What is Originalism/Textualism?

By: Bruce Petrie on February 15, 2016 on graydon.law

Justice Scalia called his judicial approach to the Constitution “originalism” or “textualism”.

The idea of Originalism/Textualism is that the Constitution means no more or less than what it meant to those who originally wrote and ratified it. This is seen as a counter-approach to the “living Constitution” idea where the text is interpreted in light of current times, culture and society.

Sometimes you’ll hear the words “judicial activism”. Those two words are now so loaded with politics that they’ve lost meaning and aren’t very useful in a Constitutional Conversation.

The Constitutional principle is Judicial Restraint. As expressed by Justice John Marshall (1801-1835), a central job of the Court, now known as judicial review, is to say what the law is. The Judicial powers in Article 3 are subject to the checks and balances of the Legislative powers in Article 1. We the People elect legislators, not federal judges. Constitutionally, federal judges are not legislative surrogates. That said, the Constitutional function of the Supreme Court includes reviewing legislative acts to make sure they are Constitutional. The checks and balances go both ways between the legislative and judicial branches. That judicial check/balance on Congress is necessarily a process of interpretation: i.e. discerning language and meaning in the context of complex cases and controversies. No Justice, liberal or conservative, not even Justice Scalia’s textualism, sees the Court’s interpretive function as simple, robotic application of crystal clear rules to crystal clear facts.

Judicial Restraint was the idea when Chief Justice Roberts famously used the baseball umpire analogy during his confirmation hearings. But even umpires have to use judgment; and those of us who enjoy baseball never hope for a day when human judgment is taken out of this most colorfully human of pastimes. So when it came to the Affordable Care Act, Chief Justice Roberts’ brand of Judicial Restraint upheld the ACA on the basis of the word “tax” which didn’t appear in the ACA. In other words, Judicial Restraint is often in the eye of the beholder; and the labels liberal and conservative don’t always fit so well when it comes to deciding cases.

In the context of Judicial Restraint, Justice Scalia’s brand of originalism/textualism had a profound impact on American jurisprudence, most notably in his 2008 Heller decision, his
most important decision and one in which he used his originalism/textualism. Justice Scalia
found in the Second Amendment not just a collective but an individual right to bear
arms—the Supreme Court’s most important pronouncement on one of the most
controversial issues of our times.

If the Constitution were textually perfect, the Second Amendment might read like this:
“American citizens, collectively and individually, have a right under this Constitution to own
guns and bear arms, which right shall not be abridged.” Instead, it’s not textually perfect
and reads like this: “A well-regulated Militia, being necessary to the security of a free State,
the right of the people to keep and bear Arms, shall not be infringed.” So, a Constitutional
Conversation about these words would (unlike a political special interest argument) observe
that we can conceive of a sentence that is clearer than the original text of the Second
Amendment.

Justice Scalia’s textualism led him to the conclusion that the Second Amendment’s reference
to “the right of the people” was individual, not collective. Well, what about “We the
People”—the all-important opening three words of the text? That reference to “the people”
certainly sounds collective. The point is that even textualism is an interpretive process by
very human judges. Justice Scalia used his brains and wordsmithing to be just as creative
with his textualism as other Justices have been with their interpretive approaches.

In the context of a written Constitution and the Judicial Restraint principle, all Supreme
Court Justices, liberal and conservative, practice various forms of Creative
Constitutionalism.