

FOREWORD

JUSTICE ANTONIN SCALIA

In introducing these essays devoted to the philosophy of constitutional interpretation known as originalism, it would be foolish to pretend that that philosophy has become (as it once was) the dominant mode of interpretation in the courts, or even that it is the irresistible wave of the future. The interpretive philosophy of the “living Constitution”¹—a document whose meaning changes to suit the times, as the Supreme Court sees the times—continues to predominate in the courts, and in the law schools. Indeed, it even predominates in the perception of the ordinary citizen, who has come to believe that what he violently abhors must be unconstitutional. It is no easy task to wean the public, the professoriate, and (especially) the judiciary away from such a seductive and judge-empowering philosophy.

But progress has been made. Twenty years ago, when I joined the Supreme Court, I was the only originalist among its numbers. By and large, counsel did not know I was an originalist—and indeed, probably did not know what an originalist was. In their briefs and oral arguments on constitutional issues they generally discussed only the most recent Supreme Court cases and policy considerations; not a word about what the text was thought to mean when the people adopted it. If any light was to be shed on the latter question, it would be through research by me and my law clerks. Today, the secret is out that I am an originalist, and there is even a second one sitting with me, Justice Clarence Thomas. Rarely, nowadays, does counsel fritter away two out of nine votes by failing to address what Justice Thomas and I consider dispositive. Originalism is in the game, even if it does not always prevail.

Sometimes, moreover, it does prevail, as in *Crawford v. Washington*,² a thoroughly originalist Supreme Court opinion that

1. *Rummel v. Estelle*, 445 U.S. 263, 307 (1980) (Powell, J., dissenting).

2. 541 U.S. 36 (2004)

brought the Confrontation Clause³ back to its moorings after twenty-four years adrift in the Sea of Evolutionism had reduced it to nothing more than a guarantee that hearsay accusations would bear unspecified “indicia of reliability.”⁴ Or in *Apprendi v. New Jersey*,⁵ where fidelity to the original meaning of the Sixth Amendment’s jury-trial guarantee put an end to a movement in both state and federal legislation to impose mandatory sentence enhancements (i.e., additional jail time) on the basis of aggravating facts found to be true only by a judge, and by a mere preponderance of the evidence.⁶ (Both of these significant cases, by the way, give the lie to the frequently heard contention that originalism is nothing more than a device to further conservative views.) In other cases, even when what I would consider the correct originalist position has not carried the day, the debate between the majority and dissenting opinions has been carried on in originalist terms.⁷ Bad originalism is originalism nonetheless, and holds forth the promise of future redemption.

In the law schools as well, originalism has gained a foothold. I used to be able to say, with only mild hyperbole, that one could fire a cannon loaded with grapeshot in the faculty lounge of any major law school in the country and not strike an originalist. That is no longer possible. Even Harvard Law School, the flagship of legal education (I can say that because I am a HLS graduate) has, by my count, no less than three originalists on its faculty (no names, please). Twenty years ago there was none. Not that all law schools, or even a majority of law schools have originalist professors; but being an originalist is no longer regarded as intellectually odd, if not un-intellectual.

To be sure, not all developments have been encouraging. American constitutional evolutionism has, so to speak, metastasized, infecting courts around the world. The American Supreme Court’s “living Constitution” now finds its correlative in the Canadian Supreme Court’s “living tree,”⁸ and in the pronouncement of the European Court of Human Rights that the

3. U.S. CONST. amend. VI.

4. *Crawford*, 541 U.S. at 40 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

5. 530 U.S. 466 (2000).

6. *See id.* at 469–74.

7. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800–15 (1995); *id.* at 865–67 (Thomas, J., dissenting).

8. *Att’y Gen. of Can. v. Att’y Gen. of Que.*, [2005] 2 S.C.R. 669, 677, 2005 SCC 56 (Can.).

Convention it applies must “be interpreted in the light of current conditions.”⁹ Increasingly, nowadays, foreign courts cite our opinions,¹⁰ and we theirs,¹¹ because (I fear) judges in all countries believe they are engaged in the very same enterprise: not in determining the original meaning of the unalienable rights approved by the American people or the Canadian people or by the European nations that signed the Convention on Human Rights; nor even in determining what present-day Americans or Canadians or Europeans believe the human-rights provisions *ought* to mean; but in determining *for themselves* the *true* content of human rights, much as judges in common-law jurisdictions once believed they were all pursuing the same “brooding omnipresence”¹² of The Common Law. One might expect this international development to strengthen the conviction of our domestic evolutionary judges that they are on the right track (can we be wrong in pronouncing this new human right when the vast majority of the world’s judges agree with us?). It may be, however, that the sheer spectacle of our judges’ determining the meaning of the American Constitution by falling into step with the judges of foreign courts will bring home to the American people the profoundly undemocratic nature of the evolutionary enterprise.

In any case, there is reason to be hopeful. The upcoming generation of judges and lawyers will have been exposed to originalist thinking far more than was my own—if not through their law professors then through lectures and symposia sponsored by the Federalist Society; and if through neither of those then at least through the reading of originalist Supreme Court opinions and dissents. It is the very premise of our free system that, in a fair and equal competition of ideas, the truth will prevail. The essays in this Issue are directed to that end.

9. *Kress v. France*, 2001-VI Eur. Ct. H.R. 41, 67–68.

10. *See, e.g.*, *R. v. Mann*, [2004] 3 S.C.R. 59, 75–76, 2004 SCC 52 (Can.) (citing, *inter alia*, *Terry v. Ohio*, 392 U.S. 1 (1968)).

11. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).

12. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).