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David Souter vs. the Antonin Scalia

By E.J. Dionne Jr.

It should become the philosophical shot heard 'round the country. In a remarkable speech that received far too little attention, former Supreme Court justice David Souter took direct aim at the conservatives' favorite theory of judging.

Souter's verdict: It "has only a tenuous connection to reality."

At issue is "originalism," an approach to reading the Constitution whose seeming precision has given conservatives a polemical advantage over the liberals' "living Constitution" idea that appears to let judges say our founding document means whatever they want it to mean.

Justice Antonin Scalia, [the court's leading originalist](#), summarized his opponents' attitude toward the Constitution with four words: "You know, it morphs."

Now, thanks to Souter's [commencement address at Harvard](#) last week, Scalia's critics have fighting words of their own. Souter, who did not mention Scalia by name, underscored "how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments."

The problem is not only that "constitutions have a lot of general language in them in order to be useful as constitutions," but also that the U.S. Constitution "contains values that may very well exist in tension with each other, not in harmony."

This means that "hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another."

Souter attacked the fatal flaw of originalism -- which he relabeled the "fair reading model" -- by suggesting that it would have led the Supreme Court in 1954 not to its *Brown v. Board of Education* decision overturning legal segregation but to an affirmation of the 1896 *Plessy v. Ferguson* ruling upholding "separate but equal" public facilities.

"For those whose exclusive norm of constitutional judging is merely fair reading of language applied to facts objectively viewed, *Brown* must either be flat-out wrong or a very mystifying decision," Souter said.

"The language of the Constitution's guarantee of equal protection of the laws did not change between 1896 and 1954, and it would be very hard to say that the obvious facts on which *Plessy* was based had changed," Souter argued. "Actually, the best clue to the difference between the cases is the dates they were decided, which I think lead to the explanation for their divergent results."

Yes, the Supreme Court changed because the nation's understanding of race changed.

Souter notes that "the members of the court in the *Plessy* case remembered the day when human slavery was the law in much of the land. To that generation, the formal equality of an identical railroad car meant enormous progress. But the generation in power in 1954 looked at enforced separation without the revolting background of slavery. . . . "

"Did the judges of 1954 cross some limit of legitimacy into lawmaking by stating a conclusion that you will not find written in the Constitution?" Souter asked rhetorically. "Was it activism to act based on the current meaning of facts that at a purely objective level were about the same as *Plessy's* facts 60 years before?"

Obviously, Souter doesn't think so. But while conservative scholars such as Michael McConnell have constructed ingenious arguments to show how [originalism](#) could accommodate *Brown*, it's hard to see judges guided by that doctrine reaching as boldly as the 1954 Warren court did.

Contrast Souter's view with Scalia's mocking reference to those who "think the Constitution is some exhortation to give effect to the most fundamental values of the society as those values change from year to year." Well, between 1896 and 1954, they did change.

The core problem with originalism is that it overlooks what the [historian Gordon Wood has observed](#) about the Founders' work: that it is exceedingly difficult to discern the "true meaning" of the Constitution since it is the product "not of closet philosophizing but of contentious political polemics."

As a result, "many of our most cherished principles of constitutionalism associated with the Founding were in fact created inadvertently." The historian Joseph Ellis offered [a parallel argument](#) in The Post last month.

Souter is right to say that "the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well."

Because these desires clash, courts are "forced to choose between them, between one constitutional good thing and another one." Souter's view admits that this is what judges do. Originalists pretend they're not choosing. Which approach is the more trustworthy?

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