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Please Stop Strangling the Constitution

By David J. Perlman

"The world does not expect logic and precision in poetry or inspirational pop-philosophy. It demands them in the law."[1] So Justice Scalia belittled Justice Kennedy's majority opinion in the gay marriage case, *Obergefell v. Hodges*. Although this wasn't the dissent's most caustic critique, it's the most interesting. For interpreting the Constitution may indeed have more in common with inter-

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Preserving the Judiciary's Legitimacy in an Increasingly Polarized America[1]

By Nolan B. Tully and Vishal H. Shah

Introduction

Today's state of American politics represents more polarization than any other time in its history. Indeed, a 2014 Pew Research study found that the share of Americans who express consistently conservative or consistently liberal opinions more than doubled, from 10% to 21% between 1994 and 2014.[2] Of the three co-equal branches of government, the legislative branch is most clearly directly

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Editor's Note

Members of the Constitutional Convention met in Philadelphia in May of 1787 under great uncertainty. The Articles of Confederation had failed. They gathered at the State House to try again.

Their objective was to construct a government unlike any the world had seen, a political system embodying the

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preting poetry or seeking guidance from inspirational pop-philosophy than in applying deductive logic.

Generally, we're reluctant to acknowledge the true character of legal interpretation. Both legal professionals and the general public prefer to view legal decision making, and hence legal argument, as objective and neutral in a manner modelled on science; if you simply plug the data of each case into the legal rule or formula, you'll get the correct result. We fear that by admitting that legal interpretation entails value judgments that we're conceding that decision-making boils down to nothing more than a judge imposing a personal preference. And from that concession, a host of evils are thought to flow—bias, arbitrariness, and ultimately, the erosion of judicial legitimacy.

Countering this fear, we succumb to a compulsion to prop things up with false accounts of decision making, comparing judges to umpires, for example (and thus law to baseball), or worse, to distort legal decisions and argument, dressing them in the phony guise of a preferred paradigm of neutrality and objectivity. It's in the area of Constitutional law, particularly the Constitution's recognition of individual rights, that the complex character of legal interpretation is most evident.

Interpreting all the way down

That the paradigm of a scientific type of objectivity, what Ronald Dworkin referred to as "scientism," is not an accurate or workable model is by no means a new idea.[2] Interestingly, the two sentences from Justice Scalia's dissent quoted above resonate in direct counterpoint to a famous sentence: "The life of the law has not been logic: it has been experience." The author, of course, was Oliver Wendall Holmes, Jr., in 1881 in *The Common Law*.[3] Sixteen years later, in his influential essay "The Path of the Law," Holmes considered "… the notion that the only force at work in the development of the law is logic" to be a "fallacy."[4] On both occasions, he noted that the law cannot be worked out from "axioms" in the manner of "mathematics."[5]

As these sentences suggest, Justices Scalia and Holmes held different conceptions of legal interpretation. One might say that Justice Scalia's demands replicable uniformity. This is different from treating like cases alike. It means every mind arguing or deciding a legal issue according to a shared, authoritative method, as if a legal problem were indeed akin to a math problem. It manifests itself as textualism, and in the Constitutional realm, originalism, but it needn't take those forms alone. It's an idea that extends beyond Justice Scalia's and Justice Thomas' literalist approach to text and their reliance on Eighteenth Century practices as an indicator of Constitutional intent. More universally, it is rooted in an underlying belief that legal rules and conclusions—and ultimately, truth itself—must be fixed across time and circumstance.

Justice Holmes, viewing the law through the prism of pragmatism, was particularly concerned with how, and whether, legal rules worked. The results of legal decisions count;

they can, in turn, influence the rules. Put another way, the impact of decisions is one factor that will determine how future decisions are made. Legal principle is not static; it must discover a continuing justification and meaning in changing fact. The fixity of a rule is insufficient ground for its validity. As Holmes dramatically put it, "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."[6]

The contrasting sentences from Justices Scalia and Holmes suggest another point: it is impossible to practice law, whether as attorney or judge, particularly Constitutional law, without subscribing, whether explicitly or implicitly, consciously or unconsciously, to a theory of law — of what law is and ought to be. For the decisional process must begin and end somewhere, making its way from here to there by some intellectual means.

