

Session 6 Scalia and Dworkin on Statutory Interpretation

Scalia, “Common-Law Courts in a Civil-Law System”

What are we looking for when we construe a statute?

- **The intent of the legislature?**
 - Scalia says of this approach that it is “incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” (151-152)
 - He compares it to Nero’s posting edicts so high they can’t be read.
 - Law has a publicity requirement: those bound by it must be in a position to know what it’s telling them to do.
 - Then there’s the “practical” threat that Scalia thinks is much more pressing: that judges will use a supposed effort to determine the legislature’s intent to promulgate their own desires and ends and view of what the law should be – “extending their law-making proclivities from the common law to the statutory field.” (p. 152)
 - Example: *Church of the Holy Trinity v. United States*
 - Questions: *Is it clear that the “intent of the legislature” approach is less democratic than the approach defended by Scalia (and later Dworkin)?*
 - *Is it clear that Scalia’s own view meets the publicity requirement?*
- **“Objectified” intent:** the intent a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*
 - Interpreter should correct for “*lapsus linguae*” and “scrivener’s error” – clear mistakes of expression, but not for mistakes of legislative wisdom (unforeseen and unintended consequences of legislation).
 - *Does this view meet the publicity requirement?*
- **Textualism** is the doctrine that what we are looking for is some kind of “objectified intent” – what Dworkin later calls “semantic intent”
 - Scalia contrasts his view with “strict constructionism” (the gun example)
 - Question: *does ruling that the law does not cover that sort of use of a gun require appealing to legislative intent?*
 - Scalia: “Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.” (154)

- **Interpreting the Constitution**

- “[T]he context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than a narrow interpretation – though not an interpretation that the language will not bear.” (155)
- Scalia: our interest should be not in the drafter’s intent but in the “original meaning of the text”.
 - *Why care about the original meaning of the text?*
 - *Is this accessible to ordinary citizens today? Does it meet the publicity requirement?*
 - *Is this approach compatible with democratic theory? Why should we be bound in this way by the decisions of 200+ years ago?*
- This is not always a straightforward matter: some words are ambiguous, and must be interpreted in context; sometimes old words must be applied to new and unforeseen phenomena (e.g. new technologies).
 - *How does a textualist do this?*
 - Example: death penalty can’t be ‘cruel and unusual’ since its use is explicitly contemplated elsewhere in the document.
 - *Does this follow? Consider Dworkin’s “mink” example...*
- The “Living Constitution” model:
 - Scalia characterizes this as a model on which the meaning of the Constitution changes with time
 - Did the death penalty *become* unconstitutional on that model?
 - It tells judges to interpret statute (i.e. the Constitution) the same way they’re supposed to interpret the common law, in accord with the changing needs of society.
 - Scalia: this is undemocratic. What justifies treating a democratically adopted text like common law?
 - Hard to change?
 - Intended to protect rights of minorities? (Scalia himself suggests the document was intended to protect individual rights against the excesses of majoritarian democracy.)
 - Adopted long ago?
 - Pragmatic argument for the “living” model: the Constitution needs to be flexible/adaptive to survive.
 - Scalia: but with recent interpretation its become *less* flexible – its been interpreted as imposing a vast array of new constraints.
 - (But these are common-law constraints –more easily revisable than the Constitution itself...)
 - Scalia: evolution has not always been in the direction of greater personal liberty, which is what the Constitution is supposed to protect.

- *Say Scalia is right that the purpose of the Constitution, at the time of its adoption, was “antievolutionary.” Why should this matter to its interpretation? On his textualist view?*
- Scalia ends by suggesting the real worry raised by the “living Constitution” model is not that it’s antidemocratic (as he has been suggesting thus far) but that it fails to protect individuals against the excesses of democracy. (Dworkin points out this tension in Scalia’s arguments for textualism.)
 - Judicial appointments will be come battles over the political/moral persuasions of the nominees.
 - We’ll end up with majority rule on rights-issues.
 - *It seems like Scalia’s right about the effect on judicial nomination battles. But is he right about the effect on rights? Dworkin things not.*

Dworkin, “Comment”

- **Distinction between “semantic intention” and legislative expectations**
- Difference between what the lawmakers intended to say and what they intended to achieve by what they said.
 - Boss example: Appoint the most qualified candidate.
- Scalia’s textualism takes *semantic intention* to be relevant to interpretation.
 - *Is this right? Is there a difference between speakers’ semantic intention and the meaning “the language will bear”? Between what the speaker means and what it is reasonable for others to understand her to be saying?*
 - *As Dworkin argues, it’s far from clear that there is a unique thing the speakers behind the Constitution (the Framers) meant to be saying (or meant to achieve). Ambiguity of language may be part of a self-conscious effort to compromise.*
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- Example: The Eighth Amendment forbidding “cruel and unusual punishment”:
 - Two possible interpretations (“translations”):
 - “punishments widely regarded as cruel and unusual at the date of this enactment”
 - “whatever punishments are in fact cruel and unusual”
 - There may be agreement that cruel and unusual punishments should be prohibited even if there is no agreement about what counts as cruel and unusual...
 - Explicit contemplation of capital punishment elsewhere in the Constitution can be explained by the fact that Framers may not have recognized its cruelty (mink example).
 - No change in the status of capital punishment over time (just a change in the recognition of its status)
 - Scalia misses the point of the mink example. Dworkin’s point isn’t that the statute against hunting endangered

species *first doesn't apply to minks* and then *does*, because minks become endangered.

- His point is that even if the legislators did not expect their statute to cover minks, because they believed minks weren't endangered (and even if there's textual evidence of this expectation), we should think the law, interpreted according to *semantic originalism*, *does apply to minks if they're in fact endangered*, regardless of whether the legislators believe they are.
- *Scalia* suggests a third interpretation: "Whatever punishments we consider cruel today." *Is this different from the first?* He says this, too, is a general principle, rather than a list of enumerated punishments (that's why he can apply it to methods of torture not known in the late 18th century). Is it more plausible to read the 8th amendment as banning punishments that were and are *in fact* cruel, or that would have been judged cruel by the Framers' contemporaries? (Consider, again, the "endangered species" case.)
- If *Scalia's* interpretation is right, judges' legal reasoning involves doing something like historical linguistics and cultural history. If *Dworkin's* is right, then it involves doing moral reasoning.
- Similar questions are, of course, raised by the equal protection clause (what counts as equal protection?) and by many other clauses of the Constitution.

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