# Off With Their Heads! - The Constitution According to Scalia

Imagine it: this summer, or next, Antonin Scalia may come before the Senate to be confirmed as the next Chief Justice. (Frightening, thought, isn't it?) When and if that happens, the Senators will all have an opportunity to ask him questions about his positions on various issues that may come before the Court. They will likely start by asking him the same kinds of questions they asked him in 1986 when he was first confirmed as an Associate Justice. (1)

Senator Kennedy: "Judge Scalia, if you were confirmed, do you expect to overturn the Roe v Wade?"

Scalia (Looking, one imagines, stunned at the temerity of the question): "Excuse me?"

Kennedy: "Do you expect to overturn the Roe v Wade Supreme Court decision if you are confirmed?"

Scalia: "Senator, I do not think it would be proper for me to answer that question."

Former Senator, former Chairman of the Senate Judiciary Committee, and former segregationist, Strom Thurmond: "I agree with you. I do not think it is proper to ask any question that he has to act on or may have to act on."

What about affirmative action, Judge? "Senator, I really do not think I should give my view."

Well, do you think death row inmates get too many post-trial appeals? "I should not have a view about it." Do you agree with the Court's current reading of the equal protection clause? "I do not think I should be in the position of saying whether I agree or disagree with the Supreme Court."

Um, what about Miranda warnings? "assuming the question is not, you know what do I think as to the extent to which those warnings, in one circumstance or another, are required by the Constitution."

The tactic is for the nominee to avoid answering any question about what he or she might actually think is, you know, required by the Constitution. Of course, the purpose of having a candidate come before the Senate in the first place is precisely so that the Senate may determine how the potential justice will determine whether and to what extent something is required by the Constitution. The purpose of confirmation is to determine a candidate's fitness for the highest bench in America. Conservatives would like fitness to mean "he knows the law," as if the law were some immovable, unchangeable monolith. They argue that questions regarding matters that might come before the court are inappropriate because judges are supposed to be neutral. Judges are supposed to have no opinions-as if judges, newly faced with a question of constitutional significance, will look at the matter with no preconceived notions, no political feeling, no background of experience or insight. The perfect judge, in this view, is a computer. Type in the numbers, apply the correct legal equation, and out comes the correct, and only correct, answer.

The problem with this view is that this is not how the law works. There is rarely one correct answer to any legal question. In fact the right answer to any legal question, as every first year law student quickly learns, is "it depends." It depends on the facts at hand. It depends upon which law (state, federal or local; common law or statutory) is applied, upon which court you find yourself in; and most of all, it depends on who the judge is. In the end the judge has enormous discretion in deciding any case, and the law is almost always flexible enough to allow him to answer any question in more than one way. And in the end judges, like everyone else, are inclined to decide disputed questions based on their ideology. Thus, Antonin Scalia can find against civil rights claimants 70% of the time, while Justices Marshall and Brennan tended to find for these same claimants in nearly 90% of the cases brought before them. Ideology is central to how a judge works. This is why conservative nominees avoid answering questions likely to expose their ideology.

The avoidance tactic was successfully used by Scalia and his Republican supporters on the Committee in 1986 to keep him from answering any meaningful questions about his views of the Constitution. Now all of us have to live with the failure of the Senators to delve, and with Scalia's failure to be candid. This is why it is so important for Democratic Senators to keep up the pressure on Bush nominees-to prevent those nominees from hiding their ideological preferences in the name of a non-existent neutrality.

An imaginative Senator (if hat is not an oxymoron) it seems to me, could find ways around this kind of stonewalling. For the less imaginative Senators I offer this suggestion: ask Scalia, and any other Bush nominees that may come up, questions they won't be expecting, questions which, while they go to the heart of the Constitution, are not part of the current series of "litmus test" answers conservative candidates think they shouldn't be forced to give. In my imaginary confirmation hearing, one bright Senator would ask this question:

"Justice Scalia, in your view, does the Constitution prohibit the execution of innocent persons?"

Most Americans, I hope and believe, would expect a potential Supreme Court justice to answer the question-whether the Constitution says the government may not subject an innocent person to execution-with a simple, uncompromising "Yes."

"Yes. The Constitution absolutely prohibits the execution of innocent persons."

Most Americans would expect this answer because most Americans believe, as they should, that the Constitution, if it does nothing else, protects all citizens from the most egregious forms of governmental injustice and oppression. If they remember any part of the Constitution at all, average Americans are likely to remember the preamble, with its declarations of Justice, Tranquility, and Liberty, and its open support for the greater good of all Americans.

That is not the Constitution Antonin Scalia reads. And the answer Antonin Scalia would have to give to the question-Does the Constitution prohibit the execution of innocent persons?-is a simple, uncompromising "No." Scalia's answer can be found in his decisions and extra-judicial statements about rights, punishment and the Constitution.