More generally, when we engage in some discipline or endeavor, we can't help but interpret the endeavor itself. As Ronald Dworkin wrote: "When we interpret any particular object or event, … we are also interpreting the practice of interpretation in the genre we take ourselves to have joined…."[7] In our case, the genre is law. In a continuation of the same sentence, Dworkin explained **how** practice in any genre, whether it be law or science or literature, also constitutes an interpretation of the genre itself: "we interpret that genre by attributing to it what we take to be its proper purpose — the value that it does and ought to provide."[8] In other words, in interpreting the law in any particular case, we are also positing some underlying values or objectives for law itself.

Clear text and context

In its guaranty of rights, the Constitution is clear. It is neither ambiguous nor "vague," the descriptive term Justice's Scalia applied in *Obergefell*.[9] For the Constitution — like a poem — cannot be expected to relinquish all of its potential meanings instantaneously in the absence of interpretive contexts yet unrealized. The First Amendment clearly restrains Congress' hand in areas of religion, speech, assembly, and petition. By carving out swaths of freedom, it implicates political values and ideals. Other passages are even more open-ended, such as the Fifth Amendment's prohibition against deprivation of "life, liberty, or property, without due process of law" or the Fourteenth's guarantee of "equal protection of the laws," but they are all clear in what they proclaim. Likewise, the Ninth Amendment's statement that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," preserving a region of unarticulated — and yet unrealized — individual rights.

The document needn't specify how any of these rights or political values will influence any particular case. It needn't specify how conflicts between them should be resolved. The Constitution's guarantee of rights is not "vague" any more than a poem is "vague" because its meaning can't be encapsulated in prose. In the words of Chief Justice Marshall, "…we must never forget it is a *constitution* we are expounding."[10] Within the genre of law, the Constitution is a sub-genre; intended to guide the future life of a nation, its text requires semantic breadth and a mode of interpretation befitting its task.

The Constitution is not a static collection of words but — again, not unlike a poem — it opens into a reality beyond the text itself. Put another way, it references our continually evolving experience, influences this experience, and, perhaps most importantly, can be read and interpreted only from the vantage point and context of this experience. It cannot stand apart from the ever-changing flow of experience from which we perceive it and to which we apply it.

Despite the Founder's genius, their foresight was limited. Not only were they unable to foresee the physical and technological components of our world — electricity, automobiles, aircraft, the internet, devastatingly destructive weapons — but our mental landscape, our new modes of understanding both our setting and ourselves. But there's even more to the unforeseeability inherent to constitution-making. The document, as the Founders well knew, set in motion a dynamic system —a set of moving pieces of government —and there was no telling how the dynamic system would play out, how the elements of democratic government and the opposing forces of checks and balances would work. There was no predicting what the government would look like, what forms of action the branches of government might take in relation to each other or in relation to its citizens. What is more, this dynamic system, in turn, was embedded in larger dynamic social, cultural, and natural systems. **Everything** was, and remains, subject to complex, unpredictable change.

Certainly, a Constitutional guarantee of rights could never be interpreted in the same manner as legal pronouncements, or, to use the language of positivist legal theory, a "command of the sovereign," such as a statute or rule. Secondly, it's obvious that the Constitution's creation of individual rights that trump the majority will entails political and moral values— freedom of speech and religion, for example, or equality under the law and in relation to the government. —Finally, being the originating blueprint for a dynamic system — which itself functions in a dynamically changing world — it can be interpreted only by assessing and reassessing those implicated values in newly arising contexts. The contexts aren't "new" simply by virtue of changing factual scenarios but "new" by virtue of a changing social and cultural environment, changing human knowledge, and a changing legal structure. The metaphor of a "living Constitution" never lost its relevance.

