SCALIA AND BREYER ON CONSTITUTIONAL INTERPRETATION: A REFLECTIVE ANALYSIS

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ABSTRACT

Justice Scalia's and Breyer's conversation stands as a model of civil debate, helping readers to understand that behind every contest over a Supreme Court opinion lies a deeper theory of law. Grappling with their arguments has sharpened my own sense of constitutional interpretation: a judge must respect the Constitution's text and history, yet also ensure the law's vitality. As Justice Breyer said, perhaps learning from abroad can assist in applying our own Constitution in "today's world," and perhaps Scalia was right to say that American democracy must maintain ownership of its fundamental charter. The balance between these impulses remains the central challenge of any constitutional system whether in Washington, Delhi, Ottawa, or Berlin. In the end, Scalia and Breyer didn't agree on much other than being friendly with each other.

Scalia on Constitutional Meaning: Method and Influence

Justice Scalia repeatedly emphasizes that the Constitution should be read as its framers and ratifiers understood it, and criticizes any approach that allows it to "change from era to era." In the conversation, after some light banter, Scalia bluntly states: "That's my approach to interpreting the Constitution."[1] He contrasts this with what he sees as Breyer's approach: Scalia notes that Breyer follows the Court's earlier doctrine of "evolving standards of decency," a phrase from the Eighth Amendment context, which holds that the Constitution's meaning can shift over time.[2] Scalia openly rejects that idea as a guiding philosophy. He declares that he "detests" the notion that the Constitution must conform to "the evolving standards of decency that mark the progress of a maturing society."[3] For Scalia, treating the Bill of Rights as a dynamic charter is mistaken: "It seems to me that the purpose of the Bill of Rights was to

[1] Antonin Scalia and Stephen Breyer, 'The Constitutional Relevance of Foreign Court Decisions: A Conversation between Justice Breyer and Justice Scalia' (2005) 3 International Journal of Constitutional Law 519, 521.
[2] Trop v Dulles 356 US 86, 101 (1958) (Warren CJ for the Court).
[3] ibid 522.

prevent change, not to foster change and have it written into a Constitution."[4]

This originalist stance is evident in how Scalia views the role of history and foreign law. He argues that if one is truly seeking "what the framers believed" through an originalist lens, one is "chained" by that meaning unless the Constitution is formally amended.[5] He warns that treating broad constitutional phrases (like "due process of law") as invitations for judges to rewrite rights based on contemporary preferences or worse, based on foreign practice simply means the Constitution "morphs. It changes." In Scalia's view, a judge should not assume the power to remake American law using non-American models. Foreign legal sources are virtually irrelevant to him unless a judge abandons both original meaning and current American standards in favor of crafting "the best answer" to social questions.[6] He freely concedes that in his own practice he cites "all old English law," but only as historical background for ambiguous text not as relevant authority for modern questions. He warns law students that it would be arrogant for a judge to declare "I can make up what the moral values of America should be" on issues like the death penalty or abortion, implying that foreign judgments cannot substitute for American constitutional commitments.

In other words, Scalia's method is grounded in fixed text and original intent, with minimal role for judges' own visions of justice or comparative experience. He views foreign law strictly as rhetorical support, at most, but never as persuasive authority: "Unless you have that philosophy, I don't see how [foreign law] is relevant at all."[7] Throughout the conversation, Scalia's tone is firm (often with humorous asides) but the message is consistent: the Constitution means what it meant at ratification, and the judge's task is to enforce that original meaning. This originalism aligns with approaches in some other systems. For instance, Germany's Basic Law has "eternity clauses" and a strong emphasis on formal stability the Federal Constitutional Court frequently highlights the fixed core of principles (though it also adapts them to modern circumstances).[8] Scalia's approach resembles a strict textualism that finds sympathy in jurisdictions that prioritize a binding constitutional text (as opposed to a holistic, purposive reading).

[4] Scalia and Breyer (n 1) 523.
[5] ibid 524.
[6] See Vicki Jackson, 'Why Justice Scalia Should Be a Constitutional Comparativist (and Why He Already Is One): A Response to Professor Dorf' (2004) 24 Quinnipiac L Rev 209, 215.
[7] Scalia and Breyer (n 1) 526.
[8] Grundgesetz [Basic Law] art 79(3); see Donald P Kommers, 'Eternity Clauses: A Comment on Their (Non) Use in Germany' (2011) 15 German LJ 1289, 1292.

Breyer's Pragmatic (Living Constitution) Approach

In contrast, Justice Breyer's remarks reflect a pragmatic, living-constitution philosophy. From the outset, Breyer is comfortable admitting the legitimacy of using foreign sources for interpretive insight. He acknowledges that "we frequently look at foreign law in such…technical cases," and argues that consulting similar legal systems can be informative in dealing with hard questions. Breyer's view is that the Constitution must function in a modern world, and judges must adapt its general language to evolving social realities.[9] He stresses that judges often confront "law-related human" problems for which purely doctrinal or textual sources are insufficient; in those situations, understanding how other democracies handle similar issues can be helpful. As he puts it, America, England, or India are not so different in core values that we should reflexively exclude their experiences: "I doubt that Americans are so very different from people elsewhere in the world" when grappling with basic rights.

