what does this guarantee? Does it guarantee life, liberty or property? No, indeed! All three can be taken away. You can be fined, you can be incarcerated, you can even be executed, but *not without due process* of law. It's a procedural guarantee. But the Court said there are some liberties that are so important, that no process will suffice to take them away. Hence, substantive due process.

Now, what liberties are they? The Court will tell you. Be patient. When the doctrine of substantive due process was initially announced, it was limited----the Court said it (substantive due process) embraces only those liberties that are fundamental to a democratic society and rooted in the traditions of the American people. But now that limitation is eliminated. Within the last twenty years, we have found that Due Process covers the right to abortion, which was so little rooted in the traditions of the American
people that it was criminal for two hundred years. Also, the right to homosexual sodomy, which was so little rooted in the traditions of the American people that it was criminal for two hundred years.

So it is literally true, and I don't think this is an exaggeration, that the Court has essentially liberated itself from the text of the Constitution, from the text, and even from the traditions of the American people. It is up to the Court to say what is covered by substantive due process. What are the arguments usually made in favor of the Living Constitution? As the name of it suggests, it is a very attractive philosophy, and it's hard to talk people out of it: the notion that the Constitution grows. The major argument is the Constitution is a living organism, it has to grow with the society that it governs or it will become brittle and snap.

This is the equivalent of, an anthropomorphism equivalent to what you hear from your stock broker, when he tells you that the stock market is resting for an assault on the 11,000 foot level. As if the stock market panting at some base camp. The stock market is not a mountain climber and the Constitution is not a living organism for Pete's sake; it's a legal document, and like all legal documents, it says some things, and it doesn't say other things.

And if you think that the aficionados of the living Constitution want to bring you flexibility, think again. My Constitution is a very flexible Constitution. You think the death penalty is a good idea: persuade your fellow citizens and adopt it. You think it's a bad idea: persuade them the other way. That's flexibility. That's democracy in action. But to read either result into the Constitution is not to produce flexibility, it is to produce what a constitution is designed to produce: rigidity.

Abortion, for example, is off the democratic stage. It can no longer be debated because it is constitutionally protected. So, for whatever reason you might like the Living Constitution, don't like it because it provides flexibility. That's not the name of the game.

Some people also seem to like the Living Constitution idea because they think it's a "good liberal thing". That somehow this is a conservative/liberal battle, and conservatives like the old-fashioned Originalist Constitution and liberals ought to like the Living Constitution. That's not true either. The dividing line between those who believe in the Living Constitution and those who don't is not at all the dividing line between conservatives and liberals, because Conservatives are willing to grow the Constitution to cover their favorite causes just as liberals are---look at this case for example.

It is called BMW v. [Gore]. Not Al Gore---another Gore. Mr. Gore had bought a BMW, which is a car supposedly advertised as having a superb finish, baked seven times in ovens deep in the Alps, by dwarfs. But Gore’s BMW apparently had gotten scratched on the way over. They did not send it back to the Alps, they took a can of spray-paint and fixed it. And Gore found out about this and was furious, and he sued. He got his compensatory damages, a couple of hundred dollars, the difference between a car with a better paint job and a worse paint job. Plus, $2 million against BMW for punitive
damages for being a bad actor, which is absurd of course, so it must be unconstitutional. BMW appealed to the Supreme Court, and my court said, "Yes, it's unconstitutional." In violation of, I assume, the Excessive Damages Clause of the Bill of Rights? So you have a federal question whenever you get a judgment in a civil case. Well, that one the conservatives liked, because conservatives don't like punitive damages, and the liberals gnashed their teeth.

I dissented because it is not a constitutional issue.

Finally, they say in politics, you can't beat somebody with nobody. So I ask, if you don't believe in originalism, then what is your principle of interpretation? Being a non-originalist is not enough. You see, I have my rules that confine me. I know what I'm looking for. When I find it, the original meaning of the Constitution, I am handcuffed. If I believe that the First Amendment meant (when it was adopted) that you are entitled to burn the American flag, I have to decide that way, even though I don't like it. But what is the criterion that governs the “living constitution” judge? What can you possibly use, besides original meaning? Think about that. Natural Law? We all agree on that, don't we? The philosophy of John Rawls? That's easy. There really is nothing else.

And so we end up with the new confirmation process for judges, wherein we want to only confirm people that would write the Living Constitution that we would want. We now look for people who agree with us (whoever is in the majority) as to whether there ought to be this right, that right, and the other right. And that is why you hear in the discourse on this subject, people talking about moderate, we want moderate judges. What is a moderate interpretation of the text? Halfway between what it really means and what you'd like it to mean? There is no such thing as a moderate interpretation of the text.

I think the very terminology suggests where we have arrived: at the point of selecting people to write a constitution, rather than people to give us the fair meaning of one that has been democratically adopted. And when that happens, when the Senate interrogates nominees to the Supreme Court, "Judge so and so, do you think there is a right to this in the Constitution? You don't? Well, my constituents think there ought to be, and I'm not going to appoint to the court someone who is not going to find that “right” in the Constitution"---when we are in that mode we have rendered the Constitution useless, because the Constitution will mean what the majority wants it to mean. And that of course, deprives the Constitution of its principle utility. The Bill of Rights is devised to protect you and me against the majority. My most important function on the Supreme Court is to tell the majority to take a walk. And the notion that the justices ought to be selected because of the positions that they will take that are favored by the majority is a recipe for destruction of what we have had for two hundred years.