



Fact vs. Fiction: Justice Scalia’s Activism Disguised as “Originalism”

In his 22 years on the Court, Justice Scalia, whom President Bush has described as one of his “favorite justices,” has consistently voted against abortion rights, gay rights, and affirmative action, and consistently voted to uphold states’ rights, private property rights, government support for religion, and the death penalty. Indeed, he has been called “the leading preacher of the conservative revival” on the Supreme Court.¹

In his recent interviews with 60 Minutes correspondent Lesley Stahl and National Public Radio’s Nina Totenberg, Justice Scalia aimed to portray himself as a principled follower of “originalism,” interpreting the Constitution based on what it meant to the people who ratified it in the eighteenth century. But Justice Scalia’s commitment to this doctrine, and to judicial restraint, is in name only. His application of this method of constitutional interpretation seems to vary from case to case to reach a result that conforms to his personal policy preferences.

SCALIA SAYS...	FACT IS...
<p><i>“The principle issue in [Bush v. Gore], whether the scheme that the Florida Supreme Court had put together violated the federal Constitution, that wasn’t even close. The vote was seven to two.”</i></p>	<p>The crucial decision to stop the Florida recount, wrest the issue away from the state court, and install George W. Bush as the winner of the election was split 5 to 4, not 7 to 2. Two of the dissenters agreed that the recount procedures violated the Equal Protection Clause but would have sent the case back to the Florida Supreme Court to establish uniform standards for continuing the recount.</p>
<p><i>“It was Al Gore who made [Bush v. Gore] a judicial question... We didn’t go looking for trouble. It was he who said, ‘I want this to be decided by the courts.’”</i></p>	<p>Although Vice President Gore brought the case to enforce the recount provision guaranteed in Florida state law, he did so in Florida state court. George W. Bush was the one who asked the Supreme Court to step in and overrule the state courts.</p>
<p><i>“I confess, I’m a social conservative, but it does not affect my views on cases.”</i></p>	<p>Original intent only takes him so far, especially when he is in the position of wielding supposedly apolitical judicial power in furtherance of policy goals he supports personally. Probably nowhere has this been more clearly seen than in Scalia’s 2003 dissent in the Texas sodomy case, <i>Lawrence v. Texas</i>.² His dissent attacked the majority, which had struck down Texas’ same-sex sodomy statute as a violation of Due Process, in very personal terms, describing the opinion as:</p>

¹ Richard Brisbin, “Justice Antonin Scalia and the Conservative Revival” (1997).

² 539 U.S. 558, 602 (2003).

	<p>The product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.</p>
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His virulent screed caused commentator Anna Quindlen to write in *Newsweek*, "His words were openly partisan, designed to call to arms the social conservatives who have long insisted that an activist court is the aim only of the left. And as such he did a grave disservice, not only to gay men and lesbians, but to the body in which he is privileged to sit and the principles for which it still stands in a rapidly eroding civic climate."³

But Justice Scalia was right when he said, "*I'm not as much of a big loser as I used to be, if you want to keep score.*"

Unfortunately for the American people, Justice Scalia's extreme views have gained wider acceptance on the Supreme Court with the additions of Chief Justice Roberts and Justice Alito. President Bush's appointees to the Supreme Court have demonstrated their willingness to jettison established precedent and legal procedure when it stands in the way of advancing their ultraconservative agenda. Together, they turn Justice Scalia's dissents into frequent majorities, disassembling crucial legal protections and imposing their ideology on the nation.

³Anna Quindlen, *Justice Rip Van Winkle*, NEWSWEEK, July 14, 2003.