The possibility of *becoming* cruel and unusual

It seems obvious that, while underlying Constitutional values in their broadest conception are identifiable, a particular Constitutional rule or holding is subject to change since the context that influences a holding is subject to change, indeed, unforeseeable change. Thus, it makes perfect sense that, while the death penalty may have been held to be Constitutional, it may, at a later time, run afoul of the Eighth Amendment's prohibition against cruel and unusual punishment.

As Justice Breyer, joined by Justice Ginsburg, argued in his dissent in *Glossip v. Gross*, circumstances may arise that require re-evaluation of the death penalty.[11] Justice Breyer's argument for re-evaluation has four parts. First, innocent

people are sentenced to death more frequently and more certainly than we realized. Secondly, the death penalty is arbitrarily imposed and therefore cruel. Thirdly, the delay in death penalty cases renders it cruel. Fourth, it's unusual since its use is declining.

Justice Breyer made the point in connection with the first argument — although it could support all the arguments — that the taking of a life by the state is of a different order from other punishment due to its "finality."[12] "Qualitative difference" is the phrase he quotes from *Woodson v. North Carolina.*[13] It's for this reason that we should be less tolerant of error when the sentence is death. In his rebuttal, Justice Scalia ignored Justice Breyer's point that death is another order of punishment, claiming that Justice Breyer misses the mark because the errors stem from the process of conviction, not the sentence. Importantly, the Breyer dissent reviews the changed factual context justifying re-evaluation due to errors. For example, the advent of DNA analysis has made us more certain than ever before of the number and identity of innocent people sentenced to death.

Justice Scalia's rebuttal, joined by Justice Thomas, is notable for its contrasting approach in which a Constitutional rule tends to be frozen in time. It begins by comparing the scenario of reconsidering capital punishment to "Groundhog Day" — the movie in which the protagonist finds himself reliving Groundhog Day until he gets his human interactions empathetically right. In Justice Scalia's view, analysis should be brought to a close once and for all because of the words of the Constitution itself: "It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*." The dissent continues: "The Fifth Amendment provides that '[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury,' and that no person shall be 'deprived of life . . . without due process of law.'"[14]

Yet it's not impossible that capital punishment, even though practiced in Eighteenth Century America and mentioned in the Constitutional text, could **become** unconstitutional, since the protection against cruel and unusual punishment must be realized, can only be realized, in a world subject to dynamic change. The inquiry doesn't end — because it's a **constitution** that we're interpreting — with the inability of Constitutional draftsmen to foresee that in another, future context capital punishment might conflict with the prohibition against cruel and unusual punishment. (In the passages Justice Scalia quoted, capital punishment is mentioned in relation to other protections afforded the accused — the right not to be held without presentment or indictment of a grand jury, for example — and capital punishment's unconstitutionality wouldn't run counter to honoring those rights.)

It doesn't matter that the delay in carrying out the death sentence, which Justice Breyer cited as a reason for abolishing capital punishment, is, as Justice Scalia observed, caused by the criminal process itself. Due process in capital cases demands time, and the delay caused by the imperatives of due process can reach a point that strains other Constitutional imperatives. There is nothing shocking about being caught between the demands of two Constitutional ideals or standards. It's entirely possible that we cannot

— and that it's taken generations for us to discover that we cannot —implement the death penalty while satisfying the mandates of Constitutional guaranties. This idea seems anomalous only if one assumes from the outset that the death penalty **must** be Constitutional.

The majority opinion by Justice Alito follows just this line of thought. The issue the majority confronted was whether use of the available formula for lethal injection was cruel and unusual because it created a risk of a painful death. A crux of Justice Alito's majority opinion reads:

> If States cannot return to any of the "more primitive" methods used in the past [such as the electric chair] and if no drug that meets with the principal dissent's approval is available for use in carrying out a death sentence, the logical conclusion is clear. But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional. [Citations omitted.] We decline to effectively overrule these decisions.[15]

In other words, since capital punishment is Constitutional (because we decline to overrule decisions saying so), there must be a means of implementing it.

