

Scalia and Breyer Debate the Constitution

- A. Do Breyer and Scalia think that the task of the judge is to do justice or to apply the law? Carefully summarize the arguments and examples that each Justice gives.

Justice Breyer believes that it is the task of the judge to apply the law, but says that the ultimate objective in applying the law is to achieve justice. Breyer says “we’re there to apply the law, but we don’t forget what the ultimate objective is...to satisfy a human desire [the want for justice].” He says that one does not seek to achieve this “basic and noble end” through simply looking for the “intuitively nicer result in each case” but through actually applying the law in every case, as this is what people believe and expect will bring about justice.

Justice Scalia, on the other hand, believes that justice is not served if he is to be the arbiter of justice. He argues that it is not his job to say what is or isn’t justice but that it is his job to “interpret the law as adopted by the people’s representatives as fairly as possible.” Scalia says that he has had to rule on a case which produced a result contrary to his personal opinion because of that. Justice Scalia said this particular case involved a piece of legislation that prescribed that a member of an Indian tribe could not be adopted by anyone outside of the tribe without the permission of the tribe council. He said that a young Indian man and woman who were unmarried gave up their child for adoption to a rancher who was financially well off, and that this child had been with the family for two or three years. The issue before the court, Justice Scalia said, was whether or not the child had to return to the tribe if the tribe council said so and, according to Scalia, because that is what the statute provided, the answer was yes. Scalia says, however, that he believed that the child’s parents should have been able to decide who they wanted the child to be with and not the tribe council. He ruled according to what the law prescribed, however. Scalia believes applying the law is much more important, especially on the appellate level.

- B. Why does Breyer think that “purpose” and “consequence” are important tools for interpreting legislative texts? What are Breyer’s arguments? Does Scalia agree? What are Scalia’s arguments?

Justice Breyer believes that “purpose” and “consequence” are important tools for interpreting legislative texts because he feels that these two are “more likely to keep the judge in touch with the legislature in a statutory case which is, in turn, in touch with the people” and he feels that this is an “appropriate thing in a democracy.” So Breyer apparently feels there is a democratic element in giving consideration to the purpose of a statute and the consequences of the various interpretations of the law. He feels that through considering the purpose of the statute this brings the judge more in line with the legislature, the representatives of the people, and through them, brings the judge more in line with the people.

Justice Breyer says that using the tools of purpose and consequence does not make a judge more likely to be subjective. He says there are ways in which a judge can use these tools in an honest fashion. Justice Breyer says that a judge can write down his/her reasoning and fully explain to the reader in their court opinion how and why they reached their decision, never having a secret or hidden motive, which Breyer says will act as a significant check on the subjectivity of the judge. Breyer insists that using these two tools is just as likely to be objective as using the first four tools: text, history, tradition, and precedent.

Scalia feels, however, that giving consideration to the purpose and consequence of a statute invites the subjectivity of the judge because as he says “to decide the purpose of a statute, it depends at what level of generality you look at it.” Scalia mentions the problem that presents itself for the limitations within statutes when it comes to looking at the purpose of that statute. He says that considering the purpose begs the question of whether or not the limitations should be applied, and whether the limitation is a part of the “statutory disposition” as Scalia puts it. Scalia says, however, that the limitations are a part of the general purpose of the statute. He says that “no legislature pursues a general purpose at all costs. There are always some limitations; we’re willing to do it up to here, but no further.”

But Scalia says, in the consequentialist opinion, to consider the purpose of a statute not only begs the question but assumes the answer which is that limitations were not intended because it would limit the purpose. When it comes to considering consequences Scalia feels there is an open question as to how a judge decides what is a good or bad consequence. Scalia says this method will probably bring about a situation in which a judge who likes the consequences will interpret it one way and if a judge does not like the consequences will interpret it the other way. It lends itself to subjectivity, which Scalia feels has no place in the job of a judge. Scalia says “the only objective criteria are the words that Congress adopted; once you get away from giving them their fairest meaning, you’re in trouble.”

C. What is the idea of a living constitution? Why does Breyer think it's a good idea? Why does Scalia disagree? Reconstruct their arguments carefully.

The idea of a living constitution essentially says that this fundamental legal document should change and grow to meet the needs and demands of a constantly changing society. Breyer agrees with this idea because he feels that the society in which the Framers of the Constitution lived was dramatically different from our current society, and in order for the Constitution to be applied continuously it must adapt to changing circumstances. He said that when the Framers adopted the commerce clause that there was no way they could have possibly considered the Internet, radio, television, or automobiles, but that there is a value written into the commerce clause and that this is what is used to determine what is should apply to.

Scalia, on the other hand, does not agree with the idea or the usage of the term "living constitution." Scalia says the problem is not with figuring out how the Constitution applies to new circumstances, but "with taking pre-existing technologies and realities" that were present during the latter portion of the 18th century and "changing the answer." He gives the example of the death penalty, abortion, and homosexual conduct. Scalia says these things were present at the time the Constitution was adopted and no one believed a prohibition on these things was unconstitutional, yet, as Scalia says, people now believe that it is not constitutional. His argument is, however, that no technologies have come about that would alter the meaning of the Constitution to spur this change in belief concerning these issues.

D. What would Breyer and Scalia say about the Palmer case? Would they agree with the majority opinion or not? Explain and carefully motivate your answer.

Concerning the Palmer case, Justice Stephen Breyer, since he considers the purpose and consequence, would most likely have decided that the murderer should not receive the inheritance. Justice Breyer would be in agreement with the majority opinion. Justice Antonin Scalia, since he considers the letter of the law, would have decided that the murderer should receive the inheritance, as the statute specified that a will can only be revoked or altered in certain ways and in no other way. Since the will was not revoked or altered in the ways specified in the statute, Justice Scalia would have been bound to rule in the defendants' favor. Justice Scalia would have dissented with the majority opinion.