

SEARCH

NYT Since 1981

Search

TimesSelect

NEWS TRACKER

TIMES FILE

[Editorials/Op-Ed Home](#)[Editorials](#)[Columnists](#)[Contributors](#)[Letters](#)[New York/Region Opinions](#)

Think Again

Stanley Fish

April
9

9:00 pm

Why Scalia Is Right

Categories: [The Constitution](#)

Antonin Scalia is the most theatrical of the present Supreme Court justices. (He's also the best stylist, but that's a subject for another day.) It's not clear whether he seeks the spotlight or it seeks him, but he seems incapable of not occupying it. In the past couple of months he has responded to a reporter's question with a gesture thought by some to be obscene — he denies this — and, in a speech given to the Federalist Society in Puerto Rico, he characterized those who disagreed with him on a point of interpretive theory as “idiots.”

He was talking about the view, which he has often criticized but not yet succeeded in killing, that the meaning of the Constitution changes as society changes. Rather than being fixed in time, the Constitution (the story goes) is continually evolving in response to unforeseen circumstances and improvements in our moral and political understanding. In short, the Constitution is a living organism, not a dead letter.

In the speech in Puerto Rico, Justice Scalia rehearsed the argument — “The Constitution ... has to change with society ...” — and then brusquely dismissed it: “But you would have to be an idiot to believe that.” The indignant bloggers and commentators who accuse him of everything from arrogance (there's something to that) to racism act as if this bit of name-calling were all Justice Scalia had to offer. But in fact he immediately offered the reasons for his severe judgment. First, he reminded his audience of the obvious: “The Constitution is not a living organism, it is a legal document.” And then he explained succinctly, and in my view correctly, what it means to be a legal document or, for that matter, any kind of document at all. “It says something and doesn't say other things.”

This might strike some as cryptic, so let me provide a gloss. A document (or text) is a vehicle of communication, and for communication to occur, some message, not all messages, must be conveyed. A document that said everything — that had no particular meaning, but various and expanding meanings — would say nothing; it would be not a document but a kaleidoscope or a Rorschach test. The Constitution is most certainly a document, and therefore it must say something, and it is the job of interpreters to figure out what that something (which can't be everything) is.

Not only does this argument make perfect sense; the integrity and seriousness of the interpretive effort depend on it. Only if the Constitution is assumed to send a message that does not change over time can the claim of an interpretation to be right or an assertion that it is wrong be intelligible. In order to be right or wrong about something, that something must precede, and be independent of, your efforts to figure out what is. What a document is at the beginning — when it is drafted — will always be what it is. The Constitution cannot be a living organism.

Justice Scalia's critics do not respond to this chain of reasoning, but instead pose what they take to be a series of devastating questions. If the Constitution's meaning is fixed and unchanging, asks Paul Greenberg, a columnist for the Joplin Globe in Missouri, how do you explain the fact that it has been “subject to different interpretations over the years?” Easy. Justice Scalia's thesis is not that the Constitution's meaning will be perspicuous and agreed on by everyone. His thesis is that the Constitution has a meaning. The history of its interpretation is a history of successive efforts to specify what that meaning is. Each of these efforts will produce a different account of that meaning, but the meaning itself will always be the same. For if it were not, there would be no point to the history.

But isn't it true (a second question) that the meanings of words themselves change? Yes, they do, which is why it is important to determine (if you can) what the original author(s) meant by a word and not go immediately to what you mean by it or to what you might want it to mean, for you are not the author.

Is Justice Scalia saying (a third question posed by blogger Wayne Besen) that “American jurisprudence has not evolved in two centuries?” No, he is identifying the jurisprudential goal, which is to figure out what the Constitution means. In time,



Stanley Fish is the Davidson-Kahn Distinguished University Professor and a professor of law at Florida International University, in Miami, and dean emeritus of the College of Liberal Arts and Sciences at the University of Illinois at Chicago. Mr. Fish has also taught at the University of California at Berkeley, Johns Hopkins and Duke University. He is the author of 10 books.

[» Read Full Biography](#)

Search This Blog

RSS

Categories

- [The Constitution](#)

Previous Entries

- [Why Scalia Is Right](#)
- [Guest Columnist Archive](#)

Related Articles

- [Previous Articles by Stanley Fish](#)

interpreters may draw closer to that goal or move further away from it, and in some sense their efforts are evolving but the meaning they are in search of does not evolve (for if it did there would be nothing to search for).

In general, Justice Scalia's critics confuse a fact about the history of interpretation (it will produce different results at different times) with an interpretive mandate (the job is to produce different results as society needs them). The fact follows from the non-transparency (sometimes, not always) of language and the fallibility of interpreters. The mandate, were it acted upon in the name of a Living Constitution, would direct us not to interpret better, but to abandon interpretation altogether in favor of making the text mean what we want it to mean. Those who think we should go this route may not be idiots, but they are certainly wrong.

[Link to This](#)[Comments \(143\)](#)