The first thing to know about Scalia is that he is an originalist. An originalist is one who reads the Constitution to mean only what it meant when it was written. Recently, Scalia has said "the Constitution that I interpret and apply is not living but dead," which brings to mind the startling image of Scalia as pathologist, picking over the corpse of our Constitution, searching it for clues as to what its demise might mean for the rest of us. Scalia and other conservatives have said that this Constitutional view is the best because it limits the judge in his reading and thus prevents him from engaging in "judicial activism." Judicial activism is bad, according to this view, because it is undemocratic; it is the judge "making" law from the bench. Scalia rejects any notion of the "evolving standards of decency," a phrase at the core of modern death penalty jurisprudence, because to apply a modern judge's notion of decency is to impose that sense of decency on the rest of the population. If the population had such a sense of decency, they would, through the legislature, pass a law that said the death penalty should be applied only when it doesn't offend "our evolving sense of decency." That we as a society have not passed such a law means that we don't have such a standard of decency, and the judge has no business imposing his standard of decency on us, even if it for our own good.

This constitutional view would, by definition, have precluded the decision in Brown v Board of Education outlawing segregation-which is and of itself reason enough to reject this constitutional view. But there are other, more current reasons for rejecting originalism as a theory, and for denying Scalia and his ilk the opportunity to impose their view of the Constitution on the rest of us.

When it comes to capital punishment, the most essential part of the Constitution is the 8th Amendment, which reads, in its entirety, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." When the Supreme Court examines this language it has to decide what "cruel and unusual punishment" means.
In the 1970's the court had adopted an approach which understood cruel and unusual by measuring it against (in a phrase we have already seen) society's "evolving standards of decency." That is, any method of punishment current society finds abhorrent would be inherently unconstitutional because it would be, by definition, cruel and unusual.
This is what is meant by a living constitution-one that grows and evolves with the society it defines.
This is the Constitution Scalia rejects. In his confirmation hearings in 1986, Scalia discussed the 8th Amendment as it would be understood by an originalist. "The cruel and unusual punishment clause would mean precisely the same thing today that it meant in 1789." In 1986, Scalia was as yet a hesitant originalist.

He told the Senators that he wasn't sure if he agreed with the originalist view, because it would have to mean that "if lashing was fine then, lashing would be fine now." Even Antonin Scalia was not ready to get up before the United States Senate and tell them that while lashing was certainly distasteful it was not unconstitutional. "I have always had trouble with lashing, Senator. I have always had trouble thinking that is constitutional."

That was then. Since then one thing has changed. Scalia is no longer bucking for a job. He's got lifetime tenure on the highest court in the land. Now lashing is just fine. As is the death penalty. And not just for murder. Now apparently he wouldn't have a problem with using it "for all felonies." Just so long as a punishment is passed by a legislature, it will pass muster with Scalia.

There are a few things the Cruel and Unusual punishments clause would preclude in the Constitution according to Antonin Scalia. According to Scalia these punishments are what he calls "always and everywhere 'cruel' punishments, such as the rack and the thumbscrew." (2) I'm sure we all find that comforting. Of course, Scalia wrote this in a decision in which he said-in dissent, thankfully-that it is perfectly all right to execute retarded people (down to an I.Q. of about 25). In another decision (this time not in dissent) Scalia said that the Constitution has nothing to say about executing children down to at least the age of 14 and, "theoretically" anyway, executing "anyone over the age of 7." (3)

Perhaps the most frightening thing about this last decision is that it came just a year after the Court had pronounced it a violation of the cruel and unusual punishments clause to execute a boy who was 15 at the time he committed the crime he was sentenced to die for. (4) What changed in that year? First, Kennedy came on board, thereby strengthening the right-wing of the Court. Second, O'Connor, who the year before had blinked at frying fifteen year-olds, had no such qualms about executing 16 or 17 year olds. The suddenness of the change shows just how vulnerable the Constitution is to the political process and to the ideology the conservatives pretend doesn't exist-one vote, one new member, and last year's low point is now high above the water line. With the Supreme Court it is important to remember that no matter how bad things are, they can always get worse.

