

CLICK HERE
RECEIVE A
FREE \$20
GAS CARD!

Welcome, **Guest** [Sign In](#) | [Register](#)
[View today's E-Dition](#)
[Free email alerts](#) [Go](#)

washingtonexaminer.com
The Examiner

Tuesday, March 9, 2010 | Last Update 10:38 ES
Washington, DC
Partly Cloudy 56°F
High/Low: 63°F / 43°F
(click for forecast)

COLUMNS AND OPEDS

[Print] [Email] 4 retweet

Josh Blackman and Ilya Shapiro: Is Justice Scalia abandoning originalism?

By: Josh Blackman and Ilya Shapiro
OpEd Contributors
March 8, 2010

Justice Antonin Scalia holds himself out as the patron saint of originalism, the idea that judges should interpret the Constitution according to its original public meaning. To do otherwise, he adds, is to succumb to government by black-robed philosopher-kings who fill the empty vessel of a "living Constitution" with their own policy preferences.

Last week, however, in a case building on Scalia's own landmark opinion in *District of Columbia v. Heller*—which found that the Second Amendment protects an individual right—when the justice was faced with a golden opportunity to advance originalism, he blinked. And in rejecting originalism, Scalia cited the un-originalist reason that following a different—and clearly incorrect—line of precedent was "easier."

The case at issue, *McDonald v. Chicago*, involves a challenge to Chicago's gun ban and seeks to extend the right to keep and bear arms to the states—as nearly all other provisions in the Bill of Rights have been extended.

The Court could take two possible routes, both under the Fourteenth Amendment, to apply, or "incorporate," the Second Amendment right against the states: the Due Process Clause and the Privileges or Immunities Clause.

Scalia has long crusaded against the former, which encompasses the "substantive due process" doctrine. To Scalia, this doctrine—which has protected rights based on alleged constitutional "penumbras and emanations"—embodies the judicial activism that is the bane of his jurisprudence. Scalia has attacked substantive due process as an "atrocious," an "oxymoron," "babble," and a "mere springboard for judicial lawmaking."

Largely as a response to this sort of "judicial usurpation," Scalia has advanced his theory of originalism. To interpret the Fourteenth Amendment, for example, a judge should look at how the amendment was understood at the time of its ratification in 1868.

McDonald presents originalist judges the perfect chance to restore the original meaning of a long-abused constitutional provision: In 1873, a Supreme Court unwilling to accept Reconstruction-era changes to our constitutional order—with the federal government empowered to check state oppression—eviscerated the Privileges or Immunities Clause. By reinvigorating that clause, the Court can scale back a warped Due Process Clause that has been misused in a clumsy attempt to protect individual rights.

Without the Privileges or Immunities Clause, however, the Court must continue extending the un-originalist version of substantive due process to protect the right to keep and bear arms. To give original meaning to the Second Amendment, it must ignore the original meaning of the Fourteenth Amendment!

Beltway Confidential

Meet the 18 House Dems whose votes matter most on health care

When health care reform passed the House in November, the vote was 220-215. Since that time, three Democrats who voted "yes" are no longer in the House (two...
—David Freddoso

Obama admin cutting fisherman out of debate on water use

ESPN reports that the nation's anglers aren't to happy about the way a proposed new "re-zoning" of America's fishing waters is proceeding: The Obama administration will accept...
—Mark Hemingway

Morning Must Reads -- Obamacare pays the price for lack of cost controls

Washington Post -- Obama launches attack on health insurance companies A deadly consensus being reached about Obamacare is that it does not control costs but does seek to...
—Chris Stirewalt

NYT: Obama will demonize your insurer until it can't pay your claim

From the Law of Unintended Consequences department. The New York Times reports on a flaw in President Obama's plans for price controls on insurance premiums: State officials...
—David Freddoso

[More Beltway Confidential posts...](#)

The 2010 Election Calendar

The "Bogus Stimulus Jobs" Map

Featured Writers

- Cal Thomas**
So much for draining the swamp
- Thomas Sowell**
Stimulus? More like a sedative
- Gene Healy**
Line-item veto is no quick-fix
- Barbara Hollingsworth**
Sound of a government bubble popping
- Byron York**
Marco Rubio and the Republicans who love him
- David Limbaugh**

Given Scalia's epic enmity for substantive due process, why would he now turn his back on decades of his own hard labors and suddenly endorse the controversial doctrine? In his own words, because it is "easier."

Granted, Scalia has been far from a down-the-line originalist. On more than one occasion, where originalism does not achieve the result he wants, he ignores the history and stands by precedent. (Most recently, Scalia voted to uphold the federal power to trump state regulation of medicinal marijuana, even if the drug never crosses state lines.) To explain these variances, Scalia has called himself a "faint-hearted originalist" or an "originalist, but not a nut."

But if the opinion Scalia joins in *McDonald* matches his signals at argument, the justice will no longer be able to call himself an originalist of any kind. He will have to turn in his O-card and leave Clarence Thomas as the only originalist on the Court. (Not coincidentally, Thomas is the only justice on record as favoring a revival of the Privileges or Immunities Clause.)

The Court has nearly four months before it issues its *McDonald* opinion. We can only hope that the straying Saint Originalism returns to the catechism he has taught so well.

Josh Blackman is the president of the Harlan Institute and blogs at JoshBlackman.com. Ilya Shapiro is a senior fellow in constitutional studies at the Cato Institute.

Follow The Examiner



Reader Comments

All comments on this page are subject to our Terms of Use and do not necessarily reflect the views of the Examiner or its staff. Comment box is limited to 200 words. Warning: If you comment, the Disqus platform default is set to email you when other reply to it. If you do not want to receive these replies to your comment, please uncheck the box.

Add New Comment



You are commenting as a Guest. Optional: Login below.



Type your comment here.

Name Website (optional)

Email Subscribe to all comments by email

Post as Guest

Showing 0 comments

Sort by Oldest first Subscribe by email Subscribe by RSS

Reactions

Joshbtweets 1 hour ago

From Twitter via BackType

On the day I write Op-Ed critical of Scalia http://bit.ly/cxELST I break my framed photo of me w/ Nino & Constitution he signed. Karma?

MOST POPULAR STORIES

- Wisconsin AG charges ACORN workers with voter fraud
- Low-tax Texas beats big-government California
- Dan Rather says 'Articulate' Obama 'couldn't even sell watermelons'
- Glenn Harlan Reynolds: Consent of the governed - and the lack thereof
- Look who's pointing out that Democrats are in disarray
- Hugh Hewitt: Liberals want to suspend self-government for Obamacare
- Civics class: Where is the House-Senate health care conference committee?
- On radio show, Massa says Dem leaders railroaded him because he voted against ObamaCare
- Gregory Kane: PC sickness claims another victim
- Bring the post office into the 21st century