



legally SPEAKING

The Originalist

Last October marked the 24th anniversary of Justice Antonin Scalia's appointment to the U.S. Supreme Court. Well known for his sharp wit as well as his originalist approach to the Constitution, Justice Scalia consistently asks more questions during oral arguments and makes more comments than any other Supreme Court justice. And according to one study, he also gets the most laughs from those who come to watch these arguments. In September Justice Scalia spoke with UC Hastings law professor Calvin Massey.



Justice
Antonin Scalia

➔ To watch the full interview, go to www.callawyer.com.

Q. How would you characterize the role of the Supreme Court in American society, now that you've been a part of it for 24 years?

I think it's a highly respected institution. It was when I came, and I don't think I've destroyed it. I've been impressed that even when we come out with opinions that are highly unpopular or even highly—what should I say—emotion raising, the people accept them, as they should. The one that comes most to mind is the election case of *Bush v. Gore*. Nobody on the Court liked to wade into that controversy. But there was certainly no way that we could turn down the petition for certiorari. What are you going to say? The case isn't important enough? And I think that the public ultimately realized that we had to take the case. ... I was very, very proud of the way the Court's reputation survived that, even though there are a lot of people who are probably still mad about it.

You believe in an enduring constitution rather than an evolving constitution. What does that mean to you?

In its most important aspects, the Constitution tells the current society that it cannot do [whatever] it wants to do. It is

a decision that the society has made that in order to take certain actions, you need the extraordinary effort that it takes to amend the Constitution. Now if you give to those many provisions of the Constitution that are necessarily broad—such as due process of law, cruel and unusual

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punishments, equal protection of the laws—if you give them an evolving meaning so that they have whatever meaning the current society thinks they ought to have, they are no limitation on the current society at all. If the cruel and unusual punishments clause simply means that today's society should not do anything that it considers cruel and unusual, it means nothing except, "To thine own self be true."

In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we've gone off in error by applying the 14th Amendment to both?

Yes, yes. Sorry, to tell you that. ... But,

you know, if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohib-

its it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box. You don't like the death penalty anymore, that's fine. You want a right to abortion? There's nothing in the Constitution about that. But that doesn't mean you cannot prohibit it. Persuade your fellow citizens it's a good idea and pass a law. That's what democracy is all about. It's not about nine superannuated judges who have been there too long, imposing these demands on society.

What do you do when the original mean-

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ing of a constitutional provision is either in doubt or is unknown?

I do not pretend that originalism is perfect. There are some questions you have no easy answer to, and you have to take your best shot. ... We don't have the answer to everything, but by God we have an answer to a lot of stuff ... especially the most controversial: whether the death penalty is unconstitutional, whether there's a constitutional right to abortion, to suicide, and I could go on. All the most controversial stuff. ... I don't even have to read the briefs, for Pete's sake.

Should we ever pay attention to lawyers' work product when it comes to constitutional decisions in foreign countries?

[Laughs.] Well, it depends. If you're an originalist, of course not. What can France's modern attitude toward the French constitution have to say about what the framers of the American Constitution meant? [But] if you're an evolutionist, the world is your oyster.

You've sometimes expressed thoughts about the culture in which we live. For example, in *Lee v. Weisman* you wrote that we indeed live in a vulgar age. What do you think accounts for our present civic vulgarity?

Gee, I don't know. I occasionally watch movies or television shows in which the f-word is used constantly, not by the criminal class but by supposedly elegant, well-educated, well-to-do people. The society I move in doesn't behave that way. Who imagines this? Maybe here in California. I don't know, you guys really talk this way?

You more or less grew up in New York. Being a child of Sicilian immigrants, how do you think New York City pizza rates?

I think it is infinitely better than Washington pizza, and infinitely better than Chicago pizza. You know these deep-dish pizzas—it's not pizza. It's very good, but ... call it tomato pie or something. ... I'm a traditionalist, what can I tell you? 🍕

For the full interview, go to www.callawyer.com.