Freedoms Unimagined

The attitude that Constitutional rights are frozen in time and impervious to a changing world is evident in Justice Scalia's repudiation of the statement, from *Trop v. Dulles* (1958), that the cruel and unusual clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." To this principle Justice Scalia attributed "the proliferation of labyrinthine restrictions on capital punishment," delays in execution, and the abandonment of capital punishment in some jurisdictions. [16]

Justice Scalia's rejects the *Trop* approach with a refrain commonly invoked to rationalize the denial of rights. In his words, interpreting "cruel and unusual" in light of "the evolving standards … that mark the progress of a maturing society" is "a task for which we are eminently ill suited."[17] The protest of modesty is echoed by Chief Justice Roberts in *Obergefell*: "Just who do we think we are?"[18] The answer is self-evident. You know — or should: The Supreme Court, of course.

It's the judiciary's responsibility to interpret the Constitution, and interpretation can only be accomplished, and is only relevant, in the ever evolving present. Judges abdicate responsibility when they back away from interpretation because it seems difficult or open-ended or entails competing values. Rights are affirmed only as they find expression in entirely new contexts, taking on new forms, maybe even becoming "new rights" —depending on how one chooses to parse the word "right" — or, put another way, becoming personal freedoms previously unimagined.

As his profession of modesty suggests, Chief Justice Robert's principal gay marriage dissent fails to accept the judiciary's role of ensuring that new manifestations of freedom become a reality — although it pays rhetorical lip service

to the idea. "I agree with the majority that the 'nature of injustice is that we may not always see it in our own times.' [Citation omitted.] "As petitioner's put it, 'times can be blind.' [Citation omitted.] But to blind yourself to history is both prideful and unwise."[19] The shift here, founded on an aversion to pride and an appeal to wisdom —with their religious and philosophic connotations — is incongruous in a dissent that faults the majority for veering from law into morality and philosophy. Chief Justice Roberts' proclaimed agreement that injustice unrecognized in one era may become apparent in another is contradicted by a passage just a few pages earlier; there, he mocks the majority, by quoting it, for relying on "its own 'reasoned judgment,' informed by its 'new insight' into the 'nature of injustice,' which was invisible to all who came before but has become clear as 'we learn [the] meaning' of liberty."[20] Ultimately, in Chief Justice Robert's due process analysis, the fact that gay marriage hasn't been historically recognized as a right becomes the basis for continuing not to recognize it.

The dissent is aided in reaching this point by remaining closed to the current plight of the petitioners and of others denied marriage as a matter of law. It considers the issue to be whether gays suing for the rights and privileges of marriage can dictate to a state legislature the "definition" of "marriage" and not an issue concerning the impact on people of the government's disparate treatment of people. Blind to the unfairness imposed on gays, it says nothing about the majority's observation — discussed in Judge Posner's notable Seventh Circuit opinion, and brought to both courts' attention by an amicus brief on behalf of the American Psychological and American Psychiatric Associations, among others — that sexual orientation is immutable, an insight realized in our times, not many years after homosexuality had been pathologized as a "disorder."

The dissent buttresses its position by labelling gay marriage as a "policy" issue, and, of course, "policy" is for the legislature, not the courts. Sadly, it devolves into small-minded turf when it portrays the opponents of gay marriage as victims, taking offense at perceived slights inflicted by the rhetoric of the gay marriage debate; it laments the "… apparent assaults on the character of fairminded people…" opposing gay marriage.[21] Certainly, the experience of gays denied marriage—paying inheritance taxes that heterosexual couples don't pay, their children deprived a guardian upon a partner's death, apart from the issue of stigma — is of a different order from the experience of gay marriage opponents participating in debate.

