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Souter's Harvard speech in practice

On May 27, 2010, retired Justice David H. Souter gave a commencement address at Harvard University that focused on his view of constitutional interpretation.

He said that while a purely textual approach to constitutional interpretation suffices in some cases, the "fair reading model" cannot decide most of the truly important cases that come before the U.S. Supreme Court. His remarks struck me as obviously true, but the vultures immediately descended to pick apart his remarks.

Some critics claimed he was attacking Justice Antonin Scalia personally or was attacking "originalism." I don't think so. A plain-speaking New Englander does not engage in personal attacks, and if he wishes to dispute the concept of "originalism," he calls it by its proper name, not "fair reading model."

Forty years of working with statutes and two constitutions have taught me that constitutions are very much like statutes. Some provisions are straightforward, while other provisions are elastic, often deliberately so.

Souter gave as his example of a straightforward provision Article I, Section 3 of the U.S. Constitution, which establishes 30 as the minimum age for a U.S. senator. He said the fair reading model would suffice to interpret this section, specifically to prevent a 21-year-old from assuming a Senate seat.

I, however, can see problems interpreting, even with the age requirement. What happens if a candidate's birthday is Feb. 29? If he has a birthday only once every four years, when does he turn 30?

An English barrister, William S. Gilbert, dealt humorously with this issue in his libretto for "The Pirates of Penzance," where a baby named Frederick is apprenticed "until he reaches his 21st birthday." And when does the age requirement attach, upon the candidate's election or when he is seated? Joseph R. Biden faced this issue when he was elected to the U.S. Senate a few days before his 30th birthday, Nov. 20, 1972.

Souter gave as examples of elastic provisions in the U.S. Constitution "open-ended guarantees, like rights to due process of law, equal protection of the law, and freedom from unreasonable searches." The Illinois Constitution contains similar provisions.

Almost all legal texts, whether statutes or constitutions, contain both straightforward provisions and elastic provisions.

For example, the Uniform Commercial Code contains provisions for which the fair reading model is appropriate: "10 days' notice"; and provisions that are deliberately elastic: "commercially reasonable," "good faith," and "seasonably."

Unlike some of Souter's critics, I think it is



Law and Public Issues

By Ann Lousin

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obvious that courts must read the language of any text within a context. We need not look further than two cases decided by Souter's former colleagues in June 2010. In *Doe v. Reed* (No. 09-559, decided June 24, 2010) and *McDonald v. Chicago* (No. 08-1521, decided June 28, 2010), the court interpreted different texts.

Anyone who thinks constitutional interpretation is simply an Aristotelian syllogism — read the provision, apply it to the facts, and the conclusion is inevitable — ought to read all of the opinions. All of the justices clearly struggled with the elastic texts dealing with the rights at issue, and most of them considered the rights within the context of two centuries of history.

Doe v. Reed concerned the clash between a petition signer's claim of First Amendment rights to privacy and association and the state of Oregon's claim of the need for transparency in government. Where in the U.S. Constitution is there a *specific* right to vote or a *specific* right to privacy? What is the value in promoting transparency in government?

The opinions delineate the history, the relevant constitutional and Oregon texts, and the nature of voting. I especially appreciated Scalia's outline of the history of voting in this country and Justice Clarence Thomas' warning about the dangers of allowing voters' personal information to be made public. Their essays were a valuable study in contrasts in constitutional interpretation.

McDonald v. Chicago concerned whether the court should resurrect the privileges and immunities clause of the 14th Amendment; whether the Second Amendment was binding upon the states through an incorporation doctrine; and the meaning of the words of the Second Amendment. Anyone reading the various opinions can see that the "fair reading model" by itself cannot solve the puzzle of the Second Amendment.

Some justices referred to the historical context in interpreting the text, especially the citizens' rights arising from the English Civil War and the efforts to disarm newly freed slaves during Reconstruction. Some justices

apparently found "an inherent right to self-defense" in the Constitution apart from a strict interpretation of the words of the Second Amendment itself.

In both *Doe* and *McDonald* intelligent, experienced jurists assisted by some of the brightest young lawyers in the country used vastly different approaches in deciding the issues. Their opinions illustrate Souter's points in action.

Let me pose a hypothetical that shows how wrong some of Souter's critics were. Let's assume that the last Supreme Court case to discuss whether a state supreme court may bar women from admission to the bar was *Bradwell v. State*, 83 U.S. 130 (1872).

That case held that the privileges and immunities clause of the 14th Amendment did not apply to the practice of law, which is purely a state matter, and suggested that it was up to a state's legislature and supreme court to decide whether women should be admitted to the practice of law.

What if the Supreme Court of the state of Ignorantia were to decide now that no more women would be admitted to practice in that state?

The justice announcing that decision might point out that as recently as *McDonald* last month the U.S. Supreme Court held that the privileges and immunities clause did not apply to state matters. He might note that there are probably too many lawyers in the state, while there is a dearth of nurturers of children. He might also quote Justice Joseph Bradley's 1872 opinion, in which Bradley said:

"[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

He could also point out that the U.S. Supreme Court has never come out four-square for a strict scrutiny standard in gender cases and has even waffled over whether a heightened scrutiny standard should supplant a rational basis test in gender cases.

Which factors would the U.S. Supreme Court take into account in considering the appeal from the Supreme Court of Ignorantia based on the precedents? Isn't it clear that the "fair reading model" would not suffice to decide the case and that the court would have to resort to the "open-ended guarantees" of the U.S. Constitution to which Souter referred?

Souter was speaking to his audience, some of whom will be lawyers one day, but he was also speaking to the wider audience of American citizens, who should realize how complex the process of statutory and constitutional interpretation is.

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