

IN MEMORIAM

JUSTICE ANTONIN SCALIA AND THE CONSTITUTION'S GOLDEN THREAD

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As Americans, it is our duty to remember United States Supreme Court Justice Antonin Scalia's unwavering commitment to the words of our Constitution—their true meaning as the Founders deliberately wrote them. Words have meaning. Otherwise, what purpose do they serve?

Chief Justice John Marshall, the great Federalist and Virginian, wrote, “As men . . . generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”¹

That the Constitution's words have fixed meaning matters because, as Justice Scalia deeply appreciated and as Chief Justice Marshall argued, “a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.”² “That near immortality is best effected, [Marshall] thought [and Justice Scalia's legacy demonstrates], by understanding the words of the instrument to have a ‘true meaning’ that can be known, a meaning that is to be presumed fixed

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1. *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).
2. *Cohens v. Virginia*, 19 U.S. 264, 387 (1821).

and incapable of change either by legislative fiat or by judicial construction.”³

Justice Scalia served our country and our Constitution by honoring the words that make our founding document nearly immortal and that protect our “right to life, liberty, and the pursuit of happiness,” articulated in the Declaration of Independence.⁴

On November 19, 2010, during my third year at Richmond Law, the Federalist Society presented Justice Scalia with its Joseph Story Award for Contributions to Constitutional Law. As president of the chapter, I had the privilege of delivering the award presentation speech at the private reception we hosted.

I began the presentation with a brief recounting of a story, because all good stories have a moral about life. And as an adult student of law, I concluded that one of my favorite childhood stories tells an important lesson about the rule of law—one which Justice Scalia venerated.

“The Magic Thread,” told in William J. Bennett’s *The Book of Virtues: A Treasury of Great Moral Stories*,⁵ illustrates the recent history of the Supreme Court, especially as to values-driven decision making. The story goes:

There was once a young, able boy who was forever daydreaming. He desired many things, but had little patience to earn them. One day the young boy encountered an old woman who gave him a silver ball, from which dangled a golden thread, his life thread, explained the old woman. If he wished time to pass quickly, he need only pull the thread and an hour would pass like a second.

3. GARY L. MCDOWELL, *THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 323 (2010).

4. The rights pronounced in the Declaration of Independence—written by Virginian and third President of the United States Thomas Jefferson and carefully protected by the Constitution—were sacred to Justice Scalia. They were initially proclaimed in the Virginia Declaration of Rights, written by Virginian and Founding Father, George Mason: “all men are by nature equally free and independent and have certain inherent rights, of which . . . they cannot . . . deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” VIRGINIA DECLARATION OF RIGHTS § 1 (1776).

5. *THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES* 57–63 (William J. Bennett ed. 1993).

But the old woman also warned that once the thread was pulled out, his life would be over.⁶

The young boy eagerly pulled the thread—first, to escape his unpleasant school days and then, as he grew, to skip through times of hardship or difficulty in his life. He quickly moved his life ahead, always searching for the easy, happy outcome in all of his life’s experiences. Before he knew it, the young boy had turned into an old man. He had shortcut his way through life without ever experiencing its meaning.

One day, walking through the woods the now old man encountered the old woman. He lamented that his life would soon be over and that because he had skipped through the hard work of living he was unable to benefit from the good things. The story ends: the old woman gave the old man another chance. She took back the magic silver ball of golden thread and allowed the boy to live his life again, to live a life of meaning.

Justice Scalia’s method of constitutional construction embodies the moral of the Golden Thread story. He did not grasp for happy outcomes while skipping over legal difficulties. He was constitutionally principled, patient, and disciplined. We admire his principles, respect his patience, and revere his discipline.

There can be no reasonable doubt that Justice Scalia’s service reflects commitment to and deep respect for the Constitution and the true meaning of its words—which he knew to be lasting and enduring, not evolving.

Justice Scalia did not pull from the Constitution’s precious fabric an alluring golden thread. In the hard cases of constitutional decision making he did not take shortcuts to arrive at politically felicitous, culturally convenient, or socially pain-free outcomes.