Unlike the dissents, Justice Kennedy's opinion recognizes that new rights will come into existence over time. "… New dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas and protests and then are considered in the political sphere and the judicial process."[22] Following his sentence about injustice being potentially invisible, he recognizes that Constitutional guarantees find their meaning in the context of the once unforeseeable, ever changing present:

> The generations that wrote and ratified the Bill of Rights and Fourteenth Amendment did not

> presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[23]

The majority accurately implies that Constitutional interpretation **requires** judicial enforcement of new rights —or, put another way, of new manifestations of rights — for the alternative is paralysis in both interpretation and the enforcement of rights: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[24] Rights are derived not just from source documents but from our evolving understanding of political principles and present circumstances: "They rise, too, from a better informed understanding of how Constitutional imperatives define a liberty that remains urgent in our era."[25]

Judge Posner's opinion, though very different from Justice Kennedy's, agrees that rights must be newly conceived under changing circumstances. It observes that sexual orientation is believed to be not simply immutable but innate in the sense of beyond choice.[26] It even offers current hypotheses on how homosexuality is consistent with natural selection.[27] Because sexual orientation isn't voluntary, it observes, discrimination based on it is, like racial discrimination, especially stigmatizing.[28] It notes the change in litigation concerning the issue since 1972, when the Supreme Court dismissed, for want of a federal question, an appeal from a state supreme court holding that limiting marriage to opposite sex couples did not violate the Constitution; *Baker v. Nelson* was the "dark ages" for such litigation.[29] With statistical specifics, it describes adoption by gay couples in today's society, countering the argument that reserving marriage for heterosexuals is justified by the necessity of nurturing children.[30]

A beginning

Not unlike a poem, the Constitution renews its meaning in time. Like inspirational, pop-philosophy, it articulates communal aspirations, which, in turn, can only be realized under the circumstances of any given moment.

As Erwin Chemerinsky observes, "… all Justices —liberals and conservatives — are making value choices."[31] But the fact that decisions implicate values does not render them extra-legal or the personal preference of a judge. It does not justify retracting into a shell of modesty for fear of venturing into restricted domains. Only by accepting that values are in play and that we're called to actualize them in the world today can we even begin to interpret a constitution.

[1] *Obergefell v. Hodges*, ___ U.S. ___ (2015) slip op., Scalia dissent, 9.

[2] Ronald Dworkin, "Law from the Inside Out," *New York Review of Books*, November 7, 2013, http://www.nybooks.com/articles/2013/11/07/law-inside-out/.

[3] Oliver Wendell Holmes, Jr., *The Common Law* (1881) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995) Vol. 3, 115.

[4] Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10:457 (1897) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (1995) Vol. 3, 396.

[5] Oliver Wendell Holmes, Jr., *The Common Law*, 115; "The Path of the Law," 396.

[6] Oliver Wendell Holmes, Jr, "The Path of the Law," 399.

[7] Ronald Dworkin, *Justice for Hedgehogs*, (Cambridge: Harvard University Press, 2011), 131.

[8] *Ibid*.

[9] *Obergefell*, Scalia dissent, 4.

[10] *M'coullough v. Maryland*, 17 U. S. 316, 407 (1819)

[11] *Glossip v. Gross*, ___ U. S. ___ (2015).

[12] One could argue that "finality," and hence irrevocability, is only one aspect of this "qualitative difference."

[13] *Glossip v. Gross*, Breyer dissent, 52-53, quoting *Woodson v. North Carolina*, 428 U. S. 280, 325 (1976).

[14] *Glossip v. Gross*, Scalia concurrence, 25.

[15] *Glossip v. Gross*, majority opinion, 20.

[16] *Glossip v. Gross*, Scalia concurrence, 39.

[17] *Ibid*.

[18] *Obergefell*, Roberts dissent, 3.

[19] *Ibid*, 22.

[20] *Ibid*, 19.

[21] *Ibid*, 28-29.

[22] *Glossip v. Gross*, majority opinion, 7.

[23] *Ibid*, 11.

[24] *Ibid*, 18.

[25] *Ibid*, 19.

[26] *Baskin v. Bogan*, 766 F. 3d 648, 657 (7th Cir. 2014).

[27] *Ibid*.

[28] *Ibid*, 658.

[29] *Ibid*, 660.

[30] *Ibid*, 662-664.

[31] Erwin Chemerinsky, *The Case Against The Supreme Court*, (New York, Viking, 2014), 340.