Breyer readily admits that foreign precedents are never binding on U.S. courts, but insists that ignoring them outright would deprive judges of useful information. He confesses to having "referred to decisions by the Supreme Court of India and [the] Supreme Court of Canada" in his own opinions, along with international and U.N. materials.[10] In his view, a judge armed with foreign cases "treating them with care," as he says enriches reasoning and reassures onlookers that decisions are not idiosyncratic. For Breyer, the law is "filled with uncertainty. Its answers in difficult cases can rarely be deduced only by…clear rules and a history book." Hence he prefers a constitution that is interpreted via pragmatic means (predicting consequences, comparing systems), rather than a dead-letter text.

This approach clearly aligns with a living-Constitution view. Breyer notably argues that even the framers might have consulted foreign examples when crafting the Constitution, citing Alexander Hamilton's assertion that one should "pay attention to the judgments of other nations." He notes that Hamilton and Madison read broadly of foreign governments while writing the U.S. Constitution, implying that learning from abroad should not surprise us . Of course, Breyer stops short of saying American law should bow to foreign law; instead, he frames it as an information-gathering exercise to interpret the U.S. Constitution better. When pressed about the presidential oath to uphold the Constitution as the supreme law of the land,

[9] Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (Knopf 2005) 14–15.
[10] Scalia and Breyer (n 1) 527; see also Printz v United States 521 US 898, 976 (1997).

Breyer responded that knowing how similar language has worked (or hurt) elsewhere "might help me to apply the American Constitution."

Breyer's tone in the dialogue is collegial and reasoned. He acknowledges, for example, that comparing certain cases across countries is tricky (an expert Zimbabwean judge's view might not match American society) but argues that the potential benefits outweigh the risks . He jokingly concedes, as did Justice Souter, that he must let Scalia "be Scalia" while he "be Breyer." Overall, Breyer defends a constitution interpreted in light of present realities and common human values, using any helpful tools (including comparative law) to discern principles of justice. This perspective resonates with other legal traditions that explicitly endorse living-charter theory. In Canada, for instance, the Supreme Court famously described the Constitution as a "living tree" that grows with society a doctrine (from Edwards v. Canada (Attorney General)) that expressly rejects strict originalism.[11] Canadian judges have often cited foreign and international sources when interpreting the Charter rights, confident that democratic legitimacy supports an evolving meaning. Similarly, India's post-Independence constitutional culture has been purposive and progressive: the Indian Supreme Court's "basic structure" doctrine effectively enshrines core values but allows expansion of rights over time. Indian jurists have frequently invoked comparative and international law (e.g. in gender and human-rights cases) in a way that echoes Breyer's pragmatism.

Contrasting Perspectives and Comparative Reflections

The conversation between Scalia and Breyer thus encapsulates a deep methodological divide. Scalia's originalism insists on historical fidelity and is wary of judicial creativity; Breyer's pragmatism values adaptation and real-world outcomes. Interestingly, Breyer's arguments draw on a broader understanding of what judges do, suggesting that the role of a judge is not fixed by some Oath to ignore global experience. By contrast, Scalia insists that departing from original meaning would mean violating the constitutional oath: "you do not know what you're saying… when you swear to uphold and defend the Constitution."

Each justice's view has echoes in other systems. In Germany, debates over constitutional change have occurred but the Basic Law's text and preamble are treated with great respect; the Federal Constitutional Court does allow for development, but within a framework of (at least)

[11] Edwards v Canada (Attorney General) [1930] AC 124, 136 (Lord Sankey for the JCPC); see also R v Big M Drug Mart Ltd [1985] 1 SCR 295, 344 (Dickson CJ) (affirming living tree doctrine).

maintaining the "identity" of core principles. Some German scholars see an affinity with originalism in that context. However, even in Germany there is dialogue with foreign law (e.g. the Court sometimes references European Union law and Strasbourg jurisprudence). In Canada, as noted, the living-tree approach explicitly embraces change, and the Supreme Court openly justifies consulting U.S. or other foreign law as supporting "the fundamental values that underlie our democracy." Likewise, India's approach is famously non-originalist: even though the Constitution's text is long, Indian judges have felt free to read into it an expanding range of social rights (for example, importing global human-rights norms via Article 21).[12] These courts might find Scalia's rigidity alien, and Breyer's pragmatism natural.

Conclusion

Reflecting on this exchange, I find that both justices articulate compelling but conflicting visions of the judge's role. Scalia's faithfulness to historical meaning offers predictability and democratic restraint, yet it can feel rigid in a changing world. Breyer's flexibility aims for practical justice and global awareness, yet it raises hard questions about who bears the final say in an elected democracy. As a law student, I think it's important to learn from other systems. For example, our Canadian neighbours clearly value foreign insight (which Breyer defends), and India's courts often remind us that just reading the text may not be enough to protect changing social rights. I also agree with Scalia's warning that judges can go too far with their creativity and go against what the people want. Overall, the conversation suggests that a middle ground where historical meaning, societal values, and careful comparative learning all play a role in making decisions might be best for a diverse constitutional democracy.

[12] The Constitution of India 1950, art 21.

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