**Quotations**

**ORIGINALISM**

*Originalism: The Lesser Evil by Antonin Scalia*

“Non-originalist opinions have almost always had the decency to lie, or at least to dissemble, about what they are doing – either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court’s desires, or else not discussing original intent at all”

“But what is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material – in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material – many of the reports of the ratifying debates, for example, are thought to be quite unreliable, And further still, it requires immersing oneself in the political and intellectual atmosphere of the time – somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer”

“I can be much more brief in describing what seems to me the second most serious objections to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of stare decisis.”

Originalism may, on occasion, lead to the conclusion that some Constitutional provisions have an evolving meaning. Perhaps the cruel and unusual punishment clause originally meant “cruel and unusual for the ages in question.”

* “But to be faithful to originalist philosophy, one must not only say this but demonstrate it to be so on the basis of some textual or historical evidence.”
* “When one goes down that road, there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of the whole cloth) an original evolutionary intent, and the latter thinks that superfluous.”

“A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values’…The purpose of of constitutional guarantees – and in particular those constitutional guarantees of individual rights that are at the center of this controversy – is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”

Stare decisis?? Perhaps talk to Prof. HB

Scalia worries that relying on “fundamental values” as the touchstone of constitutionality creates problems because “It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society.’”

* Continues to say, “One might reduce this danger by insisting that the new ‘fundamental values’ invoked to replace original meaning be clearly and objectively manifested in the laws of the society.”

“The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values – so that as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise.”

“That – to conclude this largely theoretical talk on a note of reality – is the real dispute that appears in the case: not between nonoriginalists on the one hand and pure originalists on the other, concerning the validity of looking at all to current values; but rather between, on the one hand, nonoriginalists, fainthearted originalists and pure-originalists-accepting-for-the-sake-of-argument-evolutionary-content, and, on the other hand, other adherents of the same three approaches, concerning the nature and degree of evidence necessary to demonstrate that constitutional evolution has occurred”

**TEXTUAL EVIDENCE**

13th Amendment:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

14th Amendment

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability**.**

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

15th Amendment

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

**HISTORY & DEBATE**

*The Second Founding by Eric Foner*