So, in the Constitution according to Antonin Scalia, we can execute the retarded and children down to the age of 14 (and "theoretically" down to the age of 7). We can execute people for almost any felony, because that is what the founders did. The only thing prohibited by the Cruel and Unusual Punishments clause are what Scalia calls "modes" of punishment-flaying someone alive, for example, or "rendering them asunder with horses" and that sort of thing. I feel better knowing that Antonin Scalia would protect my right not to be rendered asunder. But he only has a problem with that sort of punishment because at the time of the adoption of the Constitution, these things were "wholly alien to the spirit of our humane general constitution" (this is Scalia quoting another writer-he himself often mocks the notion that the Constitution is 'humane'). (5) Scalia acknowledges that the Cruel and Unusual Punishments clause was inserted into the Constitution as a reflection of "the improved spirit of the age." (6)

Apparently once the founders put the clause into the Constitution the possibility of improvement stopped. According to Scalia, an unprincipled, even an evil, Constitution is perfectly acceptable because, after all, the Constitution allowed for slavery. Why then should we believe the Constitution reflects our highest ideals? Who are we to think we know evil when we see it better than did the founders? If slavery and lashing and executing seven year-olds was all right by them, it must be all right by us, and there's absolutely nothing we (the Court) can do about it.

Occasionally I find myself thinking that Antonin Scalia is simply nuts. I begin to think this way when I read opinions like the concurrence he wrote in a case called Herrera v Collins. (7) In Herrera, Justice Scalia said that even if a person had obtained evidence after trial which showed that he was actually innocent of the crime for which he had been convicted, he could still be legally put to death by the state. Wow. You don't believe me? Here then, in his own words, is the Honorable Justice Antonin Scalia:
"There is no basis in text, tradition, or even contemporary practice for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Allow me to translate-if evidence of your innocence is found after you've been convicted, you have no right to have that evidence brought to the attention of a court. Wait, there's more: "I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate." Here Scalia means to say that once you've had

your shot in court, you're done, whether or not justice has been served, or whether you are actually guilty or not.
And finally, "If the system shocks the dissenter's conscience [i.e., the consciences of those Justices who think the Constitution should not and does not allow for the legal execution of an innocent person] perhaps they should doubt the calibration of their consciences." Translation: if you don't like this system, then you are too squeamish. Get over it. And here I thought the Constitution was here to protect my civil rights; I thought that not being murdered by the state for no reason at all was one of my protected rights. How nave I was. Not only is the Constitution perfectly consonant with manifest evil-I think we can all agree that killing innocent people is evil-but if you have a problem with that then there is something wrong with your conscience.

To give the devil his due (as they say), Scalia says that he thinks it would be improbable if a case "of [actual] innocence would fail to produce an executive pardon." He might be right. The innocent death row inmate might be lucky enough to have a George Ryan in the governor's chair of his state. Then again, he might be unlucky enough to have a George W. Bush.
The point, though, is that an innocent person should not have to count on good luck or the good will of a governor to decide his fate. The innocent person, or so I once believed, is protected by the rights enumerated in the Constitution, and the judicial procedures put in place to protect these rights. The constitution according to Antonin Scalia may contain such protected rights, but not being executed despite having committed no crime, and despite being able to show that one has committed no crime, does not appear to be one of them.

What happens when the Senate fails to delve into the ideology of a potential Supreme Court justice is that the ideological background the judge uses to interpret the Constitution goes unrevealed. In this case, a little delving might have revealed that Scalia has little regard for any baseline 'substantive' rights-rights which can never be violated, no matter how elaborate and protective the process given to protect them may be. Scalia is content with 'procedural due process'-he believes that if you've had your fair trial and everything attendant upon it, the Constitution does not demand that you get more, no matter what facts may later turn up.

Those of us who believe in substantive rights view the Constitution as a floor below which the government may not go. For Scalia and other right-wing conservatives, the Constitution is a ceiling above which the government has no responsibility to go, no matter how awful the outcome. These two Constitutions are enormously different, and result in significantly different outcomes for real people in real courts attempting to vindicate real rights.

Imagine another Antonin Scalia on the Court. Imagine a bench full of Scalias. Then let us hope that the Democrats in the Senate will continue to show the backbone they've recently discovered in the area of judicial nominees. Let's hope they ask tough, smart questions, and that they don't let dissemblers and avoiders off the hook. Let's hope they keep another Scalia from making his way onto the bench. In a very real sense, the lives of innocent men and women may depend upon it.

1/ For the following quotes see: Volume 13 of The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1986. Roy M. Mersky & J. Myron Jacobstein, eds. William S. Hein & Co. 1989.

2/ "God's Justice and Ours," First Things 123 (May 2002); 17-21.

3/ Stanford v Kentucky, 492 U.S. 361 (1989)

4/ Thompson v Oklahoma, 487 U.S. 815 (1988)

5/ Harmelin v Michigan, 501 U.S.957 (1991)

6/ citing J. Bayard, A brief Exposition on the Constitution of the United States 154 (2d ed. 1840)

7/506 U.S. 390 (1993)

(source: CounterPunch (Michael J. Fellows lives in Northampton, MA. Fellows is an editor at the Western New England Law Review and is working on a book about Scalia's views of the constitution.)