Like Chief Justice Marshall, Justice Joseph Story valued this essential quality of a good judge. In his *Commentaries on the Constitution of the United States*, Story wrote, “[o]urs is emphatically a government of laws, and not of men It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges.”⁷

6. *Id.* at 58.

7. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES

Justice Scalia strived to uphold the important truth that Chief Justice Marshall explained: “[t]he ‘peculiar circumstances of the moment . . . may render a measure more or less wise, but cannot render it more or less constitutional.’”⁸

The modern day Court has too often done what Chief Justice Marshall warned against and foretold:

There was no doubting that on occasion some would try to invoke what they would insist to be “the spirit and true meaning of the Constitution” in order to reach the interpretive end they might seek; this would almost always be accomplished by ignoring the “plain” or “natural” meaning of the words actually used.

Justice Scalia dedicated his judicial career to stopping the Court from succumbing to the temptation to skirt the founding document, even when doing so may result in desirable ends. His majority opinion in *District of Columbia v. Heller*¹⁰ and dissenting opinion in *Obergefell v. Hodges*¹¹ epitomize that noble fight.

In the landmark *Heller* decision, the Court held that the Second Amendment¹² protects the right to keep and bear arms for the purpose of self-defense.¹³ This holding and the Justice’s seminal opinion in this case exemplifies his fidelity to the true and plain meaning of the text of the Constitution.

In meticulously and thoughtfully reaching this conclusion, Justice Scalia echoed Chief Justice Marshall’s concern about judges disregarding the text of and the true meaning of the Constitution:

Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.¹⁴

349–50 (1883).

8. MCDOWELL, *supra* note 3, at 324 (quoting GERALD GUNTHER, JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 190–91 (1969)).

9. *Id.* at 325 (quoting *Cohens v. Virginia*, 19 U.S. 264, 380 (1821)).

10. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

11. *Obergefell v. Hodges*, __ U.S. __, __ 135 S. Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting).

12. “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.” U.S. CONST. amend. II.

13. *Heller*, 554 U.S. at 635. Two years after *Heller*, in *McDonald v. Chicago*, 561 U.S. 742, 750 (2010), Justice Scalia joined the majority opinion in which the Court made clear that this foundational principle and holding applies to the states.

14. *Heller*, 554 U.S. at 636.

The Justice explained the error of ignoring the written word of the Constitution:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.¹⁵

Justice Scalia’s dissent in *Obergefell* further embodies his devotion to the Constitution, its binding nature, and its careful and unambiguous establishment of the Court’s role as a separate branch of government.¹⁶ In *Obergefell*, the majority held that the Fourteenth Amendment¹⁷ requires a state to license and recognize a marriage between two people of the same sex.¹⁸ Justice Scalia’s dissent reads in part:

Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.¹⁹

Justice Scalia’s commitment to the Constitution and the principles it espouses, reflects the basic tenets of the Federalist Society, for which Justice Scalia was a faculty advisor in its founding in 1982.

15. *Id.* at 634 (emphasis in original).

16. *See Obergefell*, __ U.S. at __, 135 S. Ct. at 2627–31 (2015).

17. The portion of the Fourteenth Amendment *Obergefell* relied upon reads as follows: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

18. *See Obergefell*, __ U.S. at __, 135 S. Ct. at 2608.

19. *Id.* at __, 135 S. Ct. at 2627 (Scalia, J., dissenting).

Indeed, Justice Scalia always fought the constitutionally destructive tendency of judges to decide the law as an act of their will, not the Founders'. He fought it as a law professor and as an executive branch official. He fought it as a judge on the United States Court of Appeals for the District of Columbia Circuit. And he steadfastly waged this essential struggle on the United States Supreme Court, where he was the Senior Associate Justice until he died on the eve of February 13, 2016.

America is extraordinarily fortunate, indeed blessed, to have had Justice Scalia. We continue to admire his unique courage and singular discipline in upholding the rule of law to protect our liberty. We are grateful for his vital role as a model of constitutional restraint for law students, professors, lawyers, and judges.

At the close of my expression of gratitude to the Justice, I handed him a gilded antique jewel box containing a spool of golden thread, secure, in the knowledge that he would never unspool it.

With the grace of God, may Justice Scalia's leadership, character, principles, and courage forever inspire Americans.